Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law

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Michele Storms: Good afternoon everyone, my name is Michele Storms. I'm the Director of the Gates Public Service Law Program, and it's my pleasure to welcome you to our last installment of our speaker series for this academic year.

Our program is an opportunity to share with our law school community, and with the broader community important legal issues, and practice issues around public service law, and today is no exception.

So I'd like to tell you about our speaker, and about what we'll be talking about today. I think that many of you already know that last year Washington State enacted a Domestic Partnership Law that provided significant rights for our same sex couples, rights similar to those of to the legal rights of married couples.

Then this March, the State Legislature passed a measure expanding that law to include many, many more rights that were previously granted only to heterosexual married couples. In addition to getting rights to Gays and Lesbians, Washington's laws allows opposite sex couples over the age of 62 to enter a domestic partnership as well.

So many people see those changes in our law as a step in the right direction toward valuing all families under the law, but our speaker today has really much more to say about what it takes to genuinely value all families under the law.

Nancy Polikoff is a Professor of Law at American University Washington College of Law, where she teaches in the areas of Family Law, Civil Procedure, Sexuality and the Law. Previously she supervised Family Law Programs at the Women's Legal Defense Fund, now known as the National Partnership for Women and Families, and before that she practiced law as part of a Feminist Law Collective.

For 30 years she has been writing about and litigating cases involving Lesbian and Gay families, and her articles have appeared in law reviews. Her history of the development of the law effecting Lesbian and Gay parenting appears as a chapter in the book, "Creating Change: Sexuality, Public Policy and Civil Rights."

She helped develop legal theories in support of second parent adoption and visitation rights for legally unrecognized parents, and on and on. There are many, many activities and cases that I'm sure she may even tell you about herself, so I don't want to steal her thunder.
But importantly she just published a book which is actually available here, which is called "Beyond Straight and Gay Marriage: Valuing All Families Under the Law," and in it she explores what that takes.

I'm just going to quote her once, not from her book, but from an editorial in the Los Angeles Times in March of this year entitled, "Marriage Isn't the Half of It." In that article she wrote that, "The quest for marriage rights has obscured a more fundamental problem in the law. Marriage is a bright line dividing relationships from that matter from those that don't, and it shouldn't be."

She further stated that, "Marriage is no longer the only way that people organize their families and relationships. State recognized Domestic Partnerships aren't a good legal dividing line either, and those just extend a few more people without questioning why such couples have these legal rights in the first place."

So what we can gather I guess from her legal work and her work in the academy is, that she's both a scholar and an activist on these issues. We are fortunate to have her share her thoughts with us today about value and families.

So without any much more, I ask you to join me in welcoming Nancy Polikoff.

Audience: [applause]

Nancy Polikoff: Thank you, Michele. I want to thank Lisa Kelly for helping to facilitate my getting invited here, and Michele and Ann for making it possible. It's really a pleasure to be here, and get to talk to all of you today.

They told me I could talk for 45 minutes, and then do questions. My guess is I'm going to talk a little shorter than that, because I actually really like to take questions from people and have the conversation go wherever you guys would like it to go. So, I'm going to start with some stories:

Ronnie has a serious medical condition, and can't get to the doctor on her own because she suffers blackouts walking in the street. When her partner of 20 years asks for family medical leave to take Ronnie to her doctor's appointments her employer denies her request.

Eugene did not come home from his job on the 102nd floor of the World Trade Center on September 11, 2001. When his partner of 14 years Larry, applied for Workman's Compensation Survivor's Benefits, he learned he didn't qualify for those benefits, which might otherwise be paid to Eugene's estranged father.

So, these two stories may sound somewhat familiar. They are two of many examples of the kinds of stories that spur Gay rights advocates to battle for access to marriage.

If Larry and Eugene had been married they say, "Larry would have received benefits." If Ronnie and Elaine had been married, Elaine would have received leave.
So the harm in these narratives is caused by the denial of access to marriage, and therefore the solution is marriage equality.

So, I wrote this book to tell these stories in a different way. When I look at Larry and Eugene, and Ronnie and Elaine, I see a legal system that harms unmarried couples of any sexual orientation, as well as single parents and their children, extended families, and anybody else who forms relationships of emotional and economic interdependence that aren't marriage.

My solution is valuing all factors through matching laws that now privilege marriage to their purpose, and after that being able to include within those laws all of the different kinds of relationships that are necessary in order to achieve the purpose of the law.

I'm extraordinarily about this book, because it shows how the law can value all the families and relationships that people value.

I'm extraordinarily about it, because it shows how to foster the economic security and the emotional piece of mind that all people need without privileging marriage.

Amazingly enough I discovered in doing research for this article that our legal system is capable of doing this right now, so consider this story:

On November 27, 1978 openly Gay San Francisco supervisor Harvey Milk, the first openly Gay elected official in a major U.S. city was assassinated by a former supervisor who also murdered the city's mayor. His surviving partner Scott Smith received Worker's Compensation Death Benefits.

Scott and Harvey were not married; they were not Registered Domestic Partners. Registered Domestic Partnership had not been invented in 1978, and it didn't come to San Francisco until 1989.

Scott was successful because California does not base Workers Compensation Death Benefits on marriage. Had the World Trade Center been a landmark in Los Angeles, Larry and all of the other surviving same sex partners would have received those benefits.

