

# Introduction

*Karen Thompson had a problem.* Her lover of four years, Sharon Kowalski, lay in a hospital bed, having suffered a brain injury caused when a car operated by a drunk driver collided with her car on a stormy Minnesota night. Because Karen wasn't a family member, the nursing staff would not let her see Sharon; this would be the beginning of a decade-long struggle pitting Karen against Sharon's parents over control of Sharon's treatment.<sup>1</sup>

*Susan Burns had a problem.* The divorce decree awarding custody of her three children to their father stated that the children could not visit her if at any time during their stay she was living with or spending overnights with a person to whom she was not legally married. More than four years later, on July 1, 2000, Vermont instituted civil unions for same-sex couples. Susan entered into a civil union with her partner on July 3. When the children spent the night in the home Susan shared with her partner, a judge found her in contempt of court.<sup>2</sup>

*Larry Courtney had a problem.* His partner of fourteen years, Eugene Clark, did not come home from his job on the 102nd floor of the south tower of the World Trade Center on September 11, 2001. When Larry filed a workers' compensation claim, the reviewing agency replied that he did not qualify for benefits, which might instead be paid to Eugene's father, from whom Eugene had been estranged for twenty years.<sup>3</sup>

*Lisa Stewart had a problem.* At thirty-three, and with a five-year-old daughter, Emily, she was diagnosed with breast cancer, which became terminal. She was unable to continue working as a real estate appraiser and lost her income and her health insurance. Her partner of ten years, Lynn, had insurance through her job, but it did not cover Lisa and Emily. Lisa and Lynn live in South Carolina, which does not allow "second-parent" adoption, so Lisa is Emily's only legally rec-

ognized parent. When Lisa dies, Emily will receive Social Security survivors' benefits, but Lynn will not.<sup>4</sup>

A consumer of current news might imagine that access to same-sex marriage is the most contested issue in contemporary family policy, and that marriage is the only cure for the disadvantages faced by lesbian and gay families. Both of these observations would be wrong. The most contested issue in contemporary family policy is whether married-couple families should have "special rights" not available to other family forms. Excluded families include unmarried couples of any sexual orientation, single-parent households, extended-family units, and any other constellation of individuals who form relationships of emotional and economic interdependence that do not conform to the one-size-fits-all marriage model. No other Western country, including those that allow same-sex couples to marry, creates the rigid dividing line between the law for the married and the law for the unmarried that exists in the United States.

Consider the situations of the people above. Some may see them as evidence that same-sex couples must be allowed to marry. If Karen and Sharon had been married, no one would have questioned Karen's right to be Sharon's guardian. If Susan and her partner were married, she would not have been in violation of the court order when her children visited. If Larry and Eugene had been married, Larry would have received Eugene's workers' compensation benefit. If Lisa and Lynn could marry, Lisa would be covered on Lynn's health insurance, Lynn could adopt Emily, and Lisa and Emily would both receive Social Security survivors' benefits when Lisa died.

I see these stories differently. Karen was the right choice to be Sharon's guardian because she knew Sharon best and was indisputably committed to her, because Sharon progressed when Karen worked with her while she was institutionalized, and because Karen was willing to take Sharon out of an institution and care for her in their home. Susan and her children were entitled to regular visitation to sustain and support their mother-child relationship, and unless her partner was harming the children, the fact that Susan lived with a partner should not have concerned a family court judge. Larry and Eugene were an economic unit; Eugene's death hurt Larry, not Eugene's father. Lisa needed healthcare; her daughter needed legal

recognition of the two parents she had; and on Lisa's death, Lynn needs survivors' benefits to help her continue raising Emily.

I propose family law reform that would recognize all families' worth. Marriage as a family form is not more important or valuable than other forms of family, so the law should not give it more value. Couples should have the choice to marry based on the spiritual, cultural, or religious meaning of marriage in their lives; they should never *have to* marry to reap specific and unique legal benefits. I support the right to marry for same-sex couples as a matter of civil rights law. But I oppose discrimination against couples who do not marry, and I advocate solutions to the needs all families have for economic well-being, legal recognition, emotional peace of mind, and community respect.

