

OBERGEFELL AND THE DOMESTICATION (OR NOT) OF LGBTQ INTIMACY

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In the decades-long campaign for marriage equality, advocates, scholars, and pundits from across the political spectrum often argued that marriage would civilize or domesticate the sex lives of lesbian, gay, bisexual, transgender, and queer (LGBTQ) people, particularly gay men. Extending the possibility of marriage to those who had been excluded from its promise, they argued, would encourage LGBTQ people to embrace monogamy and marital fidelity, and would function to assimilate their sexual norms and subcultural practices to a traditional heterosexual model.

A decade after the Supreme Court extended the right to marry to same-sex couples in *Obergefell v. Hodges*, however, it is not clear that those predictions from both supporters and skeptics of same-sex marriage have come to pass.¹ The right to marry is now an established option for same-sex couples, and many same-sex couples have happily wed. At the same time, data suggest that other kinds of intimacy and relationships persist and even flourish, both in the shadow of marriage and in the context of marriage itself.

In this Essay, I revisit arguments about the civilizing or domesticating effects of same-sex marriage to consider what they might tell us about the present and future of LGBTQ rights. The continued vitality of LGBTQ sexual practices ten years after winning the freedom to marry suggests neither that marriage has civilized LGBTQ people nor that LGBTQ people have un-civilized marriage. Instead, the various forms of intimacy that have persisted alongside same-sex marriage suggest that a multiplicity of commitments and pleasures can coexist, and recognition of that coexistence should meaningfully inform the struggle for LGBTQ rights after *Obergefell*.

To explore this argument, this Essay proceeds in three parts. In Part I, I canvass the longstanding debate about the wisdom of pursuing marriage as a movement goal and the convictions about the domesticating function of marriage that were advanced by both supporters and opponents of marriage equality. In Part II, I consider whether and how those arguments have been

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¹ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

borne out in practice. While alternative forms of legal recognition have been impaired by the expansion of marriage to same-sex couples, many extra-legal forms of sex and intimacy have survived and even thrived in the post-*Obergefell* era. In Part III, I consider how these dynamics might inform LGBTQ rights advocacy, drawing attention to legal restrictions on sexuality in and outside of marriage, the lack of affirmative protections for many kinds of intimate relationships, and the ongoing relevance of sexual liberation as a lodestar in LGBTQ rights struggles. The lived realities of LGBTQ relationships over the past ten years illustrate that the institution of marriage does not and should not occupy the field of erotic and relational possibility, and those of us who are committed to sexual autonomy should think critically about the conditions that might enable rich and varied relationships to flourish on the post-*Obergefell* terrain.

I. THE CIVILIZING PROMISE OF MARRIAGE

Obergefell is widely recognized – and for good reason – as a crowning achievement of the contemporary LGBTQ rights movement.² In 1989, Tom Stoddard, then the Executive Director of Lambda Legal, suggested that “marriage is, I believe, the political issue that most fully tests the dedication of people who are *not* gay to full equality for gay people, and also the issue most likely to lead ultimately to a world free from discrimination against lesbians and gay men.”³

As Stoddard recognized, winning the right to marry was instrumentally important to a broader sexual liberation project in part because opponents of LGBTQ rights consistently positioned it as the penultimate destination on a slippery slope. The specter of same-sex marriage was thus used, often cynically, as a justification to deny a wide range of sexual and reproductive rights, including basic rights for LGBTQ people to be legally protected from discrimination in employment, housing, and other domains.⁴

² NATHANIEL FRANK, *AWAKENING: HOW GAYS AND LESBIANS BROUGHT MARRIAGE EQUALITY TO AMERICA* 368 (2017). While same-sex marriage was primarily understood as a gay and lesbian rights issue in both activist writing and popular coverage, I use the broader “LGBTQ” or “queer” throughout this Essay to recognize that the issue had broader repercussions for a range of people with diverse sexual orientations and gender identities. Similarly, although arguments about promiscuity and the civilizing function of marriage were primarily aimed at gay men, I refer to intimacy or sexuality throughout this Essay to reflect the full range of relationships, sexual and otherwise, that various communities under the LGBTQ umbrella have historically cultivated to express affection, care, love, pleasure, and support.

³ Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, in *WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS* 753, 756 (Mark Blasius & Shane Phelan eds., 1997).

⁴ See, e.g., Gillian Frank, *Phyllis Schlafly's Legacy of Anti-Gay Activism*, SLATE (Sept. 6, 2016), <https://slate.com/human-interest/2016/09/phyllis-schlaflys-legacy-of-anti-gay->

Marriage also mattered because of what marriage secured and signified. It was an avenue to secure what Suzanne Goldberg called the “tangible goods” of marriage, with material benefits and privileges associated with marriage provided both by the state and by private entities.⁵ It also promised to bestow recognition and equal status on same-sex couples, whose relationships were often devalued or ignored.⁶ For many LGBTQ people, the peak of the HIV/AIDS epidemic laid bare the very real material and dignitary consequences of exclusion from marriage, often in devastating ways.⁷

Some felt that the right to marry also had more radical promise, given its potential to challenge both the structural devaluation of same-sex relationships and the gendered laws and norms that long defined the marital relationship.⁸ Nan Hunter, for example, argued that same-sex marriage had the “potential to expose and denaturalize the historical construction of gender at the heart of marriage.”⁹ Even some feminist critics of marriage entertained the argument that the pursuit of same-sex marriage might helpfully decouple the marital relationship from the rigid gender roles and compulsory reproduction at the heart of the institution.¹⁰

The idea that marriage should be a priority for the LGBTQ movement, however, was met with deep skepticism by many activists and writers who valued sexual liberation as a movement goal. While Stoddard was arguing for marriage as the penultimate gay and lesbian rights issue in the late 1980s, feminist and queer critics warned that marriage was unlikely to liberate gay and lesbian people – and that, to the contrary, gay and lesbian

activism.html (noting that Phyllis Schlafly’s successful campaign to defeat explicit constitutional prohibition of sex discrimination rested heavily on the threat that the Equal Rights Amendment “‘would legalize homosexual marriages and open the door to the adoption of children by legally married homosexual couples’”).

⁵ Suzanne B. Goldberg, *Why Marriage?*, in MARRIAGE AT THE CROSSROADS: LAW, POLICY, AND THE BRAVE NEW WORLD OF TWENTY-FIRST CENTURY FAMILIES 224, 228-30 (Marsha Garrison & Elizabeth S. Scott eds., 2012).

⁶ *Id.* at 230-33.

⁷ Andrew Sullivan, *Why Gay Marriage is Good for America*, NEWSWEEK (July 18, 2011), <https://www.newsweek.com/andrew-sullivan-why-gay-marriage-good-america-68453> (“I saw spouses holding their dying husbands, cradling them at the hour of their death, inserting catheters, cleaning broken bodies, tending to terrified souls. This proved beyond any doubt for me that gay couples were as capable of as much love and tenacity and tenderness and fidelity as heterosexual couples.”).

⁸ Goldberg, *supra* note 5, at 233-34.

⁹ Nan D. Hunter, *Marriage, Law and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 18 (1991).

¹⁰ 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, 1536 (1993) (expressing skepticism about the pursuit of marriage but remarking that “[t]he only argument that has ever tempted me to support efforts to obtain lesbian and gay marriage is the contention that marriages between two men or two women would inherently transform the institution of marriage for all people”).

people and their relationships were likely to be constrained and domesticated by the institution.¹¹ In the same issue of *Out/Look* where Stoddard framed marriage as the key to full equality, Paula Ettelbrick, then the Legal Director at Lambda Legal, powerfully articulated two of the concerns that these critics identified:

First, marriage will not liberate us as lesbians and gay men. In fact, it will constrain us, make us more invisible, force our assimilation into the mainstream, and undermine the goals of gay liberation. Second, attaining the right to marry will not transform our society from one that makes narrow, but dramatic, distinctions between those who are married and those who are not married to one that respects and encourages choice of relationships and family diversity.¹²

Indeed, in the absence of a right to marry, LGBTQ people developed deep and meaningful sexual ethics and frameworks of their own. These included the cultivation of community norms around chosen family and sexual intimacy as well as efforts to create more flexible, egalitarian legal protections like domestic partnerships and recognition of *de facto* partnerships and families. Many features of LGBTQ intimacy were easily exaggerated, including stereotypes that lesbian women were serially monogamous with close networks of lovers past and present, while gay men were promiscuous and averse to long-term monogamous relationships. Yet these stereotypes reflected features of LGBTQ kinship and sexuality that were valuable and important. As Dennis Altman wrote in the early 1980s:

Both of these descriptions are caricatures, but they do catch one of the features common to a great many gay relationships, namely a degree of fluidity that allows for considerable variety and autonomy. What appears to straight critics as an obsession with sex is more accurately a preoccupation with constructing relationships that can meet our needs for both security and independence, commitment and variety.¹³

¹¹ See, e.g., NICOLA BARKER, NOT THE MARRYING KIND: A FEMINIST CRITIQUE OF SAME-SEX MARRIAGE (2012) (examining feminist perspectives on marriage and debates over same-sex marriage from various jurisdictions worldwide).

¹² Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation?*, in WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS 757, 758 (Mark Blasius & Shane Phelan eds., 1997).

¹³ DENNIS ALTMAN, THE HOMOSEXUALIZATION OF AMERICA, THE AMERICANIZATION OF THE HOMOSEXUAL 187 (1982); see also Gabriel Rotello, *Creating A New Gay Culture: Balancing Fidelity & Freedom*, NATION (Apr. 21, 1997), <https://web.archive.org/web/20021229155545/http://www.waf.org/familyarchives/marria>

Indeed, for gay men, at least some early data bore out the idea that monogamy was not necessarily a paramount value in meaningful romantic and sexual relationships. This was reflected in one of the earliest studies on male same-sex relationships, David McWhirter and Andrew Mattison's *The Male Couple: How Relationships Develop*, published in 1984, which involved five years of interviews tracing the relationships of 156 male same-sex couples. As McWhirter and Mattison noted, "The majority of couples in our study, and all of the couples together for longer than five years, were not continuously sexually exclusive with each other. Although many had long periods of sexual exclusivity, it was not the ongoing expectation for most. We found that gay men *expect* mutual emotional dependability with their partners and that relationship fidelity transcends concerns about sexuality and exclusivity."¹⁴

The debate over whether these sexual ethics were compatible with the institution of marriage gained prominence as marriage emerged as a movement goal in the early 1990s. In 1993, the Hawaii Supreme Court ruled in *Baehr v. Lewin* that although there was no fundamental right of same-sex couples to marry in Hawaii's constitution, exclusion from marriage amounted to sex discrimination that was subject to strict scrutiny under state law.¹⁵ The ruling created political shockwaves that reverberated in and beyond Hawaii. In 1996, Congress enacted the Defense of Marriage Act (DOMA), which declined to recognize same-sex marriages for federal purposes and relieved states of their obligation to recognize same-sex marriages conducted in other states.¹⁶ In *Baehr*, the state circuit court on remand held that the exclusion of same-sex couples from marriage did not survive an equal protection challenge,¹⁷ a conclusion that was ultimately mooted when voters in 1998 overwhelmingly approved an amendment to the state constitution expressly clarifying that the legislature has the power to limit the right to marry to heterosexual couples.¹⁸

ge/Creating%20a%20New%20Gay%20Culture%20Balancing%20Fidelity%20&%20Freedom.htm (discussing the values animating the sexual mores of gay and lesbian couples).

¹⁴ DAVID P. MCWHIRTER & ANDREW M. MATTISON, *THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP* 285 (1984); *see also* PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES: MONEY, WORK, SEX* 286, n.27 (1983) (finding in a large study of American couples that 73 percent of gay men had an open relationship and 61 percent had engaged in sex outside their primary relationship in the past year, compared with 37 percent and 9 percent for lesbian women, 28 percent and 7 percent of heterosexual men, and 25 percent and 6 percent of heterosexual women).