If you haven't heard of Harvey Milk you will soon, because Sean Penn is playing Harvey Milk in a major motion picture that's due to be released in November to coincide with the 30th anniversary of his assassination.

I don't know that people will be talking about his partner Scott getting Worker's Compensation Death Benefits, but that's just going to make you guys really smart when you can tell your friends that.

As for Elaine, if she worked for the federal government right now, she could use her own sick leave to take Ronnie to her medical appointments, and that's because federal government employees can use their sick leave to take care of anyone with whom they have a close association that is the equivalent of a family relationship. Laws like these solve real problems
without carving out special rights for marriage.

Now what I want to do here is differentiate between civil rights, and good family policy. For Gay men and Lesbians from a civil rights perspective, marriage is one of many good fights. It's about equality, and equality is a good civil rights goal.

From a family policy perspective, marriage is the wrong fight. It's a fight for something that isn't necessary if we can implement the laws that value all families, and it isn't sufficient even for LGBT people because it fails to capture the importance of LGBT relationships other than marriage. And for all people--all LGBT people, and really, all people, whatever their family form--they deserve the economic security and emotional peace of mind that all people want.

So the book is a road map to get the rights that we want and need, whether we get marriage or not. And this includes assuring the wellbeing of children, compensating for the loss of an economic provider, providing for care-taking leave and other leave activities that are necessary to care for loved ones, making sure that doctors and hospitals know who to listen to if we can't make our own medical decisions.

What I'd like to do is spend a little bit of time giving you my idea of how we got to where we are today, when the battle for marriage equality appears to be the principle if not the only family-policy agenda of the gay-rights movement.

So, early gay-rights advocates emerged around 1970, the early 1970s, at a time when feminism and the sexual revolution were completely transforming family life. And in that context, gay-rights advocates joined a chorus of voices in support of diverse family structures, working in coalitions to assure greater justice for all families. At the time, marriage was considered part of the problem, not part of the solution.

But those times were followed by a dramatic right-wing backlash--a backlash against feminism, a backlash against gay rights, a backlash against reproductive freedom, a backlash against women having children without fathers. And out of that emerged a self-described marriage movement, both religious and secular, making the claim, bogus as it is, that the decline of lifelong heterosexual marriage is responsible for all of our social problems.

And I do not say that hyperbolically, because it is in fact what they say. Poverty, crime, violence, substance abuse, illiteracy, homelessness, chronic illness, infant mortality, and the list goes on from there, are all attributed, by the right-wing marriage movement, to the decline of lifelong heterosexual marriage. In other words, if everybody would get married and stay married in heterosexual relationships, all of those problems would disappear.

Now, it turns out that that movement has, over the many years that it's been around, gained increasing currency, to the point where some of those who were its strongest proponents outside of government are now inside of government, where, for example, they distribute $750 million taxpayer dollars for marriage-promotion activities.

And in my city, Washington, DC, the latest manifestation of that is that we have full-length bus-
shelter posters with pictures of brides and grooms and little snippets that say things like "Marriage works." And the organization that is responsible for those posters, when I sort of traced them back, received $5 million in government funding last year. Imagine what $5 million could do in Washington, DC, if we were actually trying to solve family problems with it.

But marriage promotion has become a staple of cultural currency, and the general notion that marriage is a weaker institution and that it's really bad for everything in society has led to the notion that marriage should be strengthened.

And that rhetoric has affected how the gay-rights movement argues for access to marriage, and leads same-sex couples and their advocates often to emphasize allegiance to the institution of marriage and to seek marriage equality in the context of strengthening the institution of marriage, as though that rhetoric did not have these other connotations of a much larger ideological assault on feminism and diverse family structures, and recognition of the importance of family lives, however they're constituted, to everybody.

So we are dealing in that social climate at the moment. One of the reasons why I wrote this book is because I discovered, year after year, among my own students and others whom I would talk to at law schools around the country, that essentially they had grown up at a time when the fight for marriage equality was so prominent in public consciousness that they believed that the only thing wrong with marriage was that same-sex couples did not have access to it, and the only thing important to meeting the needs of LGBT families was allowing same-sex couples to marry.

And so they believed that, by supporting marriage equality—which they all did, at least the ones who came to my talks—they believed that they had covered the field in terms of their participation and involvement in a social-justice movement. And after I would speak to them and what I would say would resonate with them, they would say, "Why haven't we heard this before?" So I wrote the book so at least somebody would hear it.

And also, my answer is: you haven't heard it because this is how the energies of the marriage-equality movement have been funneled, and because the backlash against diverse family forms by the right wing is a very powerful backlash.

So, my basic argument is that marriage should not be the dividing line between the relationships that the law counts and those it doesn't. And it shouldn't be the dividing line, either, when same-sex couples achieve a status of civil union or registered domestic partnership that is essentially the state-based rights and responsibilities of marriage by another name.

Now, I do believe in equality. So, actually, I am one of those people who think that creating a state-based institution with a different name is done solely for the purpose of demeaning the relationships that lesbians and gay men have and treating our relationships as though they weren't worthy of the name of the relationships that go with heterosexual marriage. So I'm not happy about that.

But for purposes of the notion of the law creating a bright dividing line, marriage and domestic partnership or civil union do the same thing. If you opt into that structure, you get a whole bunch
of special rights. And if you either don't opt into it or your family structure doesn't look like that so it's not an appropriate one for you anyway, you get nothing, in spite of whatever needs you have that are connected to economic security and emotional peace of mind.