Consider the following:

Bonnie Cord graduated from law school and began working at a government agency. She bought a home with her male partner in the foothills of the Blue Ridge Mountains in Virginia. When she applied to take the Virginia bar exam—a test necessary to obtain the right to practice law in the state—a judge ruled that her unmarried cohabitation made her morally unfit to do so.<sup>5</sup>

Catrina Graves was driving her car behind a motorcycle driven by Brett Ennis, the man with whom she had been living for seven years. A car failed to stop at a stop sign and hit Brett's motorcycle; Brett was thrown onto the pavement. Catrina saw the accident, stopped her car, and ran to Brett, who had suffered trauma to his head and was bleeding from the mouth. He died the next day. When Catrina sued the driver for negligent infliction of emotional distress, the court dismissed her lawsuit because she was not related to Brett by blood or marriage.<sup>6</sup>

Olivia Shelltrack and Fondray Loving had lived together for thirteen years when they bought a five-bedroom home in Black Jack, Missouri. They moved in with their two children and a third child from Olivia's previous relationship. The city denied them an occupancy permit because its zoning laws prohibit three persons unrelated by blood or marriage from living together.<sup>7</sup>

These are heterosexual couples and they *could* marry. But they shouldn't *have to*. Bonnie's choice to live with an unmarried part-

ner bore no relationship to her ability to practice law. Catrina's anguish would have been no different had Brett been her spouse. The proper zoning concerns of Black Jack, Missouri, do not turn on whether Olivia and Fondray marry.

Extending legal rights and obligations to unmarried couples, as many Western countries do, is a start, but it is not enough. "Couples," meaning two people with a commitment grounded on a sexual affiliation, should not be the only unit that counts as family.

Consider these examples:

As a foster child, Jason was placed with married parents, Daniel and Mary Lou, who divorced two years later. Jason then lived with Mary Lou and visited Daniel, who also paid child support. When Mary Lou and Daniel petitioned to adopt Jason, the court ruled that unmarried adults could not adopt a child together.<sup>8</sup>

Two sisters in England, Joyce, eighty-eight, and Sybil, eighty, have lived together all their lives. They grew up on a thirty-acre farm and worked on the land. They moved away for about fifteen years but returned in 1965, built a home on the land, and leased the farm. They live off the rental income. They each have wills naming the other as their beneficiary. When the first sister dies, the 40 percent inheritance tax will make it necessary for the survivor to sell the land and move. The survivor of a heterosexual married couple or a registered same-sex civil partnership would not have to pay this tax.<sup>9</sup>

Fifty-nine-year-old Maria Sierotowicz had been living in the same one-bedroom, subsidized housing unit in Brooklyn since 1984. Her mother, who lived with her, passed away in 1990. Ten years later, her eighty-one-year-old father returned to the United States from Poland and moved in with her so that she could care for him. Maria followed procedures and requested that he receive permission to join her Section 8 household. Her request was denied because he wasn't her spouse and his presence would make her unit "overcrowded." Maria received a notice terminating her Section 8 subsidy.<sup>10</sup>

*Marriage* cannot be the solution to these problems. Jason's parents tried marriage; it didn't work for them. They need to be able to adopt Jason as two unmarried parents, if a judge finds that such an adoption is in Jason's best interests. Sybil and Joyce are a family, but not a family based on marriage or even on a marriage-like relationship. They are a long-term, interdependent unit, and they need—

perhaps more than many spouses do—the financial advantages now extended only to spouses. If Maria had married, her husband would have automatically received permission to live with her. Instead she wants to care for someone unable to care for himself. She needs occupancy rules that do not stand in her way.

It is possible to envision family law and policy without marriage being the rigid dividing line between who is in and who is out. Keeping the state out of marriage entirely, making marriage only a religious, cultural, and spiritual matter, would be one way to accomplish this. But the law would still have to determine how to allocate rights and responsibilities in families and when relationships among people would create entitlements or obligations. This necessity, coupled with the disruption of expectations that ending the state's involvement in marriage would produce, suggests another approach.

I call this approach valuing all families. The most important element in implementing this approach is identifying the purpose of a law that now grants marriage unique legal consequences. By understanding a law's purpose, we can identify the relationships that would further that purpose without creating a special status for married couples.

Sweeping legal changes in the late 1960s and early 1970s altered the significance of marriage and laid the groundwork for this pluralistic vision. Those changes grew out of cultural and political shifts, including feminism and other social-change movements, greater access to birth control and acceptance of sex outside marriage, and increased dissatisfaction with marriage. The legal changes included decreased penalties on nonmarital sex, especially an end to discrimination against children born to unmarried mothers; equality between women and men; and no-fault divorce.

