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Recommended Citation

Julie Shapiro, Reflections on Complicity, 8 *N.Y.CITY L. REV.* 657 (2005).
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REFLECTIONS ON COMPLICITY

Julie Shapiro*

Throughout her career, Ruthann Robson has called on us to integrate theory and practice.¹ As an academic who was once a practitioner, I have always seen the necessity for this integration.² It is an essential task if theory is to be relevant in our lives and in our practice of law.

Over the last year I have had the chance to bring theory and practice together in a way new to me, as one of the team of lawyers litigating *Andersen v. King County*,³ a case seeking access to the right to marry for lesbian and gay couples in Washington State.⁴ I ap-

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First and foremost I acknowledge my immeasurable debt to all the lawyers and clients with whom I worked on *Andersen v. King County*. Being part of such a team has been an extraordinary privilege. That I have misgivings about my own choices should in no way detract from the superb work that has been done. The talent, passion, and commitment brought together for this effort is remarkable. In addition, I am grateful to Seattle University Law School and Dean Kellye Testy for support provided for writing this piece. Many friends and colleagues read drafts and provided helpful suggestions. My thanks to them all.

¹ See, e.g., RUTHANN ROBSON, *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW* (1992) [hereinafter ROBSON, (OUT)LAW]; RUTHANN ROBSON, *SAPPHO GOES TO LAW SCHOOL: FRAGMENTS IN LESBIAN LEGAL THEORY* (1998) [hereinafter ROBSON, SAPPHO]; Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709 (2002) [hereinafter Robson, *Assimilation*].

² I have tried to lend my own efforts to the larger task. See Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN'S L.J. 17 (1999) [hereinafter Shapiro, *Second-Parent Adoptions*]. See also Julie Shapiro, *A Lesbian Centered Critique of "Genetic Parenthood"*, 9 J. OF GENDER RACE & JUST. (forthcoming 2005).

³ See *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004), available at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/308.pdf. The case is currently pending before the Washington State Supreme Court. On appeal the case was consolidated with another similar case, *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215, (Wash. Super. Ct. Sept. 7, 2004). The consolidated cases were argued before the Washington State Supreme Court on March 8, 2005. No decision has been issued at this time.

⁴ Even phrasing the question presented in the case raises questions which should be answered by reference to theory. Many, including the popular press, describe the issue as "same-sex marriage." See, e.g., FindLaw Legal News and Commentary, FindLaw Special Coverage: Same-Sex Marriage, <http://news.findlaw.com/legalnews/lit/samesexmarriage/> (last visited July 26, 2005). This formulation has two flaws. From the point of view of long-time proponents of marriage access, it implies that what is at issue is a particular kind of marriage (same-sex marriage) rather than access to the existing institution. At the same time, the term "same-sex marriage" may subtly obscure the presence of lesbians and gay men. See Robson, SAPPHO, *supra* note 1, at 81-82 (criticizing *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1992), which asserts that same-sex marriage is not the same as lesbian or gay marriage as parties to a same-sex marriage).

proached this litigation and the general question of access to marriage, however, from a particular theoretical perspective: I agree with the feminist anti-assimilationist critique of marriage that Robson and others have developed over the past fifteen years.⁵ Not long ago, I would have identified myself as being in the “anti-marriage” camp.⁶

Given that stance, it is troubling to me to find myself devoting significant time and energy to litigating for access to the right to

could be heterosexual). “Access to marry for lesbians and gay men” may also be inaccurate, because as opponents are wont to observe, lesbians and gay men can get married, as long as they marry individuals of a sex other than their own. “Access to the right to marry for same sex couples” more accurately states the goal. See Lambda Legal Defense and Education Fund, Issue: Marriage Project, <http://www.lambdalegal.org/cgi-bin/iowa/issues/record2?record=9> (last visited July 26, 2005). While the term “same-sex marriage” has become the most familiar to the general public, I find the critiques discussed above persuasive and I will not use it. I will instead refer to “access to marriage.”

⁵ See, e.g., Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, in SAME-SEX MARRIAGE: PRO AND CON: A READER 118 (Andrew Sullivan ed., 1997); 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 (1993) [hereinafter Polikoff, *What We Ask For*]; Robson, *Assimilation*, *supra* note 1; ROBSON, (OUT)LAW, *supra* note 1; ROBSON, SAPPHO, *supra* note 1; Ruthann Robson, *Mostly Monogamous Moms: An Essay on the Future of Lesbian Legal Theories and Reforms*, 17 N.Y.L. SCH. J. HUM. RTS. 703 (2000) [hereinafter Robson, *Mostly Monogamous*]. The critique I refer to is one developed from an anti-assimilationist perspective, but it is not the only analysis an anti-assimilationist could make. See Robson, *Assimilation*, *supra* note 1, at 731-32. Robson thoughtfully considers many dimensions of assimilation and the challenges and questions it poses. She has also explored the same phenomenon elsewhere, calling it “domestication.” See ROBSON, (OUT)LAW, *supra* note 1; ROBSON, SAPPHO, *supra* note 1. I shall not attempt to summarize this extensive consideration here, but will simply borrow the terminology as she uses it. See Robson, *Assimilation*, *supra* note 1, at 731-33. But the critique is also clearly rooted in the feminist critique of marriage. See Rosemary Auchmuty, *Same-Sex Marriage Revived: Feminist Critique and Legal Strategy*, 14 FEMINISM & PSYCHOL. 101, 105-11 (2004) (sketching history of critique); Claire F.L. Young & Susan B. Boyd, *Challenging Heteronormativity? Reaction and Resistance to the Legal Recognition of Same-Sex Partnerships*, in FEMINISM, LAW, AND SOCIAL CHANGE: (RE)ACTION AND RESISTANCE (Dorothy Chunn, Susan B. Boyd & Hester Lessard eds., forthcoming 2006) (chapter manuscript on file with author) [hereinafter Young & Boyd, *Heteronormativity*]. Because these origins are, in my view, important, I choose to refer to the critique as both feminist and anti-assimilationist. I have primarily cited and discuss the work of US scholars. The critique of marriage is, however, an international project. See *infra* note 13.

⁶ “Anti-marriage” was a handy short hand for the feminist anti-assimilationist stance discussed here. It was an accurate descriptor, capturing both being opposed to marriage as an institution and also being opposed to making the pursuit of marriage a top priority for lesbian and gay activists. It may no longer be useful shorthand, however. While it is certainly possible to continue to be pro-lesbian and anti-marriage in the former sense, it is increasingly futile to be pro-lesbian and anti-marriage in the latter sense. See *infra* text accompanying notes 46-49.

marry.⁷ It sometimes seems to be the opposite of putting theory into practice. After all, the litigation seeks a goal that I reject. If we obtain that goal, as we well might,⁸ can that be described as progress by a feminist anti-assimilationist?⁹ Can I argue in my own defense that I am engaged in the process of forging a new understanding of the feminist anti-assimilationist critique, one suited to current conditions? Or am I simply compromising my principles in the name of political or personal expediency? Is participating in the litigation an act of resistance or an act of complicity? These questions were and are raised for me by my participation in the litigation, and they are the questions that I seek to address here.¹⁰

I have concluded that at the very least my situation presents me with a useful opportunity to re-examine and refine theory in specific and new circumstances. In fact, I think my dilemma highlights a critical and still unanswered question: What is the role of the feminist anti-assimilationist marriage critique today? While the critique developed in a different political and legal climate, it does not follow that it has outlived its usefulness. To the contrary, I think the critique is vitally needed now, at a time when conservative ideology, both within and without the lesbian and gay communities, is ascendant.¹¹ We must ask ourselves how the critique can inform our practice now. More concretely, we must ask what role there is for adherents to this critique in the context of the current marriage debate when, as Robson suggests,¹² the choice to pursue

⁷ I am struck by Robson's contention that "we" had and made a choice between "domestication, assimilation, 'a place at the table,' or conservatism" on the one hand and "radicalism, progressivism, separatism, anti-assimilation" on the other. Robson, *Mostly Monogamous*, *supra* note 5, at 703. While it is clear that "we" chose the more conservative path, I find it hard to pinpoint how and when the choice was made. I also wonder about who "we" are and were. The fact of that choice, however, created the new conditions that I discuss here. See *infra* text accompanying notes 38-49.