¹⁵ *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993).

¹⁶ Law of Sept. 21, 1996, 1 U.S.C. § 7 ("Defense of Marriage Act") (repealed Dec. 13, 2022); Law of Sept. 21, 1996, 28 U.S.C. § 1738C (repealed Dec. 13, 2022).

¹⁷ *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996).

¹⁸ Sam Howe Verhovek, *The 1998 Elections: The States – Initiatives; From Same-Sex Marriage to Gambling, Voters Speak*, N.Y. TIMES (Nov. 5, 1998), <https://www.nytimes.com/1998/11/05/us/1998-elections-states-initiatives-same-sex-marriages-gambling-voters-speak.html>.

The rulings in Hawaii and subsequent backlash cemented marriage equality as a priority for many LGBTQ movement organizations. It would be another five years until advocates secured the right of same-sex couples to marry with the Massachusetts Supreme Judicial Court's pivotal ruling in *Goodridge v. Department of Public Health*,¹⁹ which itself triggered a wave of state constitutional amendments banning marriage for same-sex couples as well as a proposal for a Federal Marriage Amendment that would have limited marriage to heterosexual couples across the United States.²⁰ Throughout this period, however, discussion of the importance of marriage for same-sex couples and the state's interest in restricting marriage spilled into broader public discourse.

In this battle for hearts and minds, LGBTQ people's sexual ethics and practices were implicitly and explicitly evaluated against the yardstick of an idealized version of marriage. Litigants contended that they could fulfill the norms and obligations of marriage as well as heterosexual couples.²¹ States countered in litigation that they had an interest in the sanctity of marriage, ensuring marital stability, promoting procreation, and creating an optimal environment for raising children, among other considerations, and argued that bringing same-sex couples into the fold of marriage would compromise or jeopardize these aims.²²

Many conservative opponents of marriage equality similarly argued that extending the right to marry to same-sex couples would alter the institution, in part by weakening marital norms like fidelity and monogamy.²³ Contrary to those who thought marriage would change the intimate lives of same-sex couples, these critics argued that same-sex couples would change marriage. As Sherif Girgis, Robert George, and Ryan Anderson suggested:

[T]hose making this objection are right to suppose that

¹⁹ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

²⁰ See, e.g., DANIEL R. PINELLO, *AMERICA'S WAR ON SAME-SEX COUPLES AND THEIR FAMILIES AND HOW THE COURTS RESCUED THEM* (2017) (documenting and analyzing the wave of state actions to prohibit recognition of same-sex marriages); S.J. Res. 40, 108th Cong. (2004); S.J. Res. 1, 109th Cong. (2005); H.J. Res. 88, 109th Cong. (2006); see also Dale Carpenter, *The Federal Marriage Amendment: Unnecessary, Anti-Federalist, and Anti-Democratic* (Cato Inst., Policy Analysis No. 570, 2006), <https://www.cato.org/policy-analysis/federal-marriage-amendment-unnecessary-anti-federalist-anti-democratic>.

²¹ See, e.g., *Varnum v. Brien*, 763 N.W.2d 862, 872-874 (2009); *Hernandez v. Robles*, 805 N.Y.S.2d 354, 358 (2005).

²² See, e.g., *Varnum*, 763 N.W.2d at 873; *Hernandez*, 805 N.Y.S.2d at 360.

²³ Sherif Girgis, Robert P. George & Ryan T. Anderson, *What is Marriage?* 34 HARV. J.L. PUB. POL'Y 245, 276 (2011); see also Ryan T. Anderson, *Marriage: What It Is, Why It Matters, and the Consequences of Redefining It*, HERITAGE FOUNDATION BACKGROUNDER NO. 2775, at 2 (Mar. 11, 2013), <https://www.heritage.org/marriage-and-family/report/marriage-what-it-why-it-matters-and-the-consequences-redefining-it> ("Redefining marriage to abandon the norm of male-female sexual complementarity would also make other essential characteristics – such as monogamy, exclusivity, and permanency – optional.").

redefining marriage would produce a convergence – but it would be a convergence in exactly the wrong direction. Rather than imposing traditional norms on homosexual relationships, abolishing the conjugal conception of marriage would tend to erode the basis for those norms in any relationship.²⁴

Others stated the concern even more frankly, arguing that LGBTQ people simply did not sufficiently value norms like fidelity and monogamy and would therefore cheapen the sanctity of marriage through their entry into the institution.²⁵

As a rejoinder to these arguments, a prominent claim made by many supporters of marriage equality was that marriage would helpfully function in practice to “civilize” or “domesticate” LGBTQ people, particularly gay men. The underlying premise of this argument was that if LGBTQ people had historically been romantically or sexually active and less willing to commit to permanent monogamous relationships, it was only because they lacked the opportunity to enter into the institution of marriage and were not subject to the stabilizing effects of its sexual mores and values. Extending marriage to same-sex couples would create a different incentive structure, they argued, and rein in the perceived excesses of same-sex sexuality.

Some of the most prominent gay writers advocating marriage equality advanced a version of this position, both critiquing promiscuity within LGBTQ communities and positioning marriage as a positive civilizing force.²⁶ In his book-length argument for the right to marry, for example, William Eskridge contended that “sexual variety has not been liberating to gay men,” and that “[a] self-reflective gay community ought to embrace marriage for its potentially civilizing effect on young and old alike.”²⁷

²⁴ Girgis et al., *supra* note 23, at 276. Girgis et al. do not expressly argue that same-sex couples are incapable of monogamy but point to social science research showing low rates of monogamy among gay men and quote same-sex marriage advocates who praise the openness of same-sex partnerships or celebrate the possibility that same-sex couples might transform the institution of marriage. *Id.* at 276-79.

²⁵ See, e.g., James Q. Wilson, *Against Homosexual Marriage*, in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 137, 144 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) (“Perhaps [Andrew] Sullivan himself would marry, but, given the great tendency of homosexual males to be promiscuous, many more like him would not, or if they did, would not marry with as much seriousness.”); William Bennett, *Leave Marriage Alone*, in SAME-SEX MARRIAGE: PRO AND CON: A READER 274, 275 (Andrew Sullivan ed., 1997) (“Forsaking all others is an essential component of marriage. . . . Many advocates of same-sex marriage simply do not share this ideal; promiscuity among homosexual males is well known.”).

²⁶ Jonathan Rauch, *For Better or Worse?*, NEW REPUBLIC (May 6, 1996), <https://newrepublic.com/article/103297/for-better-or-worse-gay-straight-marriage>; Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261 (1995).

²⁷ WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 10 (1996).

Andrew Sullivan argued marriage would be useful because it “places more responsibilities upon gays” and thus “provides role models for young gay people who, after the exhilaration of coming out, can easily lapse into short-term relationships and insecurity with no tangible goal in sight.”²⁸ Jonathan Rauch similarly suggested that one central function of same-sex marriage, like marriage generally, was “domesticating men.”²⁹ Rauch praised the “expectations that [same-sex couples] will spend nights together, go to parties together, take out mortgages together, buy furniture at Ikea together, and so on – all of which helps tie them together and keep them off the streets and at home,” and characterized that as “a very good thing, especially as compared to the closet-gay culture of furtive sex with innumerable partners in parks and bathhouses.”³⁰

Often, this civilizing argument was expressly framed as an appeal to conservative values.³¹ Stephen Macedo, conceding that conservatives may have reason to worry about a loosening of traditional restraints,³² pointedly asked opponents of marriage equality:

If promiscuity and sexual license are problems, why not co-opt the part of the populace most in need of bourgeois domestication . . . ? It seems not only unjust but irrational to deny to homosexuals access to the social institutions intended precisely to cement and stabilize sexual relationships, and thereby to foster a culture of sexual restraint.³³

Some prominent conservatives outside of the LGBTQ movement also embraced or at least entertained these arguments for marriage, suggesting that the entry of same-sex couples into marriage could vindicate both the sanctity of marriage and its norms of sexual exclusivity, fidelity, and monogamy.³⁴

²⁸ Andrew Sullivan, *Here Comes the Groom*, NEW REPUBLIC (Aug. 28, 1989), <https://newrepublic.com/article/79054/here-comes-the-groom>; see also ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 182 (1995).

²⁹ Rauch, *supra* note 26.

³⁰ *Id.*

³¹ See, e.g., Dale Carpenter, *The Unconservative Consequences of Conservative Opposition to Gay Marriage*, in WHAT’S THE HARM? DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES OR SOCIETY? 319 (Lynn D. Wardle ed., 2008); Macedo, *supra* note 26.

³² Macedo, *supra* note 26, at 263.

³³ *Id.* at 287.

³⁴ See, e.g., RICHARD POSNER, SEX AND REASON 311 (1992) (“The existence of a right to marry . . . would contribute, although perhaps only marginally, to the stability of homosexual relationships, and by doing so would not only make homosexuals happier but also reduce the spread of venereal disease in general and of the justly dreaded AIDS in particular.”).

Yet crucially, the conviction that marriage would function in practice to civilize or domesticate same-sex sexuality was not only expressed by those on the center-left and center-right of the political spectrum. Many progressive critics also expressed, as Ettelbrick had, a deep conviction that marriage would function in practice to domesticate and assimilate LGBTQ people to dominant heterosexual norms.³⁵ Shannon Gilreath, for example, warned that “marriage is dangerous for Gays conceptually, in its patriarchal and heteroarchival foundations, and as a furtherance of an alarming movement toward assimilationist erasure of Gay identity and community,” expressly rooting this critique in “the early Gay movement’s acknowledgment of the importance of destroying gender conventions and disestablishing the family.”³⁶ As Nancy Polikoff presciently observed, too, feminist and queer critics had ample reason to expect that prioritizing marriage in LGBTQ activism would blunt the capacity to criticize and transform marriage as an institution. As she argued:

[A]n effort to legalize lesbian and gay marriage would make a public critique of the institution of marriage impossible. Long-term, monogamous couples would almost certainly be the exemplars of the movement, sharing stories of adversity resulting from their unmarried status Marriage would be touted as the solution to these couples’ problems; the limitations of marriage, and of a social system valuing one form of human relationship above all others, would be downplayed.³⁷

For many critics, this concern only deepened when the Supreme Court issued its opinions in *United States v. Windsor* and *Obergefell v. Hodges*, which cast marriage as a relationship of almost transcendental importance and implied that non-marital relationships lack that same dignity and stature.³⁸ Many commentators after *Windsor* and *Obergefell* regarded this

³⁵ See, e.g., AGAINST EQUALITY: QUEER CRITIQUES OF GAY MARRIAGE (Ryan Conrad ed., 2010) (compiling a variety of these critiques); Lisa Duggan, *Beyond Same-Sex Marriage*, 9 STUD. GENDER & SEXUALITY 155 (2008); *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families and Relationships*, BEYOND SAME-SEX MARRIAGE (July 26, 2006),

https://web.archive.org/web/20060920234800/http://www.beyondmarriage.org/full_statement.html; Yuvraj Joshi, *Respectable Queerness*, 43 COLUM. HUM. RTS. L. REV. 416 (2012); Michael Warner, *Beyond Gay Marriage*, in THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 81 (1999).

³⁶ Shannon Gilreath, *Arguing Against Arguing for Marriage*, 159 U. PA. L. REV. PENNUMBRA 28, 30 (2010).

³⁷ Polikoff, *supra* note 10, at 1546.