So, I'm going to try to spend a few minutes explaining to you why I think that the argument I am making is actually not a brand-new break but a logical and just extension of changes that were made in the law a long time ago. And to do that, I have to ask you to imagine that we're sitting here 40 years ago today: April 1968.

I know we wouldn't be in this building, but just imagine it is 1968, and I'm talking to you about the law of marriage, and the legal meaning of marriage, the legal significance of marriage. This is what I would have said to you.

Number one, the law of marriage creates and fosters separate spheres for husbands and wives--distinct responsibilities that vary depending on whether you are the husband or the wife. And those operate in tandem with the same kinds of classifications in the public sphere.

Perhaps most visibly, I can convey this to you by imagining that you open a newspaper--because we didn't have Craigslist in those days--and you look in the help-wanted ads, and they say, "Help Wanted: Male. Help Wanted: Female." So you have completely separate spheres for men and women, inside of marriage and outside of marriage. And the law sanctions those and, in fact, insists upon them.

Children born outside of marriage are second-class children, as are their parents. They do not have the entitlement to the same rights in our society as children born inside of marriage. That, it turns out, is the greatest penalty the law conveys on sex outside of marriage. Sex outside of marriage may be criminal in most places, but those laws, at least if you're heterosexual, are not as likely to be enforced. What's going to be enforced of the prohibition on sex outside of marriage is the treatment of children born to unmarried women.

And finally, marriage is a lifelong proposition, and unless you're willing to lie in court, which more and more people were willing to do; your marriage can't end unless one of you is innocent and the other is guilty of a marital fault, very specifically delineated, and the innocent person wants the marriage to end.

So, that would be the picture of the law of marriage 40 years ago today. And I think you all know none of that describes the law of marriage today. In fact, within a decade, everything I just said to you was completely exploded and a revised set of laws were put in the books discarding the gender script, equalizing the legal status of children born outside of marriage, and making no-fault divorce the norm.

Now, these changes didn't come about without some fuss. And today, I'm just going to talk about one piece of that because I think it's the piece that people think about least. I think most people have a pretty good idea that it once used to be much harder to get divorced, and you needed some kind of fault, and now we have no-fault divorce. And I think most people have some idea that the law used to discriminate against women in the family and the public's fear.
So, I think it's less commonly understood just what it meant to have two classes of people based on whether they were born to a married woman or born to an unmarried woman.

So, let me tell you again what it would look like about this in 1968. So, in 1968, a woman named Minnie Glona lost her 19-year-old son in a car accident. And a woman named Louise Levy died when multiple trips to the doctor resulted in no tests being done, and therefore no diagnosis of a medical condition that otherwise would have been treatable. So she died, leaving behind five children.

Well, her surviving children, and Minnie Glona as the survivor of her son, filed for wrongful death compensation, but their lawsuits were thrown out of court because in Louisiana in 1968, if a child was born outside of marriage, that mother could not recover for the death of her child, and the children could not recover for the death of their mother. And the courts in Louisiana upheld those statutes and threw out those lawsuits.

But a law professor from the University of Illinois, Harry Krause, had made it his mission as a matter of civil rights to try to right the wrong of the treatment in this country of children born outside of marriage. And he spearheaded a litigation strategy that included taking these cases to the United States Supreme Court and challenging the constitutionality of such laws.

So, Louisiana defended its laws in the United States Supreme Court using language that, if I just read you this quote that I'm about to read you today with no context, you would think it had been written yesterday by today's right-wing marriage movement.

Louisiana said, "We don't mean to discriminate against anybody, and we are not trying to punish anybody. We are just trying to encourage marriage.

"Since marriage, as an institution, is fundamental to our existence as a free nation, it is the duty of Louisiana to encourage it. One way of encouraging marriage is granting greater rights to legitimate offspring."

Well, the Supreme Court of the United States said that discouraging sex outside of marriage and encouraging marriage were no longer constitutionally sufficient reasons to discriminate against a family structure that was organized around something other than marriage. And that court decision in 1968 is what I like to call the Revolution of 1968 That Nobody's Heard Of.

Sandwiched in between the assassinations of Martin Luther King and Robert Kennedy with the streets of Paris filled with protestors and our own version of that going on in cities of this country, the Supreme Court issues a decision that was the beginning of the end of illegitimacy as a legal category.

And make no mistake about it, it was a revolution, because for centuries it had been taken as a matter of course that you could treat children born outside of marriage and their parents in a completely different way from how you could treat children born inside of marriage and their parents.
But nobody would do that today. It is well understood that marriage is the wrong dividing line for judging the value of parent-child relationships, and therefore, you cannot distinguish between married and unmarried relationships, with children, in the way that once was taken as a matter of course in the law.

My argument is that we need to take that the next step further and recognize that the laws that now grant special rights to those who marry distinguish between married couples and everybody else at a time when marriage is no longer the major organizing force of people's families over their lifetime.

The demographics have changed, and the laws that now carve out these special rights for marriage also do so in a way that looks so natural as though they naturally were intended to provide a perk to married people that unmarried people don't get that it obscures, actually, why we have a number of these laws.

And I'm just going to give you one example of that, one bit. Well, I'll use the workers' compensation model. Really, many of the economic benefits that go with marriage can be talked about in the following way.