⁸ Although it is no indicator, we were successful at the trial court level in this and in a companion case. See *supra* note 3. Recent decisions by trial courts in New York City, *Hernandez v. Robles*, 794 N.Y.S.2d 579 (N.Y. Sup. Ct. 2005), and San Francisco, *Woo v. Lockyer*, No. 4365, 2005 WL 583129 (Cal. Super. Ct. Mar. 14, 2005), have also reached this conclusion.

⁹ On a purely pragmatic level, winning any of the marriage cases is clearly viewed a victory for lesbian and gay people, just as losing any of the cases is viewed as a defeat. This alone may provide a practical justification for working on the litigation. But I am here in considering whether that action is also theoretically defensible.

¹⁰ Sociologist Judith Stacey has engaged in a similar reflective process, thoughtfully considering her experience as a "spin-ster" for the gay marriage movement. See Judith Stacey, *Marital Suitors Court Social Science Spin-sters: The Unwittingly Conservative Effects of Public Sociology*, 51 SOC. PROBLEM 131 (2004).

¹¹ See PAUL ROBINSON, *QUEER WARS: THE NEW GAY RIGHT AND ITS CRITICS* 6 (2005) (exploring various conservative ideologies within the lesbian and gay movement).

¹² See *supra* note 7.

marriage has already been made

Ultimately, I concluded that I should participate in marriage litigation, even if it was highly likely that there would be elements of complicity in my participation. I continue to adhere to this belief. While it might be more theoretically pure to abstain from the litigation entirely, I fear that in the end that would doom the feminist anti-assimilationist critique to, at best, a spot on the sidelines and, at worst, eventual irrelevance. If the critique is to survive and develop to fit the new conditions in which we find ourselves, it must be brought into the current debate. This itself is a form of resistance.

THE FEMINIST ANTI-ASSIMILATIONIST CRITIQUE, CONSIDERED
IN CONTEXT¹³

Debates about the importance of marriage access are not new within the lesbian and gay community.¹⁴ What I have labeled the feminist anti-assimilationist critique grew out of earlier work by feminists and members of the gay liberation movement.¹⁵ It makes several connected points.

First, echoing earlier feminists, adherents saw the very institution of marriage as a negative rather than a positive social force. They identified it as a patriarchal and oppressive institution that has historically limited the rights of women and would narrow the

¹³ The summary that follows is both superficial and narrow. It is beyond the scope of my project here to provide a recitation worthy of the work that has been done. In fact, the feminist anti-assimilationist critique of marriage is extensive and nuanced. It is also multilayered, with different authors emphasizing different aspects of marriage. It is rich in its variety and in its texture.

Additionally, the critique is neither a U.S. project nor a U.S. invention. The work of feminist scholars from many countries and many cultures has been and is critical. See, e.g., Susan B. Boyd & Claire F.L. Young, "From Same-Sex to No Sex"?: Trends Towards Recognition of (Same-Sex) Relationships in Canada, 1 SEATTLE J. OF SOC. JUST. 757 (2003) [hereinafter Boyd & Young, *No Sex*]; Davina Cooper, *Like Counting Stars?: Restructuring Equality and the Socio-Legal Space of Same-Sex Marriage*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 75 (Robert Wintemute & Mads Andenaes eds., 2001); Didi Herman, *The Politics of Law Reform: Lesbian and Gay Rights Struggles in the 1990s*, in ACTIVATING THEORY: LESBIAN, GAY, BISEXUAL POLITICS 246, 246-63 (Joseph Bristow and Angelia R. Wilson eds., 1993). In short, this summary presented here is at best over-simplified and at worst misleading. It is meant to provide enough of the context in which I operated to make the remainder of the article intelligible. For further understanding of the critique, the work of the authors cited here would provide an excellent starting point.

¹⁴ GEORGE CHAUNCEY, WHY MARRIAGE?: THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY 87-92 (2004) (detailing debates from the 1960s and 1970s).

¹⁵ See, e.g., Polikoff, *What We Ask For*, *supra* note 5, at 1535-37; Herman, *supra* note 13, at 246-63 (1993). See also CAROL SMART, THE TIES THAT BIND: LAW, MARRIAGE AND THE REPRODUCTION OF PATRIARCHAL RELATIONS (1984).

meaning of liberty in the future.¹⁶ Gay liberationists had earlier made similar arguments.¹⁷

Marriage was also identified as essentially assimilationist.¹⁸ It was and is a tool of inclusion and exclusion. Those included were substantially benefited while those excluded were harmed in corresponding ways.¹⁹ This creates division and also subjects individuals and couples to coercive pressure to conform to the degree needed to gain inclusion. Inevitably some (and always the more marginal to begin with) will be left out, while only the most palatable will be included.²⁰

The critique also recognized that the rhetoric describing what was sought as “the right to choose whether to marry” was misleading. Given the financial and social benefits at stake, for many who can satisfy the qualifications to marry,²¹ marriage is largely compulsory—the more so when it is the *exclusive* route to attaining benefits.²² In other words, perceived economic realities²³ and social expectations channel people towards getting married. And this in turn shapes and defines people’s expectations of their relationships. The ideal relationship then is one that leads to or is mar-

¹⁶ See, e.g., SMART, *supra* note 15.

¹⁷ See CHAUNCEY, *supra* note 14, at 93.

¹⁸ See Robson, *Assimilation*, *supra* note 1. See also Young & Boyd, *Heteronormativity*, *supra* note 5 (manuscript at 6-10).

¹⁹ Marriage is not always economically beneficial. For example, spouses may be liable for each other’s debts and one spouse’s income may be deemed available to the other spouse, thereby rendering them ineligible for some income-dependent benefits. But the popular belief is that the proffered benefits make inclusion desirable overall, even if there is also harm for some couples. The harm wrought by inclusion is typically minimized or ignored. See Young & Boyd, *Heteronormativity*, *supra* note 5 (manuscript at 12) (discussing their earlier work on the inequitable effects of the economic disadvantages of marriage).

²⁰ ROBSON, SAPPHO, *supra* note 1, at 106-07; Shapiro, *Second-Parent Adoptions*, *supra* note 2, at 30-32; Boyd & Young, *No Sex*, *supra* note 13, at 773.