³⁸ *United States v. Windsor*, 570 U.S. 744, 769 (2013) (calling state recognition of same-sex marriage “a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages”); *Obergefell v. Hodges*, 576 U.S. 644, 656-57 (2015) (“Marriage

distinction with some alarm,³⁹ particularly as it undermined what many believed to be the progressive potential of alternatives to marriage and the longstanding valorization by LGBTQ advocates of the importance and value of sexual autonomy and chosen family.⁴⁰

As I discuss in the next Part, data suggest that the reality of marriage equality is much more complex. Marriage has not domesticated LGBTQ people's intimate and sexual lives, at least not in the way that many of the commentators in the fight for marriage assumed or insisted that it would. At the same time, there is little evidence to suggest that the inclusion of same-sex couples has significantly altered the institution of marriage. Instead, committed marital relationships have coexisted with other forms of intimacy alongside and through marriage that retain their importance and merit attention and protection from the movement that won the right to marry in *Obergefell*.

II. LGBTQ RELATIONSHIPS IN THE SHADOW OF MARRIAGE

A decade after *Obergefell*, the right to marry has transformed the relationships of same-sex couples across the United States, extending legal certainty, material benefits, and social recognition to their relationships but also normalizing marriage as the dominant form of legal commitment. At the same time, marriage has not fully displaced or occluded other forms of intimacy, which continue to be deeply relevant and important for LGBTQ people.

Data show just how impactful the right to marry has been. The U.S. Census Bureau's 2023 American Community Survey estimates that of the

is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. . . . Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.”).

³⁹ See, e.g., Leonore Carpenter & David S. Cohen, *A Union Unlike Any Other: Obergefell and the Doctrine of Marital Superiority*, 104 GEO. L.J. ONLINE 124, 126 (2015); Courtenay W. Daum, *Marriage Equality: Assimilationist Victory or Pluralist Defeat?* in LGBTQ POLITICS: A CRITICAL READER 353 (Marla Brettschneider, Susan Burgess & Christine Keating eds., 2017); Jeremiah A. Ho, *Find Out What It Means to Me: The Politics of Respect and Dignity in Sexual Orientation Antidiscrimination*, 2017 UTAH L. REV. 463 (2017); Claire Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 31 (2015); Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CAL. L. REV. 1207, 1210 (2016); Gregg Strauss, *What's Wrong with Obergefell*, 40 CARDOZO L. REV. 631, 636 (2018); Deborah A. Widiss, *Non-Marital Families and (or After?) Marriage Equality*, 42 FLA. ST. U. L. REV. 547, 552 (2015); but see Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 424, 480 (2017) (contending that when read in the context of other LGBTQ rights precedents *Obergefell* instead “provides a road map for asserting a constitutional right to nonmarriage”).

⁴⁰ See, e.g., KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* 35 (1991) (“By defining these chosen families in opposition to the biological ties believed to constitute a straight family, lesbians and gay men began to renegotiate the meaning and practice of kinship from within the very societies that had nurtured the concept.”).

61,421,188 married couple households in the United States, 1.3 percent – or 774,553 couples – are same-sex couples.⁴¹ As one would expect, these same-sex couples married in earnest as a growing number of states recognized their right to marry, with the bulk of these marriages taking place in the immediate aftermath of *Obergefell*. Thus, of all the married same-sex couples residing in the United States in 2022, an estimated 61 percent had wed in the short period after 2015.⁴²

The rapid uptake of the right to marry after *Obergefell* also involves a significant change in the perception of same-sex marriage. Polling data from Gallup show a steady rise in support for marriage equality, from only 27 percent of the public saying marriages between same-sex couples should be recognized as valid in 1996 to 71 percent of the public agreeing with that statement in 2023.⁴³ Other polling organizations show similarly broad support.⁴⁴

Lawmakers and public officials have largely embraced marriage equality as well. In 1996, DOMA had overwhelming bipartisan approval in Congress, passing the House of Representatives in a 342-67 vote and the Senate in an 85-14 vote before being signed into law by President Clinton.⁴⁵ By 2022, when Congress voted on the Respect for Marriage Act (RFMA) to repeal DOMA and provide greater statutory protection for the freedom to marry, the tide had decisively shifted.⁴⁶ The RFMA similarly garnered

⁴¹ U.S. Census Bureau, *Table B11009: Coupled Households by Type*, AM. CMTY. SURV. (2023), [https://data.census.gov/table/ACSDT1Y2023.B11009?q=same-sex couples](https://data.census.gov/table/ACSDT1Y2023.B11009?q=same-sex%20couples) [hereinafter *Coupled Households by Type Table*].

⁴² Paul F. Hemez, *Spouses in Opposite-Sex and Same-Sex Married Couples and Their Households: 2022*, AM. CMTY. SURV. BRIEFS, at 4 (2024), <https://www2.census.gov/library/publications/2024/demo/acsbr-020.pdf> (illustrating that only 3 percent of married same-sex couples wed from 2000-2004, then 6 percent from 2005-2009, then 22 percent from 2010-2014 and suggesting that legal changes around marriage equality played an influential role in this rise, as more states recognized the right to marry through state legislative action and state and federal judicial decisions in the lead-up to *Obergefell*).

⁴³ Justin McCarthy, *U.S. Same-Sex Marriage Support Holds at 71% High*, GALLUP (June 5, 2023), <https://news.gallup.com/poll/506636/sex-marriage-support-holds-high.aspx>.

⁴⁴ Press Release, Pub. Religion Rsch. Inst., *New Survey Shows Broad Support for LGBTQ Rights Nationally, Despite Overall Declines in the Past Year* (Mar. 12, 2024), <https://www.prii.org/press-release/new-survey-shows-broad-support-for-lgbtq-rights-nationally-despite-overall-declines-in-the-past-year> (showing 69 percent support nationally for same-sex marriage in 2023 and 67 percent support in 2024); *Cross-Tabs: July 2023 Times/Siena Poll of the 2024 Race and National Issues*, N.Y. TIMES (Aug. 1, 2023), <https://www.nytimes.com/interactive/2023/08/01/us/elections/times-siena-poll-registered-voters-crosstabs.html> (showing 70 percent support nationally for allowing gay and lesbian people to marry in 2023).

⁴⁵ 1996 Bill Tracking H.R. 3396 (detailing voting records in the House and Senate).

⁴⁶ The primary impetus for formally repealing DOMA was the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, particularly a concurring opinion authored by Justice Thomas that urged the Court to reconsider *Obergefell* and other

strong bipartisan support but this time in support of same-sex marriage, passing the House of Representatives in a 267-157 vote and the Senate in a 61-36 vote before being signed into law by President Biden.⁴⁷

This is not to dismiss resistance to *Obergefell*, especially in the immediate aftermath of the decision. Many states responded to the ruling by proposing or adopting legislation expressly permitting religious objectors to decline to serve same-sex couples,⁴⁸ and litigants have met with mixed success in bringing these kinds of religious liberty claims before state and federal courts.⁴⁹

Nonetheless, the relatively swift acceptance of the underlying right of same-sex couples to marry is notable. Even in the recent resurgence of anti-LGBTQ backlash, as thousands of discriminatory bills swept state legislatures and President Trump made the demonization of transgender people a linchpin of his successful campaign for the presidency,⁵⁰ demands to roll back the right to marry have thus far been largely absent from mainstream discourse.⁵¹ Project 2025, an ambitious 922-page playbook for

substantive due process precedents. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 332 (2022) (Thomas, J., concurring).

⁴⁷ 2022 Bill Tracking H.R. 8404 (detailing voting records in the House and Senate).

⁴⁸ HUMAN RIGHTS WATCH, "ALL WE WANT IS EQUALITY": RELIGIOUS EXEMPTIONS AND DISCRIMINATION AGAINST LGBT PEOPLE IN THE UNITED STATES 12-19 (2018).

⁴⁹ *See, e.g., Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert denied*, 572 U.S. 1046 (2014) (holding that a photographer violated a state anti-discrimination law by refusing to photograph a customer's same-sex wedding); *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n*, 584 U.S. 617 (2018) (affirming the importance of both nondiscrimination laws and religious freedom before concluding that state officials' disparaging remarks about the religious views of a baker who declined to design a wedding cake for a same-sex couple violated the First Amendment); *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023) (holding that requiring a website designer to create websites for marriages that she did not personally support violated her First Amendment rights); *see also* Jeremiah A. Ho, *Queer Sacrifice in Masterpiece Cakeshop*, 31 YALE J.L. & FEMINISM 249 (2020).

⁵⁰ MOVEMENT ADVANCEMENT PROJECT, UNDER FIRE: THE WAR ON LGBTQ PEOPLE IN AMERICA 2 (Feb. 2023), https://www.mapresearch.org/file/Under%20Fire%20report_MAP%202023.pdf (charting growing attacks on LGBTQ rights in the United States); Shane Goldmacher, *Trump and Republicans Bet Big on Anti-Trans Ads Across the Country*, N.Y. TIMES (Oct. 8, 2024), <https://www.nytimes.com/2024/10/08/us/politics/trump-republican-transgender-ads.html> (examining the heavy focus on anti-transgender political advertising).

⁵¹ There are some notable exceptions. In early 2025, for example, both the Idaho House of Representatives and North Dakota House of Representatives passed resolutions urging the U.S. Supreme Court to overturn *Obergefell*. *See* H.J. Mem'l Res. 1, 68th Leg., 1st Reg. Sess. (Idaho 2025); H.R. Con. Res. 3013, 69th Leg., 1st Reg. Sess. (N.D. 2025). The North Dakota Senate rejected the measure, and similar measures introduced in three other states failed to gain traction. Abby Monteil & Samantha Riedel, *North Dakota Senate Rejects Resolution Urging SCOTUS to Overturn Same-Sex Marriage*, THEM (Mar. 14, 2025), <https://www.them.us/story/north-dakota-same-sex-marriage-resolution-senate-obergefell-supreme-court>. Similarly, Justice Thomas called on the Court to revisit *Obergefell* and other substantive due process decisions in his concurring opinion in *Dobbs*, but no other

right-wing governance that unapologetically aims at a range of sexual and reproductive rights, does not expressly condemn *Obergefell* or call for it to be overturned, and focuses instead on creating sweeping carveouts for religious objectors.⁵²

The lack of vocal resistance to same-sex marriage ten years after *Obergefell* is in part because LGBTQ couples have inhabited that relationship and status as fully as their heterosexual counterparts. Married same-sex couples typically pledge their love to one another, make a lifelong commitment in front of friends and family, and build a life together. They provide companionship to each other, know each other's friends and families, blend finances, often raise children, and offer care and support to each other in the most difficult times. Like heterosexual couples, they might make mistakes, disappoint each other, or divorce. While each marriage is unique, it is now widely recognized that married LGBTQ people are as capable of *being* married as their heterosexual, cisgender counterparts.

In the aftermath of this rapid transformation, however, there has been relatively little reflection on the arguments that dominated the decades-long debate over same-sex marriage. This includes the longstanding and vigorous dispute about whether marriage would in fact function to civilize or domesticate the romantic and sexual practices of LGBTQ people, whether legally or culturally.

Although many same-sex couples have taken advantage of the right to marry, there is significant evidence to suggest that other forms of intimate attachment have persisted alongside that right.⁵³ Data suggest that there are nearly as many unmarried, cohabiting same-sex couples in the United States as there are married same-sex couples, for example, and same-sex couples make up a greater proportion of cohabiting couples than of married couples.⁵⁴

The right to marry has, in many instances, restricted the options available to cohabiting same-sex couples, and stunted the progress of

Justice – including Chief Justice Roberts and Justice Alito, who had each dissented from *Obergefell* itself – joined that opinion. *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring).

⁵² This is not to say that Project 2025 endorses the right of same-sex couples to marry. It characterizes the RFMA as “redefin[ing] marriage to be the union between any two individuals,” though it does so in the context of calling for carve-outs for objectors rather than calling for the right of same-sex couples to marry to be eliminated outright. MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE, THE HERITAGE FOUND. 481 (2023), https://static.project2025.org/2025_MandateForLeadership_FULL.pdf.

⁵³ For a more extensive treatment of the topic, see CHRISTIAN KLESSE, *THE SPECTRE OF PROMISCUITY: GAY MALE AND BISEXUAL NON-MONOGAMIES AND POLYAMORIES* (2007).