So, wives were once dependent upon their husbands, economically. They had to be because, for a really long time, women had no independent legal existence once they married, so of course they were dependent upon their husbands.

Even when that law started to change, and it wasn't completely undone until about 1980 where, once again, Louisiana was the last state to continue to have a statute that gave men control over all of the money in the family, so we're talking about some of this rather recently, but during that period of time, of course married women were dependent on their husbands. And even when the law didn't mandate it, as a practical matter, married women were dependent on their husbands because they didn't work outside the home.

A case that later got to the Supreme Court on workers' compensation benefits was a case from Missouri. The law that was being tested there was enacted in 1920. Seven percent of married women worked outside the home.

When Social Security, an area in which not only do married couples do well but actually single-earner married couples, very highly paid men and not-very-highly paid or not working at all wives, actually make out way better than any other family form including lifelong marriages where both partners earn the same amount of money, when that scheme was put into place in the late 1930s, 15 percent of married women worked outside the home.

So, all of these laws originally were about dependent wives and income-earning husbands, and the way they worked was the benefits went to wives and widows. They didn't go gender-neutrally to spouses, so Social Security survivors' benefits went to wives.

If you happened to be a working woman, and therefore entitled to Social Security as a worker,
when you died, your husband wasn't entitled to anything. The law wasn't set up to deal with that. The law was set up to deal with the norm. The norm was married women didn't work outside the home; they were dependent on their husbands. So there were these gender-based schemes.

And for those of you who have taken sex discrimination and the law or read some of the specific cases in constitutional law, you know that eventually all of those cases went to the United States Supreme Court because, even into the 1970s, if husbands or widowers could get benefits, they had to prove that they had been economically dependent on their wives in order to get those benefits; whereas wives automatically got them, widows automatically got them.

So you all know what happened. The cases went to the US Supreme Court in the 1970s. The US Supreme Court found them all unconstitutional sex discrimination. Well, what did that mean? It meant that the federal government and the states had to go back and write gender-neutral laws.

They could have written laws requiring everybody to prove economic dependency in order to be compensated for these benefits whose purpose had been to compensate for economic dependency. And some states did, but most states just applied them gender-neutrally to husbands and wives.

So, now, for workers' compensation death benefits, in most states, if you're married and you die at work, your spouse automatically gets your benefits, even though it's almost certain that, once upon a time in that state, only widows got those benefits, not all spouses.

I loved finding out about the workers' compensation death-benefit scheme. There are some states that even require spouses to prove economic dependency. And there are others, like California, that doesn't care if you're spouses. They understand that the purpose of this benefit is to compensate for the loss of an economic provider.

It is really very simple, our workers' compensation system. It's a no-fault system, designed to compensate somebody who's hurt on the job and to compensate survivors of somebody who dies on the job. That's its purpose. It is to compensate for the loss of income that's coming into that home.

So, in California, you don't need to be married. You just need to be a member of somebody's household who was economically dependent, in whole or in part, on that person. And there are a handful of other states that do that also.

Spouses have to prove economic dependency in order to get anything. And not-spouses have to prove economic dependency, in whole or in part, and then they can get it also. Now, the purpose of the law is to compensate for the loss of the economic provider. That's the right way to do it. It's to pin the benefits to anybody who was economically dependent, in whole or in part, on the worker who died. And the fact that there is a functioning system now in some states that actually does this is evidence that we can do it.

We do not need to perpetuate and continue the idea that this is a perk of marriage when that wasn't its initial basis. Its initial basis was in the reality of family life in the early part of the 20th century. Today, families look very different, and the laws need to accommodate that.
So that's an example of fitting a category of relationships to the purpose of a law. If the purpose is to compensate for the loss of an economic provider, you need to compensate the people who were economically dependent on that person. Marriage has nothing to do with it.

So it is that methodology that I use in the book, basically going through all of the reasons why same-sex couples say they want access to marriage. So, of course, all of the plaintiffs couples in the cases present statements about themselves as a unit and about what it is that makes them want to marry.

And so I read all of those and tried to hit the high points of the issues that same-sex couples say they want—which they should have. It's just that they shouldn't be tied to marriage. And sometimes, some of the things they want are actually things that would make them part of a larger problem.

So, take Social Security as one example. As I said, the people who make out in the Social Security system are married couples where one person earns most of the money and the other person doesn't.

If you have two equal earners, they will pay far more into the system and get far less out over the course of their lifetimes, than the traditional male, breadwinner family unit. And, there are lots of really smart people working on how to change the Social Security treatment of the family, and the gay rights movement could play a great role in being part of that rather than just trying to focus on the marriage equality piece.

What would happen if same-sex couples could marry and be recognized for Social Security purposes? The same thing. The single, high earner in same-sex couples with a low earner or non-working spouse would get way more money over the course of their joint lifetime, paying in way less money to the system, than the equal earning, same-sex couples - just like equal earning, different sex married couples today.

So, the desire to be a part of a system that gives special rights to some people, in many instances, is going to simply make the same-sex couples who marry part of a much larger problem. If your focus is on equality only that makes sense. Including all LGBT families, 50% of LGBT marriages would end in divorce, just like close to 50% of different sex couples end in divorce.

Now, I've been talking a lot about couples, and I do that in the book, but I want to make sure you get a flavor for the other kinds of relationships that are really disadvantaged in a system that gives special rights based on marriage. So, consider this story: Private First Class Hannah McKinney married just before she deployed to Iraq.