²¹ Basic qualifications include age, status as unmarried, and lack of consanguineous relationship to the prospective spouse. See, e.g., WASH. REV. CODE § 26.04.020 (1998). Marriage litigation typically does not challenge these restrictions. While there are tactical reasons for doing this, Robson has observed that it is problematic. See Robson, *Mostly Monogamous*, *supra* note 5.

²² The compulsory nature of marriage flows from the inability to obtain benefits outside of marriage, as well as from the unique status accorded marriage. Thus, it is not marriage itself, but rather marriage in relation to the rest of the social structure that makes it compulsory. See Robson, *Assimilation*, *supra* note 1, at 777-78; CHAUNCEY, *supra* note 14, at 71-77.

²³ In fact, marriage is not economically advantageous for all couples. See *supra* note 19. But it is generally believed to be economically beneficial. Thus, it seems likely that some couples marry in the belief that they will receive various benefits only to discover later that the detriments outweigh those benefits.

riage.²⁴ And the ideal marriage is one in which the parties undertake particular roles and fulfill particular expectations.

There was a deeper concern as well: the right to marry is an unusual right. It is not like the right to engage in sexual conduct without sanction (which is the classical "right to be let alone"). It is not just the right to form the relationship you choose with the person you choose.²⁵ It is the right to have the state recognize and approve of that relationship. As such, seeking the right to marry is seeking state approval rather than seeking freedom or liberation from the state. This necessarily implies recognition that state approval (or the lack thereof) is an important and legitimate concern. In other words, seeking access to marriage implicitly accepts and legitimates the power of the state to categorize relationships as "approved" or "not approved." While seeking the right to marry may change the particular criteria the state uses to determine which relationships are approved, it does not challenge the basic assumption that the state has the right to judge our relationships. Thus, in seeking the right to marry we accept and affirm the authority of the state to judge the worthiness of our relationships.²⁶ The feminist anti-assimilationist critique neither accepts nor affirms this authority. The acceptance of state authority implicit in seeking the right to marry brings with it the acceptance of state regulation.

Several different courses of action were suggested by this critique. First and most obvious was direct opposition to marriage. At its most radical, the feminist anti-assimilationist perspective called for the abolition of marriage.²⁷ This is, of course, consistent with challenging the authority of the state to judge the worthiness of

²⁴ See ROBSON, SAPPHO, *supra* note 1, at 116.

²⁵ See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) ("The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.").

²⁶ For all of these reasons, the right to marry is "profoundly conservative." See ROBINSON, *supra* note 11, at 6 (referring to arguments of marriage supporters Bruce Bauer and Andrew Sullivan); see also ROBSON, *Mostly Monogamous*, *supra* note 5; Stacey, *supra* note 10; Young & Boyd, *Heteronormativity*, *supra* note 5.

²⁷ This continues to be the most radical course offered. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); Nancy D. Polikoff, *Ending Marriage As We Know It*, 32 HOFSTRA L. REV. 201, 205 n. 22 (2003) [hereinafter Polikoff, *Ending Marriage*].

relationships. But also it is and was an aspirational, rather than a practical, goal. In the United States marriage is a deeply embedded social institution and is unlikely to be abolished any time soon.²⁸

Second, and of far greater practical importance, the critique clearly supported an argument against articulating marriage access as a priority for the lesbian and gay movement.²⁹ Identifying marriage as a priority required acceptance of the institution as a positive one. It also entailed recognizing the authority of the state to judge relationships. Additionally, winning state recognition of marriage for lesbian and gay couples would compound the problems of assimilation and compulsory marriage discussed earlier.³⁰ Finally, in a world of limited resources, devoting time and energy to marriage means forgoing other issues.

A third tier of strategic actions could also be identified: actions to diminish or undermine the unique status of marriage.³¹ By encouraging courts and legislatures to value non-marital relationships³² or to make benefits available without regard to relationship status, one could hope to blur the bright line drawn between marriage and all other relationships. This blurring has several positive effects, including reducing the coercion problem. If benefits similar to those available through marriage can be obtained without marriage, then the need to marry is diminished. This in turn may actually undermine marriage as a uniquely valuable social institution.³³

This debate about marriage continued for nearly twenty years.

²⁸ The prospects for abolition may well be brighter in other countries. The Law Commission of Canada came close to proposing this course in suggesting a system of registration in place of state sponsored marriage laws. Law Commission of Canada, *BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS* 122-24 (2001), available at http://www.lcc.gc.ca/pdf/020129_e.pdf. This report is discussed in Polikoff, *Ending Marriage*, *supra* note 27, and in Boyd & Young, *No Sex*, *supra* note 13.

²⁹ This was not simply an argument about timing, an assertion that marriage was not the right issue at the right time. It was also a broader theoretical argument, that obtaining access to marriage would not take us where we want to go.

³⁰ See also *infra* text accompanying notes 69-73.

³¹ See generally, e.g., Polikoff, *Ending Marriage*, *supra* note 27.

³² See, e.g., *Braschi v. Stahl Assocs.*, 543 N.E.2d 49 (N.Y. 1989) (affirming surviving partner's right to retain rent-controlled apartment under New York statute); *Connell v. Francisco*, 898 P.2d 831 (Wash. 1995) (applying "meretricious relationship doctrine" which provides for judicially supervised division of property on dissolution of a non-marital relationship).

³³ Judge William Downing, the trial court judge in *Andersen*, observed that civil unions might have exactly that effect. *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *12 (Wash. Super. Ct. Aug. 4, 2004).

For the most part it was a debate internal to the lesbian and gay communities. Within this sphere it was a real and practical debate about the allocation of resources and the identification of institutional goals.

This internal debate was not often visible to the general public. Indeed, from the perspective of the public, it must hardly have seemed like a debate at all. The most widely published works intended for a general audience advocated for access to marriage for lesbians and gay men in a relatively uncritical fashion.³⁴ By contrast, feminist anti-assimilationist writings tended to appear in feminist or legal periodicals, where they were read by far fewer people.³⁵

Within the last two years, however, marriage has become the subject of a very different sort of debate. A series of high-profile court decisions projected marriage into the central arena of broader political debate. Notable among the cases were *Halpern v. Toronto (City)*,³⁶ *Lawrence v. Texas*,³⁷ and most importantly, in November of 2003, *Goodridge v. Department of Public Health*.³⁸ In *Goodridge*, the Massachusetts Supreme Judicial Court held that denying access to marriage to lesbians and gay men could not be justified under the Massachusetts Constitution. Six months later, lesbians and gay men could marry in the Commonwealth of Massachusetts.³⁹

Following *Goodridge*, elected officials entered the fray as Gavin Newsome, mayor of San Francisco, ordered the issuance of mar-

³⁴ See, e.g. EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY (2004); WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996); ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY (1995); BRUCE BAWER, A PLACE AT THE TABLE: THE GAY INDIVIDUAL IN AMERICAN SOCIETY (1993). See also CHESHIRE CALHOUN, FEMINISM, THE FAMILY, AND THE POLITICS OF THE CLOSET: LESBIAN AND GAY DISPLACEMENT (2000). Calhoun's book is noteworthy as it is both pro-marriage and feminist.