⁵⁴ The data show there are 774,553 married same-sex couple households, making up 1.3 percent of all married couple households, while there are 536,894 cohabiting same-sex couple households, making up 5.6 percent of all cohabiting couple households. *Coupled Households by Type Table*, *supra* note 41.

alternatives that were more flexible but still provided an important degree of legal certainty. As feminist and queer critics of marriage noted, a central contribution of LGBTQ rights advocacy prior to *Obergefell* was in fact the creation of alternatives to marriage like domestic partnerships. Even those who supported the right to marry often recognized the importance of these options. As Chai Feldblum observed, for example:

I currently believe that marriage is a normatively ‘good’ framework for most people to aspire to (I think), because it serves some very deep and legitimate human needs. But I also believe all of us are harmed, as members of a society seeking a common good, when society fails to acknowledge the wide array of non-marital intimate social structures that we as humans have ingeniously constructed to negotiate and make sense of the world.⁵⁵

While domestic partnerships and other innovations held particular promise for same-sex couples who could not legally marry at the time, they also had potential for those who did not wish to enter into the full package of legal rights and obligations attendant to marriage, regardless of their sexual orientation or gender identity. This, at times, included relationships of care and support that were platonic as well as romantic or sexual, with the prospect of state recognition and protection of a much wider range of affective commitments.

The momentum for domestic partnerships and other alternatives to marriage severely subsided, however, as a constitutional right to marry became increasingly realistic. Even states that attempted to avoid extending full marriage rights in many instances offered civil unions that closely approximated the rights and responsibilities of marriage. As civil unions and then marriage became more widely available to same-sex couples, many states and municipalities limited domestic partnerships and other alternative forms of relationship recognition.⁵⁶ Wisconsin, for example, closed its domestic partnership registry in 2018.⁵⁷ New Jersey and Washington State limited new domestic partnerships to people over the age of 62, with Washington State taking the additional step of converting all other undissolved domestic partnerships into marriages after a certain

⁵⁵ Chai R. Feldblum, *Gay is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139, 143 (2005).

⁵⁶ See generally Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509 (2016) (examining the potential effect of marriage equality on domestic partnerships, civil unions, and other legal statuses).

⁵⁷ WISC. DEP’T OF HEALTH SERVS., *Domestic Partnerships*, <https://www.dhs.wisconsin.gov/stats/domestic-partners.htm> (last visited Apr. 23, 2025).

date.⁵⁸ Many corporate and private entities that had offered accessible, flexible benefits for domestic partners ceased to do so as well.⁵⁹ In this sense, marriage functionally limited the kinds of intimacy that might be granted recognition and protection, leaving little ground between cohabitation and private law arrangements and the full rights and responsibilities of marriage.

While marriage has disincentivized important forms of relationship recognition, LGBTQ people have nevertheless continued to forge and nurture a wide range of intimate relationships they find pleasurable and meaningful. This includes casual sex, sex within friendships, dating, serial monogamy, coparenting, and other arrangements, but also extramarital relationships of various kinds. These relationships can generate various forms of intimate attachment, where LGBTQ people rely on multiple platonic or romantic partners to provide the companionship, care, and support that a traditional model of marriage might expect individuals to find in one partner. They may also generate lasting kinship dynamics of various kinds, with friends or current or former partners acting as chosen family, taking up roles as nonbiological parents or familial figures, providing genetic material to conceive a child or acting as a gestational surrogate, or otherwise cultivating attachments that are deeper or more formal than traditional friendships but are also not legally recognized as marital relationships.⁶⁰

In some instances, these intimate relationships may also involve sex outside of marriage. While extramarital sex has classically been understood as infidelity, a growing body of research distinguishes extramarital sex without the knowledge of one's partner from consensual nonmonogamy, or "a relational agreement in which partners agree that it is acceptable to have

⁵⁸ N.J. DEP'T OF HEALTH, *Frequently Asked Questions*, <https://www.nj.gov/health/vital/contact-us/faqs> (last visited Apr. 23, 2025); WASH. SEC'Y OF STATE, *Frequently Asked Questions*, <https://www.sos.wa.gov/corporations-charities/additional-services/domestic-partnerships/frequently-asked-questions> (last visited Apr. 23, 2025).

⁵⁹ See, e.g., Tara Siegel Bernard, *As Same-Sex Marriage Becomes Legal, Some Choices May Be Lost*, N.Y. TIMES (July 8, 2011), <https://www.nytimes.com/2011/07/09/business/some-companies-want-gays-to-wed-to-get-health-benefits.html> (examining this phenomenon after the legalization of same-sex marriage in New York); Katherine M. Franke, Opinion, *Marriage is a Mixed Blessing*, N.Y. TIMES (June 23, 2011), <https://www.nytimes.com/2011/06/24/opinion/24franke.html> (noting that "'winning' the right to marry may mean 'losing' the rights we have now as domestic partners, as we'll be folded into the all-or-nothing world of marriage").

⁶⁰ Jessica Feinberg, *Whither the Functional Parent?: Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55 (2017) (examining *de facto* parentage and other equitable parenthood doctrines in the context of same-sex marriage and adoption rights); Leslie Joan Harris, *Obergefell's Ambiguous Impact on Legal Parentage*, 92 CHI.-KENT L. REV. 55 (2017) (considering the nuances of legal parentage after *Obergefell*).

more than one sexual or romantic relationship at the same time.”⁶¹ This looks different for different people. As one helpful typology suggests, consensual nonmonogamy can include “swinging (in which a couple may have other sexual partners, generally at social events designed for this purpose), polyamory (in which people are free to maintain multiple loving or committed relationships), and open relationships (in which a primary couple pursues outside relationships, which are generally expected to be only about sex).”⁶² These and other arrangements that partners develop around nonmonogamy are personalized and vary by couple, frequently with rules or guidelines about when, where, how, and with whom the couple can be intimate, and whether that intimacy can be sexual or romantic or both. Often, the contours of these agreements are closely attentive to a marital or long-term relationship, up to and including rules that the couple only engage in nonmonogamous sex together. The term “monogamish,” popularized by the sex columnist Dan Savage, reflects this lasting commitment that might be made to one’s spouse or primary partner while still allowing for sex or intimacy with others.⁶³

Even as the possibility of marriage became more tangible, data suggest that LGBTQ people have continued to engage in consensual nonmonogamy at higher rates than their heterosexual counterparts. Estimates drawn from the 2012 National Survey of Sexual Health and Behavior suggest that while 4 percent of respondents identified themselves as being in a consensually nonmonogamous relationship, this varied substantially by sex and sexual orientation. Only 2 percent of heterosexual respondents reported being in consensually nonmonogamous relationships, compared to 32 percent of gay men, 22 percent of bisexual individuals, 5 percent of lesbian women, and 14 percent of those who identified their sexuality as “other.”⁶⁴ Importantly, anecdotal and quantitative data suggest this openness to extramarital sex and relationships persists alongside and through the right to marry.⁶⁵ One

⁶¹ Terri D. Conley et al., *Investigation of Consensually Nonmonogamous Relationships: Theories, Methods, and New Directions*, 12 *PERSP. ON PSYCH. SCI.* 205, 206 (2017).

⁶² *Id.*

⁶³ Mark Oppenheimer, *Married, With Infidelities*, N.Y. TIMES (June 30, 2011), <https://www.nytimes.com/2011/07/03/magazine/infidelity-will-keep-us-together.html>.

⁶⁴ Ethan Czuy Levine et al., *Open Relationships, Nonconsensual Nonmonogamy, and Monogamy Among U.S. Adults: Findings from the 2012 National Survey of Sexual Health and Behavior*, 47 *ARCH. SEX. BEHAV.* 1439, 1443 (2018).

⁶⁵ Stephen M. Haas & Pamela J. Lannutti, *The Influence of Marriage and (Non)Monogamy Agreements on Relationship Quality in LGBT Relationships*, in *THE SOCIAL SCIENCE OF SAME SEX-MARRIAGE* 159 (Aaron Hoy ed., 2022) (finding little difference between married and unmarried couples in rates of consensual non-monogamy). Scott James, *Many Successful Gay Marriages Share an Open Secret*, N.Y. TIMES (Jan. 28, 2010), <https://www.nytimes.com/2010/01/29/us/29sfimetro.html>; Charles Trepany, *Polyamory Seems More Common Among Gay People Than Straight People. What’s Going On?* USA TODAY (June 20, 2024), <https://www.usatoday.com/story/life/health-wellness/2024/06/20/gay-people-monogamy-polyamory/74152637007>.

study drawing on a national cohort of gay and bisexual men published in 2019, for example, found that 45.3 percent of the partnered men in the sample were monogamous, 44.9 percent were in open relationships, and 9.8 percent only engaged together in sex outside the relationship.⁶⁶

Beyond engaging in extramarital sex and relationships, LGBTQ people remain significantly more open to the idea of consensual nonmonogamy being acceptable as part of a marriage. Data from Pew Research Center in 2023 indicate that lesbian, gay, and bisexual adults are significantly more approving of consensual nonmonogamy in marriage than heterosexual adults, with 75 percent of LGB adults and only 29 percent of heterosexual adults finding such arrangements acceptable.⁶⁷ The sharp difference along the lines of sexual orientation suggests not only that some LGBTQ people are inclined to embrace nonmonogamy as a personal matter, but that there are distinct and longstanding queer cultural norms around sex, pleasure, intimacy, and care that persist and inform many same-sex relationships into the present day.

This is not to say that same-sex couples necessarily navigate marriage any differently than heterosexual couples. While data show a higher proportion of LGBTQ respondents engaging in consensual nonmonogamy, they also suggest that many are monogamous and likely committed to an ideal of marriage that excludes other forms of sexual or romantic intimacy.⁶⁸ Conversely, many heterosexual, cisgender couples are nonmonogamous and may understand their marriages to be compatible with sexual and romantic relationships of their own.⁶⁹

⁶⁶ Tyrel J. Starks et al., *The Prevalence and Correlates of Sexual Arrangements in a National Cohort of HIV-Negative Gay and Bisexual Men in the US*, 48 ARCH. OF SEXUAL BEHAVIOR 369, 373-74 (2019).

⁶⁷ Kim Parker & Rachel Minkin, *Public Has Mixed Views on the Modern Family*, PEW RSCH. CTR. (Sept. 14, 2023), <https://www.pewresearch.org/social-trends/2023/09/14/public-has-mixed-views-on-the-modern-american-family>, at 28.

⁶⁸ See Levine et al., *supra* note 64, at 1443; Starks et al., *supra* note 66. In recent years, many commentators have also reflected on the reasons LGBTQ people might opt instead for monogamous relationships. See, e.g., Alexander Cheves, *In Defense of Gay Monogamy*, OUT (June 24, 2024), <https://www.out.com/out-exclusives/gay-monogamy>; Gabe Dunn, *Is Monogamy Cool Again?*, AUTOSTRADDLE (Apr. 17, 2024), <https://www.autostraddle.com/is-monogamy-cool-again>; Quispe Lopez, *What I Learned After Coming Out as Monogamous*, THEM (May 21, 2024), <https://www.them.us/story/what-i-learned-after-coming-out-as-monogamous-essay>.

⁶⁹ Research using a U.S. Census-based quota sample found that approximately 17 percent of people in the United States expressed an interest in polyamory and 11 percent had been in a polyamorous relationship at some point in their life. Amy C. Moors, Amanda N. Gesselman & Justin R. Garcia, *Desire, Familiarity, and Engagement in Polyamory: Results from a National Sample of Single Adults in the United States*, 12 FRONTIERS OF PSYCH. (2021), doi:10.3389/fpsyg.2021.619640. Another study using nationally representative data estimated that 20 percent of single people in the United States have been in a consensually nonmonogamous relationship at some point in their lives. M.L.