She had a two-year-old child from a prior relationship. She left her child with her parents to raise. She died in Iraq. The government paid a $100,000 death benefit to her surviving spouse, not to her parents who will raise her child. It is a $100,000 benefit that goes to surviving spouse, period.

So, I tried to figure out why this might be. I traced the law back that created this death benefit,
and it was created in 1908. It was a lot less money then, but imagine, what the country looks like and what families look like, and what the law looks like in 1908. First of all, married women are dependent on their husbands in many places as a matter of law. Men are in the military. Divorce is uncommon, therefore, remarriage is uncommon. Men have no obligation to support children who weren't born to their wives.

So, maybe Congress thought - if it was thinking about it at all - that if a man had surviving children whom he was legally obligated to support, they would be living with his widow. So, by giving the money to the widow, they'd be taking care of the children. Well, Hannah McKinney's story shows it doesn't work that way today.

In that instance, you have a perfectly capable, independent adult who has never raised children with the deceased service member who gets a $100,000 just for having been married to her. Meanwhile, she has a two-year-old child who will have to be raised by somebody who cannot go out and work. That person needs to be taken care of by some adult who needs the money to do that and deserves the money more than the surviving spouse. But, because marriage gets you these special rights, it overvalues that relationship at the expense of children.

And, I give many other examples of the way the law makes marriage the dividing line that disadvantages a wide range of relationships other than just unmarried couples.

So there's an example of a woman in a Section eight housing unit in New York City, an elderly woman who wanted to have her 90-year-old father move in with her so she could take care of him. She lived in a one-bedroom apartment. She filled out the paperwork. The agency said no--it would make her unit overcrowded. Had she married, her husband would have been allowed to live with her.

Now, why do we have occupancy rules? They are part of a zoning scheme that's designed, let's just say, in general, to promote the kinds of neighborhoods we want to live in and the kinds of environment that are good for the people who live there.

So, if you need an occupancy limit on a unit for that reason, it's an occupancy limit, but that unit was going to have two people in it, whether it was a husband or a father. But the law let her have her husband. And when it wouldn't let her have her father and he moved in, she received a notice terminating her rent subsidy.

Now, she got that turned around, but it took more than a year and four hearings that she had to show up for before she could keep her housing subsidy and have her father live with her.

So we have, in every imaginable area of law, ways in which marriage produces special rights to the disadvantage of unmarried couples, of the way children are actually being raised, of people who form relationships to live together as non-sexual partners that involve a kind of economic interdependence that still leaves somebody vulnerable.

And my concern about the direction of the gay-rights movement and its struggle or marriage equality is that, where it is successful, it runs the risk of being the end of the struggle, because
once same-sex couples can marry, or register as domestic partners, what is the basis for arguing that they shouldn't have to, that the loss of an economic provider should justify workers' compensation survivors' benefits, whether a couple is married or not, because the purpose of it is to compensate for the loss of an economic provider? It will be very hard to do that.

And we are already seeing, in Massachusetts, some of this fallout. There are very disturbing cases coming out of the Massachusetts courts Differentiating the rights of children based on whether their lesbian-couple parents married or didn't marry, because marriage is available there as a second-parent adoption, but in instances where the law would have created a presumption based on marriage, an unmarried lesbian can walk away from a child and not make any child-support obligation.

And it's not that GLAAD, the gay-rights group in Boston, is happy about that. They're not. They don't want the cases to turn out that way. But they are having trouble articulating forcefully a theory to make marriage not necessary, to make marriage not the dividing line, having argued, the way I started out this talk, that there are all of these injustices and the way to correct for the injustices is to allow same-sex couples to marry.

We've also seen in Massachusetts that employers have stopped offering domestic-partner benefits. They say, "Straight couples can marry. Gay couples can get married. You've got to get married, or you can't cover your partner."

Salt Lake City, Utah, lets its employees cover any one adult living in their household in an economically interdependent way, and that person's children, for employee benefit purposes. So, you can cover your unmarried different-sex partner, your unmarried same-sex partner, or, if you're a lesbian and a gay man and you're living together to raise a child together but you're not in a sexual relationship, you can cover each other.

If you're two single mothers who think that by combining your economic and emotional resources, you will be better able to raise your children, and one of them works for the city of Salt Lake, she can cover the other woman and all the children in their household on her employee benefits.

So that's a development in a state hostile to gay rights--in a place where they actually don't want to do things in the name of gay rights. But nobody said anything anti-gay when they passed that benefit. Instead, the city-council members said, "You know, our single employees have families also. They have responsibilities also. They have people that they need to take care of also, and we want to make sure that all our unmarried employees get to do that, just like our married employees do."

So, Massachusetts has marriage for same-sex couples. If you're a couple and you don't marry, you may not be able to get domestic-partner benefits. If you're not a couple, it doesn't even work plausibly that you could cover an economically interdependent unit on your medical benefits. But if you work for the City of Salt Lake, you can.

So, I'm actually optimistic that some of the things on my Valuing All Families agenda can be
achieved in some places that are hostile to gay rights. And I'm keeping my fingers crossed that in places that are less hostile to gay rights, somebody will figure out before its too late that some of these changes need to be made in the law so that we just don't wind up with another group of people--same-sex couples who marry--who have the special rights of marriage to the exclusion of everybody else.