³⁵ See Auchmuty, *supra* note 5, at 107-09. During the early 1990s, litigation in Hawaii and subsequent legislation in Congress and in many states brought greater attention to the marriage question. However, even then the internal debate between feminist anti-assimilationists and those advocating marriage access as a top priority remained largely out of view.

³⁶ 172 O.A.C. 276 (2003) (finding right to access to marriage in Ontario, Canada).

³⁷ 539 U.S. 558 (2003). While the majority and Justice O'Connor did not address marriage (and Justice O'Connor was explicit on this point), Justice Scalia's strenuous dissent predicted that the opinion would lead to marriage for lesbian and gay couples. *Id.* at 601 (Scalia, J., dissenting).

³⁸ 798 N.E.2d 941 (Mass. 2003).

³⁹ The ruling did not take effect for 180 days. Beginning on May 17, 2004, marriage has been available to lesbians and gay men who live in Massachusetts.

riage licenses to lesbian and gay couples beginning on February 12, 2004. Newsome's actions inspired others, including the county commissioners of Multnomah County, Oregon and the mayor of New Paltz, New York to similar actions. Within weeks, happily married same-sex couples were on the front page of virtually every newspaper and weekly news magazine in the nation.⁴⁰

The reality of lesbian and gay couples getting married sparked fierce public debate that continues unabated today. The contours of this debate are very different from those of the earlier internal debate. Where once "the marriage debate" referred to the debate between various factions within the lesbian and gay movements, it now means the debate between those advocating "access to marriage for same sex couples" and those opposed to "same sex marriage."⁴¹ Suddenly marriage is at the heart of the culture war that encompasses a broad spectrum of issues including gay and lesbian rights generally, gender roles, reproductive freedom, women's rights, immigrant's rights, and the rights of poor people.

Marriage has unquestionably become the primary battleground between pro-lesbian and gay and anti-lesbian and gay forces.⁴² All the participants in the earlier internal marriage debate shared a common core of lesbian and gay pride. By contrast, the new anti-marriage campaigners question the very humanity of lesbian and gay people. To be anti-marriage in today's debate is to be anti-lesbian and gay, and conversely, at least in the eyes of the general public, to be pro-lesbian and gay implies that one is also pro-marriage. The middle ground—where one could plausibly be pro-lesbian and anti-marriage simultaneously—has vanished.

This shift in the structure of the marriage debate necessarily altered the position of feminist anti-assimilationists. To align oneself with the vitriolic forces of the anti-lesbian fundamentalism is unthinkable. But to be loyal opposition is nearly impossible. As this new marriage debate has moved to center stage in mainstream

⁴⁰ For descriptions of the San Francisco experience see Karen Breslau & Brad Stone, *Outlaw Vows*, NEWSWEEK, March 1, 2004, at 40, and Dean E. Murphy, *San Francisco Sees Tide Shift in the Battle Over Marriage*, N.Y. TIMES, March 12, 2004, at A12.

⁴¹ See *supra* note 4.

⁴² From a purely strategic perspective, this may have been (as well as continue to be) a poor battleground for lesbian and gay rights. For example, public opinion polls reveal wide support for anti-discrimination ordinances and hate-crime legislation. Similarly, there was substantial support for benefits for lesbian and gay survivors of 9/11 victims. There has also been significant progress with regard to lesbian and gay students, as well as issues centering around lesbian and gay parenting. Marriage, therefore, was and is a singularly unfavorable ground for battle, although some would say that is because it is singularly valuable.

media, arguments are reduced to their simplest sound bites.⁴³ In this arena, the nuanced criticism of marriage offered by feminist anti-assimilationists is entirely unintelligible.⁴⁴

In fact, many of the courses of action suggested by the feminist anti-assimilationists during the internal debate are either impractical or impossible under current conditions. This is not a time when it is effective to argue for the abolition of marriage.⁴⁵ Neither can one step back to an earlier time and argue that marriage should not be a priority for the lesbian and gay movement. As George Chauncey observed recently, the demand has been made, it is the issue of the day and there is no way to back away from it at the moment.⁴⁶

Where once the question being debated was whether lesbians and gay men should *seek* the right to marry, now it is whether, having sought that right, lesbians and gay men should be *granted* that right. This shift in the focus of the marriage debate has left the feminist anti-assimilationist position on the brink of irrelevance. Feminist anti-assimilationists never supported discriminatory access to marriage and do not do so now.⁴⁷ But there is no room in the current, highly polarized marriage debate for the critical pro-lesbian and gay yet anti-marriage position developed by feminist anti-assimilationists.⁴⁸ It is therefore not surprising that most of the critical voices of the feminist anti-assimilationist activists and theorists have fallen silent.⁴⁹

This does not mean, however, that the feminist anti-assimilationist critique is obsolete. It is as pointed and potent as it ever was. The underlying analysis and insights remain valid. However,

⁴³ See Stacey, *supra* note 10, at 140-42.

⁴⁴ *Id.*

⁴⁵ It is interesting to consider one of the most recent published works advocating a marriage abolition, Polikoff, *Ending Marriage*, *supra* note 27. It is less than three years old (the publication date is fall 2003). The article quotes the briefs from the then-undecided *Goodridge* case. Professor Polikoff's critique of the emphasis on marriage is pointed and cogent as always. But she could not foresee the dramatic shifts in social and cultural forces that would occur in the year and a half following the publication of her article. While I am essentially in agreement with her, I cannot but read her concluding call to set aside the quest for marriage in favor of work on a network of laws valuing close personal relationships as the echo of another time.

⁴⁶ John M. Broder, *Groups Debate Slower Strategy on Gay Rights*, N.Y. TIMES, Dec. 9, 2004, at A1. See also Robson, *Mostly Monogamous*, *supra* note 5.

⁴⁷ Anti-marriage theorists all acknowledged that if the question were posed as it is now, the answer was clearly that lesbian and gay couples should be no less entitled to marry than should heterosexual couples.

⁴⁸ See Boyd & Young, *No Sex*, *supra* note 13, at 757-58.

⁴⁹ Not surprisingly, Robson would be an exception. See Robson, *Mostly Monogamous*, *supra* note 5.

if the critique is to retain its vital force, we must employ it to address new questions, ones that are framed by the current situation: Given the current focus on marriage, what should we, as feminist anti-assimilationists, do and how should we do it?

In the following section, I explore the implications of the choice I made to participate in the litigation and of the actions I have taken. In doing so, I try to bring the analysis of the feminist anti-assimilationist critique to bear on the current context. By doing this, I hope to begin to join theory and practice together in a new context, one rooted in the questions we face now. But this is a grand goal. If I accomplish nothing else, perhaps I can bring the insights that I have gained from the experience of practice back to the world of theory, in the hope that, though the combined efforts of many, we can forge a new path suited to the current times. Perhaps that is the best way to avoid complicity, or at least to couple complicity with constructive resistance.

MARRIAGE LITIGATION CONSIDERED

In the aftermath of *Goodridge*, as well as the San Francisco and Multnomah County marriages, marriage litigation sprang up in several jurisdictions. Though the number has fluctuated over the last year and a half, at present count there are at least five lawsuits pending challenging the exclusion of lesbian and gay men from marriage.⁵⁰ This proliferation of litigation gave rise to a clear question: What role (if any) should feminist anti-assimilationists play in the litigation? Was it possible that there was no role at all?