One reason that these forms of intimacy may persist alongside marriage at greater rates for LGBTQ people, however, is that queer sexuality and relationality mean something to those who engage in them, and did not cease to mean something solely because of the recognition of a constitutional right to marry. This is reflected in the writing of feminists and gay liberationists who recognized that the autonomy to structure relationships free from the proscriptions of tradition and the state can offer an important degree of freedom, openness, pleasure, sincerity, and growth. This may be true not only for committed relationships, but for more casual sexual encounters as well. As Gabriel Rotello observed nearly thirty years ago, “sexual intimacy is a way of connecting with other gay men, a way of creating community, a source of psychological meaning”⁷⁰ – and that remains true today. The community that a flexible and open sexual ethic creates and sustains is one reason for the durability of queer sexual norms even in the shadow of marriage.⁷¹

Just as importantly, these values of extramarital intimacy do not necessarily come at the expense of the commitment, love, and support that ideally animate a marriage. In contrast to those who insisted that marriage would domesticate LGBTQ people’s sexuality, some early writers were forthright in asserting that nonmonogamy might deepen and enrich marriage. Richard Mohr, for example, underscored that sexual freedom among gay men illustrates that monogamy “is not an essential component of love and marriage,” and suggested that “the lived experience of gay couples not only shows them as fulfilling the norms of marriage but can even indicate ways of improving marital law for everyone.”⁷²

Indeed, the idea that nonmonogamy can be compatible with a meaningful primary relationship is borne out in more recent data. While studies differ, a large body of research generally suggests little difference between monogamous and consensually nonmonogamous relationships on a variety of variables. One study, for example, found “no differences in the majority of indices of relationship health, including self-reported relationship satisfaction, hostile conflict, felt constraint, confidence in the relationship, and relationship instability.”⁷³ Another study of more than

Haupt et al., *Prevalence of Experiences with Consensual Nonmonogamous Relationships: Findings from Two National Samples of Single Americans*, 43 J. SEX & MARITAL THERAPY 424, 435-36 (2017).

⁷⁰ Rotello, *supra* note 13.

⁷¹ ALTMAN, *supra* note 13, at 190 (observing that “many gays are surrounded by a rich network of friends (often originally sexual partners) and past and present lovers, which can be far more supportive than are most nuclear families”).

⁷² Richard D. Mohr, *The Case for Gay Marriage*, 9 NOTRE DAME J.L. ETHICS & PUB. POL’Y 215, 218, 233 (1995).

⁷³ Sarah W. Whitton, Eliza E.M. Weitbrecht & Amanda D. Kuryluk, *Monogamy Agreements in Male Same-Sex Couples: Associations with Relationship Quality and*

2,100 people found that love, commitment, and satisfaction were no different among participants engaged in monogamy and consensual nonmonogamy, and those engaged in consensual nonmonogamy had higher levels of trust and lower levels of jealousy.⁷⁴

If it seems doubtful that marriage has civilized or domesticated LGBTQ people's sexuality, it is also unclear that same-sex couples have destabilized marriage. Many critics have noted a recent boom in depictions and discussions of nonmonogamy in popular culture, coinciding with shifts in public opinion regarding nonmonogamy as permissible or even affirmatively desirable.⁷⁵ But this more general interest in nonmonogamy is typically traced to a variety of factors and not primarily to the ability of same-sex couples to marry. The philosophical underpinnings of consensual nonmonogamy have developed over decades, and the recent boom has more often been traced to the pervasive ideals of individualism and free market capitalism, shifting socioeconomic conditions, and introspection and self-realization triggered by the COVID-19 pandemic, among other factors.⁷⁶

As the decade after *Obergefell* illustrates, marriage has mattered. It has allowed hundreds of thousands of couples to secure the material and symbolic benefits of marriage, and countless more to navigate relationships knowing that marriage is available to them as a matter of constitutional right. At the same time, its promise has come at the expense of other kinds of legal arrangements, real and imagined, that might have offered many LGBTQ people and others a better mixture of flexibility and stability. But a variety of intimate and sexual attachments have shown remarkable

Individual Well-Being, 14 J. COUPLE & RELATIONSHIP THERAPY 39, 53 (2015); see also Alicia N. Rubel & Anthony F. Bogaert, *Consensual Nonmonogamy: Psychological Well-Being and Relationship Quality Correlates*, 52 J. SEX. RSCH. 961, 979 (2015) (“[T]he majority of research suggests that the psychological well-being and the quality of the relationships of consensual nonmonogamists is not significantly different from that of monogamists. This is evident in terms of psychological well-being, overall relationship adjustment, jealousy, sexual satisfaction, and relationship stability.”).

⁷⁴ In this study, the kind of consensual nonmonogamy mattered somewhat; those in polyamorous relationships fared slightly better than those in monogamous relationships, who in turn fared better than those in open relationships. Conley et al., *supra* note 61, at 213.

⁷⁵ E.g., Mandy Len Catron, *Non-Monogamous Relationships Seem to Be on the Rise. Is That Surprising?*, GUARDIAN (Jan. 22, 2024), <https://www.theguardian.com/commentisfree/2024/jan/22/non-monogamous-relationships-seem-to-be-on-the-rise-is-that-surprising>; Jennifer Wilson, *How Did Polyamory Become So Popular?*, NEW YORKER (Dec. 25, 2023), <https://www.newyorker.com/magazine/2024/01/01/american-poly-christopher-gleason-book-review-more-a-memoir-of-open-marriage-molly-roden-winter>. The pop culture boom is not purely a post-*Obergefell* phenomenon. See, e.g., Jessica Bennett, *Polyamory: The Next Sexual Revolution?*, NEWSWEEK (July 28, 2009), <https://www.newsweek.com/polyamory-next-sexual-revolution-82053> (last updated July 30, 2011, 12:43 PM).

⁷⁶ See generally CHRISTOPHER M. GLEASON, AMERICAN POLY: A HISTORY (2024).

resilience in the aftermath of the marriage fight, and this should inform the way we think about marriage as a civilizing or domesticating project.

III. ADVANCING SEXUAL JUSTICE THROUGH AND BEYOND *OBERGEFELL*

A striking feature of the decades-long debate over what marriage does or could mean for queer liberation is how suddenly it faded after *Obergefell*. In a sense, that is understandable. Marriage is now a constitutional right, and whether that struggle was wise is by now a largely academic question. But in another sense, abandoning that debate seems premature. Vigorous contestation over the campaign for marriage generated important insights, and winning marriage does not necessarily preclude the further pursuit of liberationist goals.⁷⁷ Insofar as sexual autonomy and intimate attachments remain meaningful for many LGBTQ people, important questions remain about other changes that might be needed to make marriage as an institution more just, the viability of future innovations in relationship recognition, and what sexual liberation might ultimately look like in the shadow of marriage.

In this Part, I consider three ways in which attentiveness to a fuller range of intimate attachments in the aftermath of *Obergefell* might shape contemporary LGBTQ law and policy demands: first, by challenging restrictions on sexual intimacy; second, by conceptualizing and advocating protections for the various permutations of that intimacy; and third, by boldly recentering sex and sexuality alongside demands that LGBTQ couples and families be afforded the same rights that others enjoy.

A. Challenging Restrictions on Intimate Relationships

Even after *Obergefell*, sex and sexuality are a fraught site of civil and criminal regulation in the United States. To the extent that marriage did not displace but can instead coexist with a broader ethic of sexual liberation, ample work remains to be done to protect sexual autonomy and relationships in the post-*Obergefell* era.

In light of the rates of consensual nonmonogamy among LGBTQ couples, obvious targets are adultery laws that remain on the books in a variety of states. While Idaho, Minnesota, and New York recently repealed their criminal adultery bans, fifteen U.S. jurisdictions still ban adultery, with Michigan, Oklahoma, and Wisconsin punishing adultery as a felony

⁷⁷ As Nathaniel Frank points out, this dialectic has characterized queer advocacy more generally. He suggests that “dividing the LGBTQ movement into sides pitting ‘liberationists’ against ‘assimilationists’ would be reductive,” as “the gay rights movement has contained all these ingredients,” with liberationist interventions laying the groundwork for greater acceptance, and assimilationist interventions setting the stage for other restrictions and taboos to be questioned. FRANK, *supra* note 2, at 2-3.

offense.⁷⁸ Until 2024, the states that prohibited adultery included New York, where many people are openly nonmonogamous,⁷⁹ often with the knowledge and consent of their spouse, but adultery nonetheless remained a Class B misdemeanor, subject to up to 90 days in jail and a \$500 fine.⁸⁰

While *Lawrence v. Texas* cast serious doubt on the constitutionality of adultery laws,⁸¹ federal courts have not yet struck down prohibitions on adultery as similarly violative of constitutional rights, largely because criminal prosecutions under these laws are rare.⁸² Historically, these laws also have been justified by a slightly different set of state interests than those banning same-sex activity or non-marital sex. Adultery laws aim to limit sexual relationships inside of marriage in the name of both preserving the sanctity of marriage as an institution and protecting the interests of the spouse whose partner has been unfaithful, among other interests.⁸³

Yet as various legal academics and critics have pointed out, these interests are not necessarily implicated by many of the sexual relationships that would formally run afoul of existing adultery laws. Edward Stein, for example, argues for the calculated reform of laws that penalize consensual

⁷⁸ See ALA. CODE § 13A-13-2 (2024); ARIZ. REV. STAT. ANN. § 13-1408 (2024); FLA. STAT. § 798.01 (2024); GA. CODE ANN. § 16-6-19 (2024); 720 ILL. COMP. STAT. ANN. 5/11-35 (West 2024); KAN. STAT. ANN. § 21-5511 (2024); MD. CODE ANN. CRIM. LAW. § 10-501 (2024); MICH. COMP. LAWS §§ 750.29-750.30 (2024); N.C. GEN. STAT. § 14-184 (2024); N.D. CENT. CODE § 12.1-20-09 (2024); OKLA. STAT. §§ 870-871; R.I. GEN. LAW § 11-6-2 (2024); S.C. CODE ANN. § 16-15-60 (2024); VA. CODE ANN. § 18.2-365 (2024); P.R. LAWS ANN. tit. 33, § 4758 (2011).

⁷⁹ The former mayor and first lady of New York City, for example, told the *New York Times* they planned to date other people while remaining married. Matt Flegenheimer, *Bill de Blasio and Chirlane McCray Are Separating*, N.Y. TIMES (July 5, 2023), <https://www.nytimes.com/2023/07/05/nyregion/de-blasio-marriage-chirlane-mccray.html>. For another admittedly unrepresentative but very public example, see Molly Young, *He & He & He*, N.Y. MAG. (July 27, 2012), <https://nymag.com/news/features/sex/2012/benny-morecock-throuple>.

⁸⁰ N.Y. PENAL LAW § 255.17 (repealed 2024); Erin Nolan, *Attention, New York Adulterers: Your Sin May Soon No Longer Be a Crime*, N.Y. TIMES (Apr. 1, 2024), <https://www.nytimes.com/2024/04/01/nyregion/adultery-law-crime.html>.

⁸¹ See, e.g., JoAnne Sweeny, *Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal Laws*, 46 LOY. U. CHI. L.J. 127, 129-30 (2014); Brett R. Turner, *Justice Scalia's "Wild Ride": Lawrence v. Texas and the Constitutionality of Penalizing Adultery*, 17 NO. 7 DIVORCE LITIG. 109 (2005); Gabrielle Viator, Note, *The Validity of Criminal Adultery Prohibitions after Lawrence v. Texas*, 39 SUFFOLK U. L. REV. 837, 837-39 (2006).

⁸² In at least one instance, state courts have understood *Obergefell* to require an expansion of adultery laws to same-sex couples, who had previously been excluded from their purview. See *In re Blaisdell & Blaisdell*, 261 A.3d 306, 311, 313 (N.H. 2021) (recognizing that “adultery,” as a statutory ground for divorce, also applies to same-sex conduct, and suggesting that *Obergefell* would make a contrary ruling constitutionally suspect).