So, I always like to talk about the state where I am. And I actually have lots of things to say about Washington. So, you guys live in the only state where, when a couple lives together as a unit and their relationship ends, the court will consider dividing up the property that they have accumulated, whether they were married together or not. This is the recommendation that the American Law Institute made a few years ago. It doesn't exist anywhere else.

I have a chapter in the book on how they do it in other countries. Trust me, they do it differently--especially in Canada, where nobody has to get married for anything legal. I don't know if you guys know that, but couples in Canada can choose to marry because it means something to them. Nobody has to marry for the law. There's almost nothing in the law that changes, whether you're a married or an unmarried couple in Canada.

But no place in the United States can you ask for some temporary support if you have committed yourself to a family unit and then your relationship breaks up and you're going back into the workforce. No place in the country, including Washington state, can you ask for that under the same circumstances you could if you were married. In British Columbia, just a little bit north of here, they've been able to do that since 1972. So that's just a contrast, to show you how it is possible to do it differently.

Can I see a show of hands as to how many people here know what the Washington State Advance Health Care Directive Registry is? And if you were with me at lunch, don't raise your hand; that doesn't count. Three people. OK.

So, you guys, it's not the best model in the country. Idaho actually has a really good one. You should learn from your neighbors. And again, not a gay-friendly place.

But the single most-frequently strongest reason why same-sex couples want access to marriage is that they are terrified about what will happen if one of them is hospitalized. And they have good reason to be worried about it because the stories are completely outrageous, including stories in some places of people who had documents that they had drawn up.

So let's just agree: this is a big problem. Could we also agree that marriage is not the solution to this problem?

First of all, unless couples are never going to leave the state that allows them to marry, it's not going to do them any good. I mean, you guys who register as domestic partners here, just go to Montana and see what that gets you if you think that it'll get you something in a hospital in the state of Washington.

So, considering that more than half the states in the country have constitutional amendments that
ban same-sex marriage, and more than half of those ban recognition of any unmarried couples, gay or straight, it's going to be a really long time, and not in any of our lifetimes, until a married, same-sex couple could travel all over the country and be able to say, "Well, we're married," and expect to get to make medical decisions. So marriage isn't the answer for that.

Not only that, it's the wrong answer. There's a study in Detroit of people who had medical powers of attorney. 50 percent of the married people did not pick their spouses.

And in Chicago, at an outpatient clinic where they did a study of people who didn't have them, almost [inaudible] in that study said they would fill out the forms that day if their doctors asked them to, 33 percent of the married people said they wouldn't pick their spouses.

And there are all sorts of reasons for that. Every single person in the country, everybody, from the most right-wing ideologue to whoever you think of as the opposite of that, will agree that there is only one goal of any system that creates a surrogate medical decision-maker, and that is for that person to make the decision that you would make yourself if you were able to. That is what everybody wants. Everybody believes that the person you choose should get to make the decision if you choose somebody.

So they're not, the right wing is not going after the 50 percent of those people in Detroit who don't want their spouses to make that decision. It is a matter of personal autonomy.

So what we need is a system that gives that right to everybody, including all of the un-partnered LGBT people, who actually may not want the next person on the list under the default statute to get to make those decisions for them, who may be far away from their families of origin, who may have moved to Seattle or another gay-friendly place to get out of the places where they lived close to their families of origin. I care as much about my un-partnered LGBT friends as I do about my partnered ones who might marry or register if that was available.

And the only way to make sure that everybody has access to the peace of mind that we all deserve of knowing that the right person would make our decisions is to have an easy-to-use healthcare directive registry that culturally becomes understood as part of what it is to be an adult human being. You get the information from your primary care doctor. You get it when you get your driver's license. You find out about it, and everybody knows that they can fill out forms for free and send them to a registry for free and get back a wallet card that they carry with their driver's license.

I personally, actually, want a notation on drivers' licenses as well, but in Idaho, you've got a picture of it, they have a picture of it on their website, you get a card with a scan-able bar code. And I understand their scanning system isn't quite running yet, but it has numbers.

You type the numbers into a computer that's a secure database for the Secretary of State's office, and that doctor and that hospital get the Advance Directive Registry on the screen in the emergency room in seconds, in real time. Now they know what you want, and they know who you want to make decisions if you can't make them yourself.
There are a number of states that have these. Washington State has it; it's not quite as user-friendly as Idaho, but I want all of you to go home tonight and write these, unless you're absolutely sure that, if you're married, you want your spouse to do it, if you're not married and you have adult children, that you want your adult child to do it, if you're not married and you don't have an adult child, that you want your parents to do it.

If you have two parents and you only want one of them to do it, you need to fill out the form. If you've got siblings and you want only one of them to do it, you need to fill out the form. It is not hard, and you have a registry here, so you're in better shape than some places.

When I talked at the University of Arizona, I did the same thing; they actually have an excellent registry. Almost nobody in the room had heard of it.

This is a gay rights issue, as far as I'm concerned. And it turns out that there are lots of groups around the country who care about this, lots of them. The gay rights movement used to work in coalitions with groups like that. This is the way to solve the problem that drives same-sex couples to seek marriage more than any other single problem, and it's a way to solve it for all LGBT people and really, for everybody.