I consider myself to be a feminist anti-assimilationist. During the early months of the current external struggle over marriage, that was not a serious problem. There were many other things to do in the world. I could devote time and effort to other causes or other activities and simply ignore marriage. I could work on other cases of importance to lesbians.⁵¹

But as the debate became more and more prominent and became one that implicated the basic humanity of lesbian and gay people and the worthiness of their relationships, silence became more problematic. If this was the culture war, surely it was necessary to declare one's allegiance? And yet, as is discussed above, loyal opposition was difficult to portray in the wider media. One

⁵⁰ I am aware of cases in Washington, California, New York, New Jersey, and Connecticut.

⁵¹ See *In re Parentage of L.B.*, No. 75626-1, 2005 WL 2901834 (Wash. Nov. 3, 2005) (establishing de facto parenthood as status with full parental rights).

was either on the side of lesbian and gay people or one was not. And if one was on the side of lesbian and gay people, then by definition, one supported marriage rights. Beyond opposition to the welter of anti-lesbian and gay constitutional amendments, there was no clear course of action to take.

And then marriage litigation came to Washington. For a variety of reasons—many of them having to do with local or statewide electoral politics—it was apparent that a lawsuit seeking a declaration that the state law barring lesbians and gay men from marrying was unconstitutional would be brought.⁵² If I chose to, I could work on the case.⁵³

To me it was critical that I was invited to participate by the Northwest Women's Law Center. As the name suggests, the Law Center is a feminist organization.⁵⁴ As such, it situates its work on marriage access as a part of a larger political and legal agenda.⁵⁵ To the degree possible, the Law Center tries to bring a critical feminist view into all its activities, including the marriage litigation.

Even with this favorable circumstance, participating in the litigation required significant compromise at the outset. One cannot

⁵² Ron Sims, the elected King County Executive, both supported access to marriage and was responsible for issuing marriage licenses. However, unlike his counterparts in San Francisco and Multnomah County, he did not believe he had authority to defy the law of Washington and issue licenses to lesbian and gay couples. Instead, he promoted a lawsuit in which he was the named defendant. (Given the subsequent invalidation of both the San Francisco and Multnomah County marriages, it would seem he chose a prudent course.) It seemed quite clear that Mr. Sims would find someone willing to sue him, and so the litigation was inevitable. See Nicole Brodeur, *Sims Acted Quietly on Marriage*, SEATTLE TIMES, Mar. 9, 2004, at B1. Despite the original named defendant's personal support for the plaintiffs, the case has in fact been vigorously defended by the King County attorney's office as well as by the state attorney general's office and a group of intervenors.

⁵³ My comments in this section, and indeed throughout the paper, embody my personal reflections on the experience of working on *Andersen v. King County*. This is not an account of that litigation. None of the discussion that follows reflects on any particular client in the case, or on any particular lawyer. I have made no effort to describe actual discussions that occurred during the litigation process. To the contrary, I have made every effort to avoid references to actual conversations. To do otherwise would, I think, be both professionally and personally problematic.

⁵⁴ For a description of the Northwest Women's Law Center's programs, see the Law Center's website, <http://www.nwwlc.org/programs>. The Law Center represents the plaintiffs in *Andersen* along with Lambda Legal Defense and Education Fund. Lambda is "a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work." Lambda Legal Homepage, <http://www.lambdalegal.org/cgi-bin/iowa/index.html>.

⁵⁵ *Andersen* is one part of the Northwest Women's Law Center's "Celebrating Our Diverse Families" Initiative. See Policy Memorandum (on file with author). *In re Parentage of L.B.*, 2005 WL 2901834, was also a part of this initiative.

advocate for the abolition of marriage in the context of asserting a client's right to marry.⁵⁶ In our case, and I suspect in all the pending litigation, the plaintiffs have assured the court that it is not their intention to undermine or abolish the institution of marriage.⁵⁷ This statement would almost undoubtedly be repeated in any judicial opinion upholding the right to marry. In *Goodridge*, for example, the Supreme Judicial Court noted reassuringly, "Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping of the marriage licensing law."⁵⁸ A virtually identical statement appears in the plaintiffs' briefs in *Andersen*.⁵⁹ It appears yet again in the opinions of the two trial court decisions in Washington upholding the plaintiffs' claims.⁶⁰ Thus, whatever else a marriage critic may hope to accomplish in marriage litigation, she may not advocate the abolition of marriage within that forum. Neither may she challenge the other fundamental restrictions on marriage.⁶¹

Indeed, as I contemplated marriage litigation, I realized one must accept an even harsher truth—a truth noted by the Supreme Judicial Court in *Goodridge*.

If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.⁶²

In other words, if the marriage cases are successful, marriage will be even more firmly embedded in our culture than it was before. If the goal was the abolition of marriage, this could hardly be seen

⁵⁶ Perhaps even more obviously, one cannot hope to lose a case. However, hoping to lose is not what the feminist anti-assimilationist critique suggests. As is noted above, *supra* note 47, once the question is framed "should lesbians and gay men have the same right to marry that heterosexual women and men have?" a feminist anti-assimilationist must answer yes. Feminist anti-assimilationists have never supported less than full rights for lesbians and gay men.

⁵⁷ Brief of Respondents at 13-14, *Andersen v. King County*, No. 75934-1 (Wash. Nov. 24, 2005).

⁵⁸ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 965 (Mass. 2003).

⁵⁹ See Brief of Respondents, *supra* note 57, at 13-14.

⁶⁰ See *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *8-9 (Wash. Super. Ct. Aug. 4, 2004).

⁶¹ Robson, *Mostly Monogamous*, *supra* note 5, at 703-05.

⁶² *Goodridge*, 798 N.E.2d at 965.

as progress.⁶³ And yet one cannot undertake representation of a client in the hope of losing.

At the same time, the feminist anti-assimilationist critique of marriage had identified other avenues for productive action besides abolition of marriage. Thus, actions that might blur the line between marital and non-marital relationships are positive when viewed in that light.⁶⁴ From this perspective, the advent of civil unions, which potentially parallel marriage and thereby undermine the unique attractiveness of marriage as a way to obtain economic benefits, might be seen as positive.⁶⁵

But here too there must be compromise if one is to join marriage litigation. For whatever the theoretical value of civil unions in undermining marriage, it is clear that the marriage plaintiffs seek marriage and only marriage. Plaintiffs contend, and in the current context they are unquestionably correct, that civil unions, available only to same-sex couples, are a mark of second class citizenship. And so a critical part of the case must be to reject civil unions and instead reinforce the unique and over-arching importance of marriage.⁶⁶

The anti-assimilationist critique suggests further that if there is going to be marriage for same-sex couples, it should be, to the extent possible, optional rather than compulsory.⁶⁷ Here perhaps is

⁶³ In his opinion in *Andersen*, Judge Downing articulated an interesting version of the converse. If the legislature were to create civil unions, in part as an effort to "save" marriage from the attack of same-sex couples, that act would undermine marriage. Civil unions could present an attractive alternative to marriage, bringing all of the financial benefits (and obligations) without the social weight of marriage. Many people might prefer to become civilly united, although this would depend on whether civil unions were available to couples eligible to marry. *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *12 (Wash. Super. Ct. Aug. 4, 2004). Judge Downing's observation suggests an interesting possibility. Perhaps, for an anti-assimilationist, civil unions (if available to all couples) are the better outcome. Perhaps a significant number of couples would in fact select civil unions rather than marriage. This speculation is idle, however, as civil unions (at least to date) are exclusively available to same-sex couples and, as such, are clearly recognizable as a second-class status. Further, they are an inadequate substitute for marriage in a number of other regards. See generally Amici Curiae Brief of Legal Marriage Alliance of Washington, Gay and Lesbian Advocates and Defenders, and Vermont Freedom to Marry Task Force, *Andersen v. King County*, No. 75934-1 (Wash. Feb. 7, 2005), available at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/404.pdf.