⁸³ See Martin J. Siegel, *For Better or For Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 49, 87 (1991-1992) (examining interests in “prevention of disease and illegitimate children, the preservation of the institution of marriage and the safeguarding of general community morals”).

nonmonogamy as well as infidelity, arguing that the former does not exact the same kind of harm or implicate the same state interests that have historically been used to justify adultery bans.⁸⁴ Deborah L. Rhode asserts more broadly that marital fidelity should not be a virtue regulated and enforced by the state, and thus argues that whether consensual or nonconsensual, “[a]dultery should not be a basis for criminal or civil liability, employment decisions, or custody and alimony awards.”⁸⁵

Adultery laws are an obvious target for post-*Obergefell* advocacy, as they constrain the relatively widespread sexual practices of many of those individuals who won the right to marry in *Obergefell*, and they do so under threat of criminal sanction. But it is not the only form of consensual sexual activity prohibited in many jurisdictions, including in marital relationships. Linda S. Anderson points more broadly to “[s]tatutes prohibiting adultery, cohabitation, fornication, sex toy sale and use, and consensual BDSM behaviors,” for example, arguing that these kinds of restrictions on consensual sex are ripe for reconsideration and repeal.⁸⁶ As Andrew Gilden has documented, even sexting and other virtual sexual fantasy between consenting adults can have significant legal repercussions in criminal law and beyond.⁸⁷

Both adultery laws and other restrictions on sexual autonomy can also have potential consequences in the family law context. As other scholars have noted, fidelity and monogamy in the marital relationship have historically been enforced with consequences in the context of divorce, parenting, and other family law domains.⁸⁸

These laws and regulations can also threaten other forms of progressive family recognition. One such framework is the Uniform Parentage Act, promulgated in 2017, which recognizes that children may have more than two parents. As I discuss below, state passage of the UPA is one way that advocates might expand options for LGBTQ families consistent with *Obergefell* and the related right to be recognized as a parent in *Pavan v.*

⁸⁴ Edward Stein, *Adultery, Infidelity, and Consensual Non-Monogamy*, 55 WAKE FOREST L. REV. 147, 150-51 (2020).

⁸⁵ DEBORAH L. RHODE, ADULTERY: INFIDELITY AND THE LAW 7 (2016).

⁸⁶ Linda S. Anderson, *Marriage, Monogamy, and Affairs: Reassessing Intimate Relationships in Light of Growing Acceptance of Consensual Non-Monogamy*, 22 WASH. & LEE J. C.R. & SOC. JUST. 3, 41 (2016); see also Elizabeth J. Baia, Note, *Akin to Madmen: A Queer Critique of the Gay Rights Cases*, 104 VA. L. REV. 1021, 1044-60 (2018) (identifying sexual liberties that might be threatened by the emphasis on traditional values in the Supreme Court’s LGBT rights jurisprudence).

⁸⁷ Andrew Gilden, *Punishing Sexual Fantasy*, 58 WM. & MARY L. REV. 419 (2016).

⁸⁸ RHODE, *supra* note 85, at 44-47; Gilden, *supra* note 87, at 434-439; Stein, *supra* note 84, at 159-64.

Smith.⁸⁹ And indeed, in California and elsewhere, LGBTQ advocates have actively and successfully fought to have the UPA incorporated into state law.⁹⁰

Yet adultery bans significantly limit the potential of the UPA in practice. Rhode Island is one example of a state where the adoption of the UPA is in pronounced tension with an existing criminal ban on adultery, which applies regardless of the consent of the parties involved.⁹¹ As Thomas Wall observes, this creates the seemingly irrational outcome that a married couple who raise a child with a platonic third legal parent enjoy a series of legal protections for their parentage, while the same couple who raise a child with a third legal parent with whom they are romantically involved would subject all three parents to criminal sanction.⁹²

Because the law has long been used to regulate certain forms of sexual conduct, even as bans are repealed or are rarely enforced, they often also have collateral consequences. To the extent that LGBTQ people and others face punishment for adultery, fornication, cohabitation, and other non-marital or extramarital sex, it is frequently through adverse treatment by employers, landlords, public accommodations, and others with broad discretion to punish sex considered immoral or socially unacceptable.⁹³

As I discuss below, there are certainly other ways that advocates might recenter a more general ethic of sexual liberation alongside their recognition of a right to marry and the equal treatment of same-sex couples and families under the law. But the use of criminal law and family law to police and punish consensual sexual intimacy outside of the marital relationship are two areas that are ripe for queer interventions under the law, not only for same-sex couples but for all those who consider such intimacy meaningful and significant in its own right.

⁸⁹ *Pavan v. Smith*, 582 U.S. 563, 564 (2017) (holding that putting heterosexual but not same-sex spouses on a child's birth certificate "infringes *Obergefell*'s commitment to provide same-sex couples 'the constellation of benefits that the States have linked to marriage'").

⁹⁰ See, e.g., NAT'L CTR. FOR LESBIAN RTS., *Children With More Than Two Parents*, <https://www.nclrights.org/our-work/legislation-policy/children-with-more-than-two-parents> (last visited Feb. 19, 2025); GLAD LAW, *GLAD Legal Briefs: Protecting and Celebrating Our LGBTQ Families No Matter How We Form Them*, BOSTON SPIRIT (Mar. 16, 2021), <https://bostonspiritmagazine.com/2021/03/glad-legal-briefs-protecting-and-celebrating-our-lgbtq-families-no-matter-how-we-form-them>.

⁹¹ Uniform Parentage Act, ch. 59, 2020 R.I. Pub. Laws 211 (codified as amended at 15 R.I. GEN. LAWS § 15-8.1 (2020)); 11 R.I. GEN. LAWS § 11-6-2 (2020).

⁹² Thomas M. Wall, Comment, *The Pitfalls of Polyamorous Parenting in Rhode Island: The Crime of Adultery and the Best Interests of the Child Under the Uniform Parentage Act*, 26 ROGER WILLIAMS U. L. REV. 766, 766-68 (2021).

⁹³ RHODE, *supra* note 85, at 72-88.

B. Affirmatively Protecting Intimate Relationships

Of course, as the fight for marriage equality after *Lawrence v. Texas* illustrates,⁹⁴ eliminating prohibitions and restrictions is only part of the struggle for sexual autonomy. To more generally advance the aim of sexual liberation, advocates might also consider affirmative interventions on behalf of those who want alternatives to marriage, those who want protection of their choice of whether or not to marry, and those who wish to expand rights and recognition to a wider range of marital and familial attachments.

i. Advancing Alternatives to Marriage

First, insofar as LGBTQ people value forms of erotic and intimate relationship that they cannot or do not wish to codify in marriage, advocates have a role to play in fighting for alternative forms of relationship recognition that allow varied commitments to be appreciated and treated with dignity and respect.

Many such forms of recognition have already been pioneered or utilized by queer and feminist advocates, from domestic partnerships to reciprocal beneficiary arrangements to private law instruments. Chai Feldblum, among other advocates for marriage, argued that there was real value in maintaining and cultivating these kinds of protections even as same-sex couples gained the right to marry. As she recognized:

There are some people who are not interested in being marriage partners, but would like to be in a sexual, non-marital relationship that includes various aspects of commitment. These couples (or individuals) desire some of the interdependence of marriage, but also affirmatively value the independence that comes from structuring a relationship that does not mimic all the same characteristics as marriage Indeed, the early development of domestic partnership structures were explicitly designed to create – for both gay and non-gay couples – a state-recognized relationship that would not encompass all the rights and responsibilities of marriage.⁹⁵

Feldblum further argues that these need not be limited to sexual relationships. Expanding the option of domestic partnership to platonic relationships could lend those relationships important protection and stability that need not, and should not, be confined to marriage.⁹⁶

⁹⁴ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁹⁵ Feldblum, *supra* note 55, at 180.

⁹⁶ *Id.* at 181.

As discussed above, the impetus to create, foster, and promote these kinds of legal protections for non-marital relationships has largely faded in the shadow of marriage. Yet a reinvigorated movement for these kinds of recognized statuses has real potential, and not only for LGBTQ people.⁹⁷ In the wake of the COVID-19 pandemic and economic conditions that have impaired the ability of younger generations to marry and parent children, accrue savings, and own property, more people live with roommates or rely on close friends into adulthood as primary sources of care and support.⁹⁸ Particularly in this climate, there are compelling reasons to prioritize creating and advancing protections for relationships that are temporally limited or do not necessarily require taking on the full rights and responsibilities of marriage.

While having a formalized legal status for a wider range of relationships can lend them stability and predictability, pre-*Obergefell* case law also illustrates the importance of fighting for recognition of *de facto* relationships of mutual dependence and care, with or without prior recognition by the state. There is ample precedent in state and local law to illustrate how the functional recognition of intimate and familial relationships by courts and agencies can secure important benefits and protections, both historically and in the present day.⁹⁹

As with domestic partnerships, the ability to marry has threatened to blunt some movements for functional recognition of familial relationships, including the development of doctrines like *de facto* parentage. As Douglas NeJaime notes, only about two-thirds of states have a functional parent doctrine, and a lack of predictable legal recognition for nonbiological parents and those who act as parents threatens the stability of those relationships for parents and children alike.¹⁰⁰

⁹⁷ *Id.* (arguing that the embrace of non-sexual domestic partnerships “is simply to acknowledge that there are rich webs of interdependences that often exist *outside* of the framework of sexuality. (Indeed, the gay community has pioneered in developing such relationships and non-gay individuals could learn and benefit from developing similar relationships.)”).

⁹⁸ Richard Fry & Kim Parker, *Rising Share of U.S. Adults Are Living Without a Spouse or Partner*, PEW RSCH. CTR. (Oct. 5, 2021), <https://www.pewresearch.org/social-trends/2021/10/05/rising-share-of-u-s-adults-are-living-without-a-spouse-or-partner>; Krista Westrick-Payne & Wendy D. Manning, *Marriage, Divorce, and the COVID-19 Pandemic in the U.S.* 2-3 (Nat’l Ctr. for Family & Marriage Rsch., Family Profile No. 12, 2022), <https://www.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/NCFMR/documents/FP/westrick-payne-manning-marriage-divorce-covid-pandemic-US-fp-22-12.pdf>.

⁹⁹ See, e.g., *Braschi v. Stahl Assoc. Co.*, 543 N.E.2d 49, 53-54 (N.Y. 1989); *West 49th St. LLC v. O’Neill*, 178 N.Y.S.3d 874, 878-84 (N.Y. Civ. Ct. 2022).

¹⁰⁰ Douglas NeJaime, *Parents in Fact*, 91 U. CHI. L. REV. 513, 516 (2024); see also Solangel Maldonado, *De Facto Parents, Legal Parents, and Inchoate Rights*, 91 U. CHI. L. REV. 557, 560 (2024).

Notably, the UPA protects both married and unmarried same-sex couples, recognizes that children may have more than two parents, recognizes *de facto* parents as legal parents, and offers other critical protections for LGBTQ families.¹⁰¹ Courtney Joslin observes that this model legislation has the potential to provide powerful protection for nonbiological parents who may face challenges establishing their parental rights and responsibilities even after *Obergefell*.¹⁰² Yet as of November 2024, only eight U.S. states had adopted the UPA or something substantially similar, leaving ample opportunities for advocacy to shore up parental and familial relationships beyond the right to marry.¹⁰³

As with domestic partnerships, equitable doctrines that are attentive to the lived realities of human relationships are critically important. They fill a crucial gap for those who do not wish to or cannot obtain legal recognition of their relationships but nonetheless have meaningful attachments that at times require recognition or protection from the state.

ii. Protecting Those Who Do Not Marry

In the struggle for marriage equality, advocates persuasively identified a wide range of benefits that inhere only in marriage.¹⁰⁴ Many of these were painfully apparent upon the death or incapacitation of a partner when anti-LGBTQ animus and a lack of legal recognition led people to lose hospital visitation, custody of children, employer benefits, health insurance, housing, property, and other material goods, to the extent they had been able to obtain these at all.