Early gay and lesbian rights advocates forged alliances with others who challenged the primacy of marriage: divorced and never-married mothers, including those receiving welfare benefits; unmarried heterosexuals, both those consciously rejecting the baggage associated with marriage and those who simply did not marry; and nonnuclear units, such as communal living groups and extended families. The gay rights movement was part of broader social movements challenging the political, economic, and social status quo and seeking to transform society into one in which sex, race, class, sexual

orientation, and marital status no longer determined one's place in the nation's hierarchy. Marriage was in the process of losing its iron-clad grip on the organization of family life, and lesbians and gay men benefited overwhelmingly from the prospect of a more pluralistic vision of relationships.

There were setbacks. A backlash resulted in restrictions on women's reproductive freedom, repeal of gay rights laws, and less support for welfare mothers. Conservatives employed the rhetoric of "traditional family values" to fight any proposal advancing recognition and acceptance of lesbian, gay, bisexual, and transgender (LGBT) people, and used antigay propaganda to raise money and garner votes for a wide-ranging conservative agenda.

I seek to reclaim and build on the principle that law should support the diverse families and relationships in which children and adults flourish.

Since the mid-1990s, two movements have placed marriage in the public policy spotlight. The "marriage movement"—with both religious and secular components—opposes not only recognition of LGBT families but also easily obtained divorce, childbearing and sex outside marriage, and sex education that teaches anything other than abstinence. It advocates government funding of "marriage promotion" efforts. Its most prominent religion-based groups are Focus on the Family and the Family Research Council. They speak of a "God-ordained family."

David Blankenhorn of the Institute for American Values and Maggie Gallagher of the Institute for Marriage and Public Policy are leading spokespeople for the secular claim that supporting any family form other than heterosexual marriage endangers the social fabric. By blaming poverty, crime, drug abuse, and education failure on family diversity, they point the finger at unmarried mothers and absolve government of the responsibility for wage stagnation, income inequality, poor schools, sex and race discrimination, and inadequate childcare and healthcare. Legal groups such as the Alliance Defense Fund and Liberty Counsel represent these positions in litigation. The mission of Liberty Counsel is "restoring the culture one case at a time by advancing religious freedom, the sanctity of human life, and the traditional family."

The "marriage equality" movement advocates for gay and lesbian

couples to be able to marry. Attorney Evan Wolfson heads a national organization, Freedom to Marry, which has the support of numerous partner organizations, gay and nongay, at the national, state, and local levels. Two national groups, the Human Rights Campaign and the National Gay and Lesbian Task Force, work to advance many LGBT rights issues and devote some of their resources to marriage-related organizing and advocacy. Four legal groups that challenge discrimination against LGBT people in all areas, including employment, schools, immigration, the military, and family law, have had primary responsibility for the litigation contesting restrictions on access to marriage: Lambda Legal (formerly known as Lambda Legal Defense and Education Fund); Gay & Lesbian Advocates & Defenders, the Boston-based group that won the right to marriage equality in Massachusetts; the American Civil Liberties Union Lesbian Gay Bisexual Transgender Project; and the National Center for Lesbian Rights.

Both these movements focus on marriage. Neither starts by identifying what all families need and then seeking just laws and policies to meet those needs. The marriage movement does not want to meet the needs of all families. Its leading spokespeople argue that the intrinsic purpose of marriage is uniting a man and a woman to raise their biological children. They oppose marriage for same-sex couples, and want marriage to have a special legal status.

The marriage-equality movement wants the benefits of marriage granted to a larger group: same-sex partners. With few exceptions, advocates for gay and lesbian access to marriage do *not* say that “special rights” should be reserved for those who marry. But the marriage-equality movement is a movement for gay civil rights, not for valuing all families. As a civil rights movement, it seeks access to marriage as it now exists.

The movement’s most consistent claim is that exclusion from marriage harms same-sex couples in tangible ways. But people in any relationship other than marriage suffer, sometimes to a level of economic or emotional devastation. The law is not uniquely unfair for gay and lesbian couples. Access to marriage will provide some gay men and lesbians with the economic support and peace of mind that come from knowing that all your family members have adequate health insurance, that a loved one can make medical decisions for

you if you are ill, that your economic interdependence will be recognized at retirement or death, and that your children can be proud of the family they have. But other LGBT people, and all whose family form, for whatever reason, is not marriage, will still be without those supports that every family deserves.