⁶⁴ See *supra* notes 28-33 and accompanying text.

⁶⁵ But see *supra* note 63.

⁶⁶ See Amici Curiae Brief of Legal Marriage Alliance of Washington, Gay and Lesbian Advocates and Defenders, and Vermont Freedom to Marry Task Force, *supra* note 63.

⁶⁷ See *supra* text accompanying notes 21-24.

a line of analysis that could suggest productive action during litigation. But can marriage litigation make marriage less compulsory?

Answering this question again requires consideration of what makes marriage compulsory in the first place. Several factors combine to do this. First, there can be substantial economic benefits associated with marriage.⁶⁸ The existence of these benefits, which can either only be obtained through marriage or can only be obtained at some degree of expense and difficulty without marriage, creates pressure to marry.⁶⁹ Second, the prevailing cultural view of marriage presents it as the most critical of adult human relationships, the mark of successful personhood.⁷⁰ Success in life, perhaps particularly for women, includes or is even defined by a happy marriage. As with the perceived economic benefits, this creates immense pressure on people to marry.⁷¹

The pressure to marry can be insidious.⁷² It may not be perceived or articulated as pressure. To many, gaining the right to marry means winning a chance to enter into a charmed circle. Certainly much of the rhetoric about access to marriage portrays what is sought as the right to choose whether to marry. But there are powerful forces that compel entry into that charmed circle, channeling our behavior and our aspirations whether we know it or not. This plays a significant role in making marriage compulsory, even when it does not appear to be so.⁷³

⁶⁸ *Id.*

⁶⁹ See *infra* note 73 and accompanying text.

⁷⁰ This is a point on which all parties to the litigation agree. The defendants argue that this is the reason marriage must be "defended." The plaintiffs counter that this is the reason that access must be granted.

⁷¹ As if these pressures were not enough to coerce marriage, a press release from the Human Rights Campaign articulated yet another reason one "should" get married. The op-ed piece asserts "[s]tories abound about the transformative effect on non-gay people when a same-sex couple they know gets married. All of a sudden the couple next door understands the relationship of the two women living next to them. They 'get it.'" Seth Kilbourn, *Getting Equality*, Q BLISS (May 17, 2005), http://www.qbliss.net/coverstory/2005/05_05/. In other words, for the sake of lesbian and gay people everywhere, I "should" get married if I plausibly can. To remain unmarried is to fail to do one's part for the movement.

⁷² This is not to say that it is only insidious. Sometimes it is quite blatant, when, for example, a parent anxiously inquires as to whether one is going to marry.

⁷³ The pressure to marry will be greater for some couples than for others. For example, given a high degree of education, ready access to legal services, substantial financial resources, and assorted other privileges, my partner and I can decide whether to avail ourselves of marriage or not. We can assess and then carefully weigh the costs and the benefits. We both have jobs that provide health insurance. We can procure legal documents that will offer a measure of security and so on. By contrast, a low-income, less well-educated, less privileged lesbian couple might have much greater difficulty in resisting the pressure to marry. Indeed, there may be no feasible

Can marriage litigation diminish these pressures? Or can it at least not increase them? Or will it compound the problem? Here again, it would seem that participating in marriage litigation requires significant compromise, for it seems likely to me that marriage litigation makes things worse rather than better.

Goodridge is a case in point. The opinion of the Supreme Judicial Court in *Goodridge* makes several points that bear on the compulsory nature of marriage. First, it catalogs the many benefits of marriage. Though the opinion also references the obligations, the emphasis is clearly place on the advantages.⁷⁴ Thus, for those who may not have thought hard about it, *Goodridge* makes it clear that it is extremely beneficial to marry. For those who had already observed this, it makes the benefits palpable and important.

Second, *Goodridge* emphatically extols marriage as a highly desirable state. It is necessary for the structure of the opinion that it do so. If marriage were not such an extraordinary and beneficial institution, then the exclusion of lesbian and gay couples from its scope would not be problematic. *Goodridge* states that civil marriage is "central to the lives of individuals and the welfare of the community."⁷⁵ Any winning opinion in this field will almost certainly contain similar language. Thus, no matter how carefully lawyers articulate the goal as obtaining the right to *choose* to marry, successful marriage litigation will likely increase the compulsory nature of marriage.⁷⁶

Despite all the apparent compromises, in the end deciding whether or not to join in the litigation was not a difficult choice for me. By the time the question was raised, it was clear that litigation would occur in Washington.⁷⁷ Once brought, it is clearly better to win the litigation than to lose it. Thus, if I thought I had something I could contribute, I felt I ought to do so.

Further, the question was no longer "*should* we litigate for marriage equality" but rather "*who* will litigate for marriage equality." And who has a great deal to do with how. And how might be criti-

alternative that will offer them a measure of protection. They may even find it difficult to assess whether it will in fact be beneficial to them to marry. Thus, like it or not, they are more likely to find marriage mandatory.

Perhaps this is not surprising. Privilege has many benefits in this society. But it is disturbing to me to realize that I am creating a mandatory marriage scheme that I will be better able to resist than many others.

⁷⁴ This is sound rhetorical technique. To argue that exclusion from a category is injurious, one points to the benefits of being included in the category.

⁷⁵ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 957 (Mass. 2003).

⁷⁶ *Id.*

⁷⁷ See *supra* note 52.

cal. As is true in many jurisdictions, Washington has established laws that protect the rights and obligations of non-marital families.⁷⁸ These are substantive, typically judge-made law, and serve feminist anti-assimilationist goals by blurring (at least to some degree) the line between marriage and non-marriage. They offer some legal protections to individuals who cannot or who choose not to marry. Marriage litigation could be sensitive and protective of this body of law or not. One could, for example, argue that one advantage of extending marriage rights to lesbian and gay couples is that employers would no longer need to bother with developing and administering individually crafted domestic partner benefit policies. While this argument might in fact support the extension of marriage rights to same sex couples, it would do so at the expense of unmarried couples and perhaps at the expense of those in other sorts of non-traditional family relationships. At the very least, participating in the litigation ensures that this potential cost is considered. At best, it may lead to a decision not to make this argument.