The inability of some individuals to access material benefits has thus been a central concern of progressive critics from the early days of the fight for marriage equality. Yet the *Beyond Same-Sex Marriage* manifesto, issued by activists and scholars in 2006, also warned that even after winning the right to marry “many individuals and households in LGBT communities will be unable to access benefits and support opportunities that they need because those benefits will only be available through marriage, if they remain available at all.”¹⁰⁵

¹⁰¹ *Uniform Parentage Act of 2017*, NAT’L CTR. FOR LESBIAN RTS., <https://www.nclrights.org/our-work/legislation-policy/uniform-parentage-act-of-2017> (last visited Feb. 19, 2025).

¹⁰² See generally Courtney G. Joslin, *Nurturing Parenthood Through the UPA*, 127 YALE L.J. FORUM 589 (2018).

¹⁰³ *Parentage Act*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f> (last visited Feb. 21, 2025).

¹⁰⁴ Goldberg, *supra* note 5, at 228-30.

¹⁰⁵ *Beyond Same-Sex Marriage*, *supra* note 35.

Nearly twenty years later, marriage has unquestionably expanded the scope of material protections available to same-sex couples. But it has done so only for those who want to or can get married, and not to LGBTQ people as individuals or as unmarried partners or lovers. For some, this limits sexual autonomy by compelling marriage. Certain benefits – for example, immigration benefits – are contingent on marriage rather than a long-term partnership, providing a powerful inducement for people to marry even if the full bundle of rights and responsibilities inherent in marriage is more than they wish to take on. For others, this material pressure limits sexual autonomy by making certain intimate commitments irresolvably precarious. Consider, for example, a married couple who enter a lasting and permanent relationship with a third partner, whose ability to obtain and rely on a wide range of benefits will not be the same as their partners' even if they are equally committed and present in the relationship. Whether the unmarried partner remains in the relationship, regardless of love and mutual support, may be shaped by the structural and material exclusion that dynamic engenders.

One alternative, of course, is to create a world where many of the benefits that arise and flow through marriage are more accessible to all individuals. Various goods, including housing and health care, can be considerably more accessible to those who are married and benefit from that legal status and a variety of state-sponsored and private incentives.¹⁰⁶ Advocacy that seeks to decouple material benefits like citizenship, access to benefits and social insurance, and other goods from marriage would see a dual benefit of making the pressure to marry less coercive and ensuring that those who want to forge lasting commitments can do so with greater autonomy.

Separate from the fight for access to benefits, there is value in advocates seeking stronger affirmative protections from discrimination based on marital status for those who are single, do not want to or cannot marry their partner or partners, or maintain multiple kinds of intimate attachments. As the debate over the fight for marriage made clear, LGBTQ people know all too well the material and stigmatic consequences that come with being unmarried.¹⁰⁷ Research suggests that those who are in consensually nonmonogamous relationships are also widely subject to discrimination,

¹⁰⁶ Bella DePaulo, *It's Not Just Love: Some Stay Married for the Health Insurance*, PSYCH. TODAY (Mar. 3, 2021), <https://www.psychologytoday.com/us/blog/living-single/202103/its-not-just-love-some-stay-married-the-health-insurance>; Amanda Jayne Miller & Colleen E. Wynn, Opinion, *The Affordable Housing Crisis is Destroying Relationships and Families*, NEWSWEEK (Oct. 21, 2021), <https://www.newsweek.com/affordable-housing-crisis-destroying-relationships-families-opinion-1641326>.

¹⁰⁷ Goldberg, *supra* note 5, at 228-30.

with more than two-thirds of one sample reporting discrimination based on their relationship.¹⁰⁸

Yet protections based on marital status are often limited. Title VII of the Civil Rights Act of 1964, for example, does not protect workers from adverse employment actions based on their marital status.¹⁰⁹ The Fair Housing Act prohibits discrimination based on familial status, protecting those families with children, but not marital status.¹¹⁰ Many states lack protections from discrimination based on marital status, and the protections that do exist vary considerably in their scope and understanding of what marital status entails.¹¹¹ LGBTQ activists and scholars have a role to play here too in envisioning and fighting for protections based on marital status as part of a broader post-*Obergefell* agenda.

iii. Broadening Recognition of Intimate Attachments

Finally, advocates may consider expanding affirmative recognition and protection of relationships beyond the scope of the burgeoning movements that preceded the successful push for marriage equality.¹¹² Both *Windsor* and *Obergefell* stopped short of recognizing a right to marry for polyamorous families. And contrary to what critics of same-sex marriage argued, there are at least conceivable distinctions that could allow courts to draw that line.¹¹³ The state may, for example, have an investment in the administration of benefits, the orderly ownership and transmission of property and estates, the parentage of children, and other interests where limiting the number of people in a legal arrangement can be relevant and important.

But whether it is through marriage or other alternatives, there can still be real value in protecting “intimate pluralism,” including the development

¹⁰⁸ Ryan G. Witherspoon & Peter S. Theodore, *Exploring Minority Stress and Resilience in a Polyamorous Sample*, 50 ARCHIVES OF SEXUAL BEHAV. 1367, 1381 (2021).

¹⁰⁹ 42 U.S.C. § 2000e-2.

¹¹⁰ 42 U.S.C. § 3604.

¹¹¹ Leslie Dalton, *Marital Status Discrimination in the Workplace: The Need for Title VII Protection and a Uniform Definition of the Term ‘Marital Status,’* 120 DICK. L. REV. 867, 869-70 (2016); *State Public Accommodation Laws*, NAT’L CONF. STATE LEGIS., <https://www.ncsl.org/civil-and-criminal-justice/state-public-accommodation-laws> (last updated June 25, 2021).

¹¹² Amy C. Moors, Sharon Flicker & Michelle Vaughan, *LGBTQ+ Activism Should Include Consensual Non-Monogamy*, MEDIUM (Oct. 10, 2022), <https://medium.com/national-center-for-institutional-diversity/lgbtq-activism-should-include-consensual-non-monogamy-996ae2321760>.

¹¹³ Edward Stein identifies and analyzes some of the most common of these asserted interests: that plural marriage is harmful to women, raises different concerns about consent and coercion, is worse for children, and is administratively difficult, in addition to the argument that prohibitions on plural marriage implicate a weaker liberty interest than prohibitions on same-sex marriage. Edward Stein, *Plural Marriage, Group Marriage, and Immutability in Obergefell v. Hodges and Beyond*, 84 UMKC L. REV. 871, 881-887 (2016).

of legal protections and support for polyamorous families.¹¹⁴ Polyamorous families are capable of the same degree of love and commitment as dyadic couples, and can perform similar functions of mutual dependence, care, stability, and childrearing.¹¹⁵

At the local level, advocates have begun to innovate and experiment with such protections, and have in some instances successfully enshrined them into law. The Polyamory Legal Advocacy Coalition, for example, has actively worked to enact municipal protections for polyamorous families. Three cities in Massachusetts – Cambridge, Somerville, and Arlington – have adopted ordinances allowing individuals to obtain domestic partnerships with multiple partners.¹¹⁶ These ordinances grant limited rights and benefits, including the ability to be granted access to a partner’s child in school and access to employment benefits, hospital visitation, and travel opportunities that are open to domestic partners at the federal or transnational levels.¹¹⁷ The City of Somerville has subsequently bolstered this recognition with antidiscrimination protections for people in polyamorous relationships, recognizing “family or relationship structure” as a protected class.¹¹⁸

Of course, this is not to say that all forms of intimacy merit or benefit from recognition by the state. Few people want their hookups or friendships with benefits registered and codified by the government, with obligations and restrictions on entry into and exit from those relationships. As the repeal of adultery laws might suggest, in many instances the best approach is for the state to simply get out of the business of restricting intimate attachments, particularly insofar as it has historically sought to police sexual morality with the threat of civil or criminal sanctions. But legal protections do, in many instances, provide stability and structure for those who desire it, whether by insulating relationships against external scrutiny or by providing certainty in the event of a relationship ending. And as I discuss in the final

¹¹⁴ Casey E. Faucon, *Polygamy after Windsor: What’s Religion Got to Do With It?*, 9 HARV. L. & POL’Y REV. 471, 473 (2015); Stein, *supra* note 113, at 887-93.

¹¹⁵ Elisabeth Sheff, Kimberly Rhoten & Jonathan Lane, *A Whole Village: Polyamorous Families and the Best Interests of the Child Standard*, 31 CORNELL J.L. & PUB. POL’Y 287, 328-29 (2021) (analyzing empirical data and concluding that polyamorous families are capable of satisfying the best interest of the child standard).

¹¹⁶ Kaiponanea T. Matsumura, *Beyond Polygamy*, 107 IOWA L. REV. 1903, 1904-07 (2022); *Cambridge Domestic Partnership Ordinance Frequently Asked Questions*, POLYAMORY LEGAL ADVOC. COAL., <https://polyamorylegal.org/cambridge-ordinance-faq> (last visited Feb. 15, 2025); *Somerville Domestic Partnership Ordinance Frequently Asked Questions*, POLYAMORY LEGAL ADVOC. COAL., <https://polyamorylegal.org/somerville-ordinance-faq> (last visited Feb. 15, 2025); Note, *Three’s Company, Too: The Emergence of Polyamorous Partnership Ordinances*, 135 HARV. L. REV. 1441, 1141-42 (2022).

¹¹⁷ Matsumura, *supra* note 116, at 1904-07.

¹¹⁸ Sara Luterman, *Polyamorous Families Now Have Legal Protections in This Massachusetts City*, 19TH (Apr. 5, 2023), <https://19thnews.org/2023/04/somerville-massachusetts-legal-protections-polyamorous-families>.

section, while legal protections are important for many intimate relationships, there is also value in cultivating enabling conditions for sex and sexuality more generally.

C. *Recentring Sexual Liberation After the Right to Marry*

In the immediate aftermath of *Obergefell*, there were countless books, articles, and blog posts reflecting on what LGBTQ advocates should prioritize next, along with concerns about maintaining funding and harnessing energy and attention around remaining movement goals.¹¹⁹ In actuality, however, winning recognition of a right to marry meant that countermovement organizations immediately set to work on two fronts, seeking to defang the promise of equality by carving out sweeping religious exemptions to LGBTQ rights and demonizing transgender people.

These anti-LGBTQ efforts have put movement organizations in a defensive posture, having to advocate, lobby, and litigate against hundreds of bills introduced across the United States as well as hostile administrative and legislative activity at the federal level.¹²⁰ They have stalled positive progress on a range of LGBTQ rights, with the steady advancement of nondiscrimination protections grinding to a halt at both the state and federal levels.¹²¹ And they have breathed renewed life into harmful and inaccurate stereotypes that have licensed open hostility and violence toward LGBTQ people and communities.¹²² Within this environment, energy has

¹¹⁹ See generally AFTER MARRIAGE EQUALITY: THE FUTURE OF LGBT RIGHTS (Carlos A. Ball ed., 2016); THE UNFINISHED QUEER AGENDA AFTER MARRIAGE EQUALITY (Angela Jones, Joseph DeFilippis & Michael Yarbrough eds., 2018); QUEER ACTIVISM AFTER MARRIAGE EQUALITY (Joseph DeFilippis, Michael Yarbrough & Angela Jones eds., 2018); QUEER FAMILIES AND RELATIONSHIPS AFTER MARRIAGE EQUALITY (Michael Yarbrough, Angela Jones & Joseph DeFilippis eds., 2018); Symposium, After *Obergefell*, 84 UMKC L. REV. 605 (2016); Jon W. Davidson, *A Glass Only Half Full: The Ongoing Struggle for LGBT Rights*, in LOVE UNITES US: WINNING THE FREEDOM TO MARRY IN AMERICA 291 (Kevin M. Cathcart & Leslie J. Gabel-Brett eds., 2016); Gary Mucciaroni, *Whither the LGBTQ Movement in a Post-Civil Rights Era?* in LGBTQ POLITICS: A CRITICAL READER 525 (Marla Brettschneider, Susan Burgess & Christine Keating eds., 2017).