The focus on access to marriage may be constricting the imagination of advocates for LGBT families who attribute every problem a same-sex couple experiences to marriage discrimination. Consider this:

Openly gay San Francisco supervisor Harvey Milk was assassinated on November 27, 1978, by a former supervisor, who also murdered the city's mayor, George Moscone. Milk was a community leader, dubbed the Mayor of Castro Street, and the first openly gay elected official in a major U.S. city. A film about his life won the Academy Award for best documentary in 1985. San Francisco named a plaza in his honor, and numerous gay community organizations and alternative schools across the country bear his name.

His surviving partner, Scott Smith, received death benefits from the state Workman's Compensation Appeals Board.<sup>11</sup>

When gay surviving partners of those who died on September 11, 2001, did not receive workers' comp death benefits, gay rights advocates attributed it to marriage discrimination. But solutions to this problem and others are available or more achievable using a valuing-all-families approach, and they will help more people. Scott Smith was successful because California does not base entitlement to workers' comp death benefits on marriage. Its law is one model other states could adopt.

Laws that distinguish between married couples and everyone else need to be reexamined. They stem from the days when a husband was the head of his household with a dependent wife at home, when a child born to an unmarried woman was a social outcast, and when virtually every marriage was for life regardless of the relationship's quality. It was a very different time.

When the Supreme Court declared the laws differentiating between men/husbands and women/wives unconstitutional, the laws became gender-neutral. This created a new problem. It left distinctions between married couples and everyone else without assessing the justness of that approach. It's time to make that assessment. To-

day more people live alone, more people live with unmarried partners, and more parents have minor children who live neither with them nor with their current spouse. The laws that affect families need to be evaluated in light of contemporary realities. A valuing-all-families approach does this by demanding a good fit between a law's purpose and the relationships subject to its reach.

Karen Thompson was the right choice to be Sharon Kowalski's guardian. Susan Burns and her children needed regular visits with each other. Larry Courtney deserved compensation for Eugene's death. Lisa Stewart needed health insurance and the ability to provide for her family when she dies, and her daughter needed two legal parents.

Many of these results could be secured right now by looking for solutions other than marriage. In every area of law that matters to same-sex couples, such as healthcare decision making, government and employee benefits, and the right to raise children, laws already exist in some places that could form the basis for just family policies for those who can't marry or enter civil unions or register their domestic partnerships, as well as for those who don't want to or who simply don't, and whose most important relationship is not with a sexual partner. These laws will help many families, not just LGBT ones, and not just couples.

Successful reform that values all families may not come in the name of gay rights. It may come under the banner of, for example, patients' autonomy, family pluralism, and the needs of children. Some lawmakers will support important reforms precisely *because* they help many people in many families and do not appear to be "gay rights" issues. In recent years, that motivation has produced a policy in Salt Lake City that extends health insurance to any one adult member of an employee's household and that person's children, a law in Virginia requiring hospitals to allow patients to select their own visitors, and a change in federal pension law that allows any beneficiary to inherit retirement assets without paying a tax penalty. After such laws change, gay rights leaders rightly trumpet that they will help LGBT families.

A strategy in the name of gay rights toward recognition of same-sex partnerships, where successful, is a civil rights triumph. It may, however, have unfortunate consequences for family policy. Same-sex

couples will have the right to a formal legal status for their relationships; those who exercise that right will have the array of consequences that married spouses now receive. This will disregard the needs of LGBT couples who don't marry or register, LGBT singles and households not organized around sexual intimacy, LGBT parents without partners, and the families and relationships of vast numbers of heterosexuals.

Where a gay rights strategy loses and does not result in marriage, civil unions, or partnership registration, the "special rights" given marriage will continue to harm same-sex couples. Where a losing gay rights strategy results in a constitutional amendment barring recognition of unmarried same- and different-sex couples, as more than a dozen states have, those couples may be worse off than they are now. That's what happened in Michigan, where public employees lost domestic partner benefits.

A valuing-all-families strategy achieves good results, for good reasons, and makes marriage matter less. That was the direction in which U.S. law and policy was headed before the right-wing backlash against feminism, LGBT rights, and other progressive social change. That backlash today includes the religious and secular marriage movement. *Its* emphasis on marriage should not lead gay rights activists away from advocacy that will meet the needs of diverse families and relationships in a pluralistic society.