The problematic effects of marriage litigation discussed above are inherent in virtually all marriage litigation. But if they cannot be avoided, they can perhaps be diminished. It seemed to me unlikely, however, that lawyers who were not concerned with the existing critique of the marriage strategy would conduct the litigation with a critical eye in that regard. The harms identified above would come to pass with me or without me. At least in theory, critical sensitivity to the potential problems posed by marriage could help to shape the litigation.⁷⁹

But of course, the reality of litigation is far from theory. Ultimately, the theoretical opportunities for meaningfully shaping the litigation may not be real opportunities. And looking backwards, I can see more clearly now than I could then a range of issues which make constructive opposition difficult.

Most obviously, litigation is pursued on behalf of clients. And clients must have a significant degree of control of the litigation, both formally and informally. Formally this is true because of the

⁷⁸ See, e.g., *In re Parentage of L.B.*, No. 75626-1, 2005 WL 2901834 (Wash. Nov. 3, 2005); *Connell v. Francisco*, 898 P.2d 831 (Wash. 1995) (recognizing property rights of unmarried cohabitants); *Gormley v. Robertson*, 83 P.3d 1042 (Wash. Ct. App. 2004) (extending *Connell* to same-sex couples).

⁷⁹ While I portray my decision as a pragmatic one, I know that some might view this course of action as little better than collaboration, perhaps adorned with a thin veneer of critical analysis. The possibility that I am in fact merely complicit in causing harm is of great concern to me.

rules of professional conduct. Informally, this is so because the clients' stories frame the issues.

Clients for marriage litigation are not ordinary clients. They are trying to use the legal system to create social change. For the most part, they are clients of organizations that are seeking the same social changes, and they are typically carefully chosen.⁸⁰

There are several factors involved in selecting the clients that have implications for the radical possibilities of marriage litigation. First, and true for all test case litigation, one must choose appealing and attractive clients—and that means appealing and attractive to the judiciary and the general public. Ideally, they will be just like heterosexual couples who are permitted to marry, but for the fact that both members of each couple are the same sex. In other words, one must seek out “but for” lesbians.⁸¹ The plaintiffs in the marriage cases cannot be too marginal or too challenging.⁸² Ideally, for reasons discussed below,⁸³ some of them should also have children and form “but for” families.⁸⁴

Second, the clients must present clear and articulated reasons for seeking marriage. There must be specific circumstances that make the advantages of marriage readily apparent to all. Again, children are helpful. It would be odd, to say the least, to include plaintiffs for whom marriage would work a disadvantage.⁸⁵

Third, the clients must be committed to marriage as a goal. If they are personally ambivalent and conflicted about marriage, they are unlikely to take on the burden of being the plaintiffs.⁸⁶ If they were not deeply committed to the goal, counsel would have to worry that they would not be good plaintiffs. And stating the obvious, marriage opponents are unlikely to be effective plaintiffs.

In sum, and hardly surprisingly, the ideal plaintiffs will present

⁸⁰ Legal rights organizations have taken the lead in all of the major cases now pending in California, New Jersey, New York, and Washington. See generally Lambda Legal Website, <http://www.lambdalegal.org/cgi-bin/iowa/index.html>.

⁸¹ See ROBSON, SAPPHO, *supra* note 1, at 30-31.

⁸² At the same time, the clients must be ethnically, religiously, and economically diverse in order to demonstrate the breadth of the community of lesbians and gay men who are injured by exclusion from marriage.

⁸³ See text accompanying notes 95-96. Besides public appeal, the very structure of the claim to marriage as a part of “equal” treatment compels the choice of plaintiffs who are most like married couples. See Boyd & Young, *No Sex*, *supra* note 13, at 772-74.

⁸⁴ See Shapiro, *Second-Parent Adoptions*, *supra* note 2, at 31-32.

⁸⁵ See *supra* note 23.

⁸⁶ The plaintiffs in Andersen, for example, have spent countless hours doing press work and other forms of public speaking. They have opened their private lives to public scrutiny with remarkable grace.

a clear and compelling case that marriage is undoubtedly a beneficial institution, that they are just like married people already, and that the deprivation, both in concrete terms and in social terms, is both severe and unfair.

Beyond the clients there are other practical problems. Litigation is not controlled by one party. It is shaped by all parties, including, of course, the defendants.⁸⁷ Thus, each party's rhetoric shapes the other's. Whatever the initial plan of the litigation, counsel must be responsive to the defendants' arguments. Generally, all marriage litigation defendants are emphatic about the importance of marriage. Many pages are devoted to the centrality of the institution to civilized society. Consistent with plaintiffs' position that one does not seek to undermine or destroy marriage, one is generally obliged to agree with this sentiment.⁸⁸ At the same time, defendants argue that allowing lesbians and gay couples the right to marry will undermine the admittedly central institution. To this, plaintiffs must respond that it will not do so, and indeed, that it will bolster and sustain marriage. In the end it is difficult not to emphasize this point, whatever one's misgivings.

Finally, there is the court, composed of a judge or judges. The court will rule as it sees fit. The *Andersen* plaintiffs won in the trial court, obtaining an opinion generally hailed by the lesbian and gay community.⁸⁹ But we can hardly hope to control the terms on which we win. Thus, the trial court too extolled the central significance of marriage in ways that might not serve my goals.

As *Andersen* and other similar cases developed, particular arguments took shape as a result of this combination of influences. Specifically in *Andersen*, arguments concerning the well-being of children have come to play a central role.⁹⁰ As is true in many states, Washington permits lesbians and gay men to become adoptive parents as well as foster parents.⁹¹ Sexual orientation is not a

⁸⁷ In *Andersen* these include the state, the county, and intervenors. *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *12 (Wash. Super. Ct. Aug. 4, 2004).

⁸⁸ See generally Brief of Respondents, *supra* note 57. There is important disagreement, however. While defendants tend to articulate marriage as a "natural" institution, plaintiffs can forcefully demonstrate that it is in fact an institution created and frequently shaped by society. In addition, plaintiffs can fruitfully discuss the oppressive role of marriage in the past.

⁸⁹ See *Andersen*, 2004 WL 1738447.

⁹⁰ See Brief of Respondents, *supra* note 57, at 65-72; *Andersen*, 2004 WL 1738447, at *9-10.

⁹¹ See Brief of Respondents, *supra* note 57, at 68-70.

factor for determining custody of children.⁹² Assisted insemination is also available to lesbians, either singly or as couples. Thus, like other states, Washington has a lesbian and gay baby boom.⁹³

These facts provide the basis for a simple yet compelling argument in favor of access to marriage. For whether or not it is true,⁹⁴ it is generally believed that marriage is beneficial to children. And so one can (and perhaps must) argue that the failure to grant marriage access to lesbian and gay parents unfairly penalizes their children. Whatever one thinks of the parents, the children are "innocents." To deny access to marriage in the name of the well-being of children (a reason typically proffered by state defendants) is simply irrational.

This argument is so strong that it is virtually impossible not to make it. It also reflects the feelings of many within as well as without the lesbian and gay community, including significantly many of the plaintiffs in the marriage litigation. In any event, even if plaintiffs chose to omit it, it seems likely to form a critical part of any decision affirming the right to marry.⁹⁵

But for a feminist anti-assimilationist, it is a profoundly disturbing argument. Its potential to enforce mandatory marriage is manifest. How much harder would it be for two women raising a child together to resist marriage when everyone has agreed it is better for the child if they marry? What additional burdens does it place on those raising children in non-coupled households, whether they be single parents or communal households or, indeed, anything besides a monogamous couple, to be labeled a less desirable choice for the children? And at the same time, this irresistible argument sharpens rather than blurs the line between marriage and all other relationships. It reinforces ideas that are antithetical to the overall goal of a feminist anti-assimilationist.⁹⁶

Regrettably, I cannot see that there is much one can do about this. Once offered, even if in a carefully crafted, limited, and

⁹² *Id.*

⁹³ See Amicus Curiae Brief of Children's Rights Organizations in Support of Respondents at 7, *Andersen v. King County*, No. 75934-1 (Wash. Feb. 7, 2005), available at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/385.pdf.