¹²⁰ See, e.g., *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2024*, ACLU, <https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2024> (last visited Feb. 19, 2025) (identifying 533 anti-LGBTQ bills filed in the United States in 2024); *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2023*, ACLU, <https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2023> (last visited Feb. 19, 2025) (identifying 510 anti-LGBTQ bills filed in the United States in 2023).

¹²¹ Ryan Thoreson, *Lawmakers Are Harming LGBTQ+ Youth*, PROGRESSIVE (June 30, 2021), <https://progressive.org/op-eds/lawmakers-harming-lgbtq-youth-thoreson-210630> (observing that the steady passage of LGBTQ-inclusive nondiscrimination laws stalled as anti-LGBTQ bills gained steam).

¹²² See CTR. FOR COUNTERING DIGITAL HATE & HUM. RTS. CAMPAIGN, DIGITAL HATE: SOCIAL MEDIA'S ROLE IN AMPLIFYING DANGEROUS LIES ABOUT LGBTQ+ PEOPLE 4 (2022), <https://counterhate.com/wp-content/uploads/2022/08/CCDH-HRC-Digital-Hate-Report-2022-single-pages.pdf> (documenting a 406 percent increase in “grooming” slurs and discourse in the month after Florida adopted its Don’t Say Gay or Trans bill).

understandably gone toward shoring up and defending crucial equality protections in law and policy, and fighting overt attacks on LGBTQ people, and especially transgender children, that have gained traction in recent years.

Alongside these overt attacks, recent years have also seen a consistent and sustained assault on the visibility of LGBTQ identity and relationships in the public sphere. In this final section, I want to briefly highlight some of the areas of law where these restrictions are arising, and to think about them collectively to make the case that we as scholars and advocates should take them seriously as part of a post-*Obergefell* agenda.

First, scholars and advocates should acknowledge the extent to which the initial post-*Obergefell* push for religious exemptions – a push that found a sympathetic audience among the dissenting justices in *Obergefell* itself – has transformed into a broader demand for the censorship and eradication of LGBTQ identity and relationships from public life. As same-sex marriage becomes a fixture of the legal landscape, efforts to erase LGBTQ people from the public sphere have taken on a fervor not seen in a generation or more.

Examples of this erasure abound and particularly aim to silence any acknowledgment of the possibility of queerness for youth. As of January 2025, nine states restrict discussions of sexual orientation and gender identity across a wide range of school curricula, and eight states require advance notification to allow parents to restrict their children from learning about these topics.¹²³ Many other states have made it easier for conservative groups and aggrieved individuals to have books removed from schools and libraries, with material with LGBTQ characters and themes among those that are most often censored.¹²⁴ In 2025, the Supreme Court ruled in *Mahmoud v. Taylor* that parents have a constitutional right to opt their children out of instruction that includes LGBTQ stories and themes.¹²⁵ While depictions of same-sex couples and their families face restrictions in schools, efforts to erase transgender people from public life have been far more sweeping and draconian. In addition to hundreds of laws restricting

¹²³ *LGBTQ Curricular Laws*, MOVEMENT ADVANCEMENT PROJ., https://www.lgbtmap.org/equality-maps/curricular_laws (last visited Feb. 19, 2025).

¹²⁴ Kiara Alfonseca, *Report: LGBTQ Content Drove Book Banning Efforts in 2023*, ABC NEWS (Apr. 8, 2024), <https://abcnews.go.com/US/report-lgbtq-content-drove-book-banning-efforts-2023/story?id=108992375>; Jillian Eugenios, *The Next Chapter in Record U.S. Book Bans? “Soft Censorship,”* NBC NEWS (Sept. 27, 2024), <https://www.nbcnews.com/nbc-out/out-news/soft-book-bans-censorship-lgbtq-race-rcna172855>.

¹²⁵ Lawrence Hurley, *Supreme Court Appears Poised to Rule for Parents Who Objected to LGBTQ Content in Elementary Schools*, NBC NEWS (Apr. 22, 2025, 6:00 AM), <https://www.nbcnews.com/politics/supreme-court/parents-objections-lgbtq-books-elementary-schools-montgomery-county-md-rcna202193>.

access to health care, bathroom and locker room usage, and participation in athletics or other gendered activities, a barrage of executive branch orders and agency actions in early 2025 aimed to eliminate any acknowledgment of transgender people across the federal government and to withhold federal funding from other entities, including schools, that extend the most basic recognition and dignity to transgender people.¹²⁶

Recent legislation targeting the visibility of LGBTQ people may not seem as immediately related to intimacy and relationships as, say, decriminalizing adultery or extending domestic partnership benefits to polyamorous families, but it functions as a sharp rebuke to the growing recognition of the humanity of LGBTQ people that led up to and produced *Windsor* and *Obergefell*. The promise of *Obergefell* is not just that adults can marry, but that same-sex relationships are as valid and legitimate in the eyes of the state as heterosexual relationships are.¹²⁷ The backlash in recent years has sought to reject that idea for young people, painting LGBTQ identity and same-sex relationships as something reserved for adults and inappropriate for minors. For the marriage decisions to uphold their full promise, advocates should unapologetically insist on their deeper meaning and link those principles to the fight for visibility and access to information about queerness in the public sphere.

Second, and relatedly, advocates and scholars should recognize that married as well as single LGBTQ people need and deserve interventions that make sexual intimacy pleasurable, safe, and healthy. As Mary Anne Case has noted, the fact of sex, with all of its joy and stress and pleasure, was conspicuously absent from *Obergefell*, even as the valorization of marriage coincided with renewed assaults on sexual and reproductive health and rights.¹²⁸ A decade later, the fight for these rights remains as urgent as ever, and that requires community resources that span across and meet the needs of different kinds of intimate relationships.

Consider, for example, recent attacks on access to pre-exposure prophylaxis, or PrEP, used by many LGBTQ individuals and others to effectively prevent the transmission of HIV. PrEP has been taken up widely among gay and bisexual men and transgender women who have sex with men, including those who may be married and wish to more safely engage

¹²⁶ Ryan Thoreson, *Transgender Rights at a Crossroads in the United States*, VERFASSUNGSBLOG (Feb. 13, 2025), <https://verfassungsblog.de/transgender-rights-at-a-crossroads-in-the-united-states/>.

¹²⁷ *Obergefell v. Hodges*, 576 U.S. 644, 668 (2015) (expressing concern that laws prohibiting same-sex marriage “harm and humiliate the children of same-sex couples” because those “children suffer the stigma of knowing their families are somehow lesser”).

¹²⁸ Mary Ann Case, *Missing Sex Talk in the Supreme Court’s Same-Sex Marriage Cases*, 84 UKC L. REV. 675, 677-84 (2016).

in extramarital sex.¹²⁹ Currently, PrEP is generally covered at no cost to patients under the Affordable Care Act (ACA), making a medication that would otherwise be prohibitively expensive for many individuals affordable and significantly reducing rates of HIV transmission.¹³⁰

Yet in recent years, access to PrEP has come under fire on two fronts. In some instances, litigants have sought an ability to refuse to prescribe or dispense PrEP because they argue that it encourages promiscuity and thus would conflict with their religious beliefs. Other litigants have challenged the requirement that insurers cover PrEP by contending that the administrative scheme that imposes that requirement is itself unlawful, with a case on that issue – *Kennedy v. Braidwood Management, Inc.* – recently decided by the Supreme Court.¹³¹ These challenges threaten to exacerbate the difficulty that many LGBTQ people, particularly in rural areas, already face in accessing PrEP and other forms of sexual and reproductive healthcare.¹³²

A similar phenomenon is evident with reproductive and sexual health care for lesbian and bisexual women and many transgender men. Data suggest that access to contraception and abortion, now under renewed fire as the judiciary tilts rightward and lawmakers float new legislative and administrative restrictions on reproductive care, matter for LGBTQ people.¹³³ One analysis of data from the National Survey of Family Growth, for example, found that while 15.4 percent of heterosexual women who had been pregnant had obtained an abortion, 22.8 percent of lesbian women and 27.2 percent of bisexual women who had been pregnant had done so.¹³⁴ Ensuring that queer women and transgender men who need access to contraception and abortion can obtain it, and sensitizing healthcare personnel to that need, is crucial if a meaningful right to sexual autonomy

¹²⁹ Benjamin Ryan, *PrEP's Promise to Change the Course of HIV Has Succeeded – But Only for White Gay Men*, NBC NEWS (Mar. 18, 2023), <https://www.nbcnews.com/nbc-out/out-health-and-wellness/preps-promise-change-course-hiv-succeeded-only-white-gay-men-rcna75438> (estimating that the number of gay and bisexual men on PrEP in the United States rose to 382,000 by 2022).

¹³⁰ *Prevention of Acquisition of HIV: Preexposure Prophylaxis*, U.S. PREVENTIVE SERV. TASK FORCE (Aug. 22, 2023), <https://www.uspreventiveservicestaskforce.org/uspstf/recommendation/prevention-of-human-immunodeficiency-virus-hiv-infection-pre-exposure-prophylaxis>.

¹³¹ *Kennedy v. Braidwood Mgmt., Inc.*, No. 24-316 (U.S. argued Apr. 21, 2025).

¹³² HUM. RTS. WATCH, “YOU DON’T WANT SECOND BEST”: ANTI-LGBT DISCRIMINATION IN US HEALTH CARE 13-18 (2018).

¹³³ *Human Rights Campaign Fact Sheet: Lesbian, Bisexual, Queer Women Who Have Been Pregnant Are More Likely to Need Abortion Services*, HUM. RTS. CAMPAIGN (June 2, 2022), <https://www.hrc.org/press-releases/human-rights-campaign-fact-sheet-lesbian-bisexual-queer-women-who-have-been-pregnant-are-more-likely-to-need-abortion-services-demonstrates-impact-roe-reversal-would-have-on-lgbtq-people>.

¹³⁴ *Id.*

is to extend to LGBTQ people engaged in different forms of intimacy and relationships.

None of this is to say that movement organizations should abandon their urgent lobbying and litigation commitments in response to aggressive anti-LGBTQ backlash. It is instead to say that as they do this lifesaving work, it is contingent on a wider movement to reimagine what sexual liberation looks like in the aftermath of marriage equality and create the conditions for meaningful intimate attachments to flourish.

* * *

A decade after *Obergefell* extended the right to marry to same-sex couples, the decision has proved transformative in countless respects. While many more couples have been able to legally wed and gain the material and symbolic benefits that status provides, more flexible alternatives crafted by feminist and queer advocates have largely fallen by the wayside. But the predictions that marriage would civilize or domesticate LGBTQ people's sex and relationships, for good or ill, do not seem to have come to pass. In the shadow of marriage and sometimes within marriage itself, LGBTQ people continue to forge and navigate a wide range of intimate relationships, from casual sex to open relationships to polyamory to chosen families, in ways that express deep-seated values about sexual autonomy, pleasure, and mutual care.

In the aftermath of a rich and generative intra-movement debate about same-sex marriage, the persistence of these intimacies should be cause for both reflection and action. Years after *Windsor* and *Obergefell*, the threat of policing and punishment still hangs over a range of consensual sex in and outside of marriage, and many forms of meaningful relationship continue to lack the recognition and benefits that would provide certainty and stability to those within them. Crucially, it is possible to recognize and celebrate the possibilities that marriage opened while also acknowledging the liberatory work that remains urgent – and is arguably becoming more urgent – ten years after winning the right to marry.