And we can do it, I think if we get enough states to do it, we can get a national one, which is what we need. We need a national database that's very easy. And there are moments when this becomes possible. Terry Schiavo proved that being married isn't the answer. It proved that sometimes people will fight about it, but most times people won't, they'll just go by whatever the system is. We need to make a system that assures the emotional peace of mind of all people, that's easy to use.

Now, there's one other thing I would do with that system, and it's done in the District of Columbia, and that is, you've got to have a default law because no matter how many times you tell the constituency that you're connected to that it's really easy, you can fill it out and send it in, and it's free, and you don't need a lawyer, there will always be people who don't do it, there would be people who don't have drivers' licenses, so it doesn't help that they have a wallet card, they don't have a wallet, whatever. OK, so you have to have a default statute.

So, the District of Columbia has a default statute. Spouses and domestic partners are treated equally; you do not have to be registered. If you are living in a committed, familiar relationship with somebody, that person gets to make decisions if you don't have a spouse, first line.

Then there's the usual order that you might expect, adult child, parent, sibling, et cetera. On the list after that is close friend. I didn't make it up. A group of really smart medical professionals and the people who care about medical care and death and dying issues actually figured out that friendship matters. 20 states have statutes that include close friends on the list.

Now, the problem is they're farther down the list. The District of Columbia has a statute that says this order is just presumptive. If somebody lower down on the list knows the person better, they get to jump and make the decision.
OK, it may mean some people have to go to court, but like I said, Terry Schiavo proved that some people are going to go to court. There's no way to avoid that. You've got to give somebody the tool to say, wait a minute, you, distant sibling, actually don't have this right. I, who have cared for this person, who's my closest friend, through all the years of her illness, I'm the one who gets to decide.

And if you have a statute like that, and you have medical personnel trained to know that that's the statute, which is another part of it, you have somebody who has the ability to actually make what would more likely be the decision that the person would make themselves.

And there isn't any reason why I have to be going around telling people, including people very active in gay rights, that there are these statutes, that there are organizations that are fighting for these advance directive registries, that there are model statutes that already include close friends. We should have people who care about gay and lesbian families plugged in to what's going on, with...

And one of my funniest stories about writing this book is the day I finished it, I went for my checkup, but that's because I had no time to go to the doctor while I was writing the book, so literally, I timed my annual checkup for the day I had to turn it in.

So the doctor says, how are you, what have you been doing? And I'm like, "Oh, I've been writing this book." I've had this doctor for a long time. "I've been writing this book," you know. "And what's it about?" OK, it's about how marriage shouldn't be the dividing line between relationships that can, relationships that do that.

And she says to me, "Oh, we wrote a statute about that for the District of Columbia on health care decision-making." It turns out my primary care doctor was on the committee that did it. And she said, "You know, I think we did something unique in our statute." I'm like, "You did. I can guarantee."

You know, it's like, doctors and medical professionals trying to solve a real problem knowing how people really live came up with the idea that friends matter and that sometimes they know patients better than their siblings or parents do.

So, those are the kinds of things I'd like to see happen, and I think I'll stop now and see what people want to talk about. Thank you.

[applause]

Nancy: Yeah.

Michele: I really appreciate your energy and your focus on researching the history of this stuff rather than going off the deep end on theory. I think it's really valuable.

But two things: One, it's interesting you use "special rights", because that, in my opinion, originated with the Christian right wing.
Nancy: That's why I use it.

Michele: OK. Secondly, it still seems to me, even though you talk about the un-partnered gays and lesbians, most of this book is focused on people in relationships and emphasizes relationships.

And, as someone who was very active in the gay movement for years and is now totally alienated from it with its focus on marriage and the paucity of its range, it still bothers me that maybe what, 25 to 30 percent of gay and lesbian couples are couples with children? They figure they want to get a piece of this pie that then all the single people in this country should pay for, right?

And it seems to me you're still privileging relationship. You're drawing a line between those in relationships and the great unwashed who are on the outside of the relationship. And it seems to me to bypass a lot of social equity and economic issues. I'm sure you've heard this before.

Nancy: Well, I have a couple of responses to that. The children thing and the marriage thing are completely separate. I spent most of my career working on LGBT parenting legal stuff, and the gay rights groups in Massachusetts still tell all the married couples there that they still need to do second-parent adoptions of their children. We created a mechanism to protect parent-child relationships, and you have to do it if you're a same-sex couple. Marriage doesn't work. It isn't protective enough.

So, the way that works better than marriage is the way that doesn't have any connection to marriage, and parent-child relationships aren't supposed to depend on the marriage of the parents anyway.

I think there may be something I disagree with of what you said. I mean, I feel like single people do feature prominently in my book, like the fact that single people are entitled to have their own health care wishes met when they are hospitalized, and that their friends matter if that's the person they want to ride with them in an ambulance or to visit them in the hospital.

I think the way I might differ with you is that I start with what the purpose of laws are, and I do think that providing for the economic wellbeing of children is a valid purpose because those children can't provide economically for themselves, and they are all of our future. Even if you don't have children, they are the people who are going to pay your Social Security benefits when you're collecting benefits as an older person.

So, I actually think that there are some laws, if they're designed for the economic wellbeing of children, that may look like they disadvantage people without children, but I'm OK with that because of what my value system is. You may have a different value system and that's OK, that's a conversation that we could have.