⁹⁴ See Judith Stacey, *Legal Recognition of Same Sex Couples: The Impact on Children and Families*, 23 QUINNIPIAC L. REV. 529 (2004).

⁹⁵ See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 957 (Mass. 2003); *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *12 (Wash. Super. Ct. Aug. 4, 2004); *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215, (Wash. Super. Ct. Sept. 7, 2004).

⁹⁶ Many heterosexual feminists long ago faced the same dilemma that will soon await lesbian feminists.

nuanced version, an argument has a life of its own. The troubling effects of this argument must be acknowledged.

CONCLUDING REFLECTIONS

Given all the negative consequences, why should a feminist anti-essentialist join in marriage litigation? What difference can one hope to make? Can one find ways to engage in resistance, even as one is complicit? There are several possible justifications that can be offered, but the ultimate question is whether any of the possible benefits discussed below make participation an appropriate choice.

First, as I have noted above, once marriage litigation is begun, it is clearly better for lesbians and gay men to prevail in the litigation than to lose. I do not believe that the feminist anti-assimilationist critique ever suggested any other conclusion. Thus perhaps the simplest and most obvious reason for participating is to make the case a stronger case, thus improving the chances of winning. But that answer, while perhaps pragmatic as well as simple, seems incomplete to me. It fails to take into account the range of specific problems identified by theoretical critique and it fails to acknowledge that complicity must, to some degree, make one responsible for these problems.

Is the litigation improved in any way if feminist anti-assimilationists participate? Is the result any less problematic? There are no certain answers to these questions, though many forces shape the litigation that are entirely beyond the control of the litigator. Yet still I resist the conclusion that sitting out the litigation is the only option for a feminist anti-assimilationist.⁹⁷

I can identify elements of resistance as well as those of complicity in my actions. For example, I believe it is critical to consider the litigation as a part of a larger process. I accept that (like it or not) marriage is currently a goal, and maybe even the primary one, of at least a large sector of the organized lesbian and gay community.⁹⁸ But marriage should be pursued as but one goal in a broader struggle seeking liberty and dignity, not only for lesbians and gay men but also for other marginalized communities. Ob-

⁹⁷ I recognize that sitting out the litigation is not necessarily the same as sitting on the sidelines. There are other avenues for activism and resistance. My question is not whether participation in the litigation is the only choice, but rather whether it is a legitimate choice.

⁹⁸ I acknowledge that this acceptance may be an aspect of complicity. Though I may disagree on a tactical level, I respect the work of those who continue to argue against the primacy of marriage as a goal.

taining marriage rights will serve some people well and perhaps a larger number of people fairly. But there will be many people who are not served by marriage at all—and some who are in fact disadvantaged by it.⁹⁹ Lesbians who do not have health care because they do not have jobs that provide benefits, or do not have partners who have jobs that provide benefits, or do not have jobs at all will not have healthcare after the right to marry is secured. People who do not aspire to monogamy will find themselves even more marginalized then they are today. And those who choose not to marry may find themselves at a greater disadvantage than they were before marriage was an option.¹⁰⁰

One role for the feminist anti-assimilationist, then, is to constantly remember and remind others of the ways in which using marriage as the key to so many benefits excludes and domesticates, as well as the ways in which articulating marriage as the central pillar of a successful adult life diminishes those who do not aspire to marry. This mindfulness (and insistence that others also be mindful) is a form of resistance.

In the end we seek the ability to live freely, work freely, move freely, and choose freely, as well as to be entitled to respect and dignity for the choices we make. Setting marriage in this broader context is a significant contribution to and improvement of the debate. It may allow us to shape the discourse and to plant seeds for subsequent legal developments. At the same time, we can preserve the legal devices that offer some protection to those not protected by marriage.¹⁰¹

Further, participating in the litigation ensures that a radical feminist anti-assimilationist voice is a part of the conversation. We can and should help to build organizations and coalitions within our communities that will continue to pursue the broader range of goals even after the marriage litigation is completed. Through doing so, we can reduce the dominance of narrowly focused marriage advocates.¹⁰²

This means being attentive to the ways in which the litigation

⁹⁹ See *supra* note 19.

¹⁰⁰ I have made a similar argument with regard the availability of second-parent adoptions. See Shapiro, *Second-Parent Adoptions*, *supra* note 2.

¹⁰¹ It is possible that if and/or when marriage becomes an option, protection for non-marital families will diminish. To the extent those protections were premised on the inability of lesbians and gay men to marry, some would assert that they were no longer needed.

¹⁰² Robson has observed that lesbian and gay litigation is dominated by a very small number of organizations. ROBSON, SAPPHO, *supra* note 1, at 114. Of these, only the National Center for Lesbian Rights identifies itself as feminist.

may make marriage more compulsory. It means striving to build support that stretches beyond this one piece of litigation. It means directly seeking protection for unmarried couples and for individuals who are not and do not wish to be partnered.¹⁰³

If (and more likely, when) marriage is obtained there will be harmful effects. Marriage is obviously less compulsory if it isn't available. And the rhetoric and arguments used will in part compound the problem. Those who participate in the litigation bear some of the responsibility for this, even though those things will happen anyway, without critical thinkers on the inside.

And so it comes back to complicity and resistance. It is crucial to consider the nature and forms of resistance. Again, I turn to Robson for that understanding.¹⁰⁴ Resistance is not monolithic.¹⁰⁵ There is no single "correct" way to engage in resistance. Resistance can be incremental and subtle as well as grand and dramatic. While the latter may be more readily understood as resistance, this does not invalidate the former course.¹⁰⁶

The very act of scrutinizing and analyzing our current condition can be a step towards resistance.¹⁰⁷ For it is only through examination and understanding that we can effectively formulate our strategies for action. In that sense, this essay itself may be the act of resistance I can fashion in the midst of my complicity.

¹⁰³ This is not to say that all feminist anti-assimilationists should now work within the framework of marriage litigation. There is a critical role for those who choose to remain outside this forum. However, as I chose to participate in the litigation, this is the course of conduct I have focused on.

¹⁰⁴ ROBSON, SAPPHO, *supra* note 1, at 167-70.

¹⁰⁵ *Id.* at 168.

¹⁰⁶ I resist categorizing the more subtle and smaller form as "lesser." It is not clear to me that there is a hierarchy of resistance, and if there is, it is not clear to me how we would place the forms of resistance in that hierarchy. Instead, I see valued roles for multiple forms of resistance.

¹⁰⁷ Thus, "by examining the family's power to domesticate our legal theories and lives, we can begin to resist our domestication." ROBSON, SAPPHO, *supra* note 1, at 168.

Annotated Bibliography