None of that has anything to do with partners or marriage, that has to do with who's actually raising those children. I think if the government is giving death benefits to compensate dependents of somebody who dies, then it should go to the people raising their children, and if somebody doesn't have children, maybe they don't get that benefit.
On the other hand, if the purpose of the benefit is the government saying thank you for your service, "I'm sorry you died in the line of duty, thank you for your service," we're just going to give you the money, then it should be within the control of the person to leave it to whoever they want, and that should be equalized, because the purpose of that isn't caring for dependents, it's like, OK, you died, we'll give you $100,000, do what you want with it. And then that person can leave it to whoever they want, if they're single or married or what.

Michele: I want to try to say this kind of simply. Durable power of attorney is a really, very important thing in intercultural situations where the parents of the other family may not approve of the relationship that the person's in.

I have to say this without being emotional. My lover was in a coma for about four days, and the hospital decided they should disconnect him, and the family had come in and was to make decisions about him, and told me that I would only be able to be with him for few hours, and then they would make the decision about unplugging him.

Well, it turns out that he came out of the coma, and for a week or so, I was with him, and then the parents decided that, the father, essentially, that I wouldn't be allowed to be around him anymore, and I was kicked out of the hospital. And I'm in the middle of a situation right now where I'm trying to just get in contact with my guy.

And as much as what the legal situations are set up for, gay people here, it's really difficult to navigate through all that. It's very important that people understand the durable power of attorney because if we had done it, we had discussed this, then we never would have been in this situation.

I want to thank you for doing what you're doing in bringing this up as a topic.

Nancy: I'm sorry. And it would be the same whether you registered or didn't register; married or didn't, you would still be in a position where you should be the person who's able to make those decisions.

Michele: Because he doesn't care for his parents or his stepmother, or call those people his family.

Nancy: If there's anybody, if there's a Washington State person here who thinks they have any advice for that person, you can talk to him later. I don't, I can't do that. Are there comments, questions? Yeah.

Audience: My question is about the healthcare directive registry that you talked about. Is that transferable out of state?

Nancy: Well, that is a database question. I mean, as I understand it, the hospitals have to have access to the database where they're kept, and so if it's only at hospitals in Idaho, I mean, you can go to the Idaho Secretary of State website, and you can get to the point where it says, OK, we'll show you that power of attorney if you type in these numbers, but you have to know what the
numbers are to type in, and your hospital has to somehow be connected to it.

So, I think it may be that an out-of-state hospital would have to go through another step to figure out how to do that. That's why I think we need a national one, but there are a number of state ones. I think if we can get a critical mass, then all those state ones will want to be linked, and that's ultimately what we have to have is one that links.

**Audience:** Well, I guess I'm just thinking that when it comes to domestic partnership in this state, one of the things that [indecipherable] to put on a couple of panels, and one thing we say is you still need a healthcare directive if you ever plan on leaving the state.

**Nancy:** Right.

**Audience:** And even if you like live in southeast Washington, you'd want one because it gets into Oregon right here.

**Nancy:** Right.

**Audience:** And so, it's important that you still get a healthcare directory, but if you had this card, would you still advise people that they need a healthcare directive?

**Nancy:** The card is, you've done the healthcare directive. It's just on file with the Secretary of State. The card shows that you have one. So it's about how easy it will be for the hospital to plug into it, and it may be that the hospital in another state can't, but that wallet card is still evidence that you have filled out a healthcare directive and it is registered somewhere, it just might not be as easy as it is in-state to type into it.

And I'm sorry, I meant to check before coming here, there's something about the Washington State one, I don't remember if it's that you have to call to get it, that you can't automatically get it by computer. There's something about it that's not as good as what Idaho has or what Arizona has, but it's still pretty good. And I think maybe they charge $10 or $15, which they shouldn't do, it should be free because it's a public service for everybody.

So, hopefully someday they'll be linked. I mean, there are a lot of people who don't like the default statute, wouldn't want the result that the default statute has, so it's a cultural change. Yeah.

**Marsha:** If you signed a healthcare directive in Washington State and you took it with you to Montana, they would still need to honor that? Not necessarily?

**Nancy:** I mean, they should because whatever the Montana, there's likely to be a Montana statute that at least makes clear that you can have these. I mean, technically the answer would be in the Montana statute, but there is, I mean, there's one of the many tragic stories, and it's one of the ones I tell in my book, was a couple who were from California who were traveling in Maryland when one of them wound up hospitalized.
And they were registered in California and had the paperwork, which did at one point get lost, but the hospital never honored it. And it was a complete outrage. I mean, they admitted later on that they made a mistake. Meanwhile, the guy got put on a ventilator, which his partner would never have done. And they waited hours until the mother and the sister showed up, and that's when they let the partner in.

I mean, these are real problems. I'm profoundly moved by the seriousness of the problems. It's just that marriage isn't the solution to the problem.

Audience: I first read your stuff back in the mid-'70s, when you were writing about lesbian mothers—I think one of the first articles on that. And back then, lesbian mothers were considered to be de facto unfit because it was a sexual perversion, a psychological perversion, and a crime. And so, of course they're unfit. And then I think it required slightly moving in the best interest of the child.

One of the things we've seen so often, arguing for gay and lesbian rights, is, "Well, what's next? A man and dog, or bestiality?" But most non-joking but serious.

Our current problem, that debacle in Texas, where women and their children are being parted on the basis of their marriage relationships that we don't approve of. I'm not saying anybody approves of child abuse or anything like that, but there's no proof. It's the same kind of hysteria that there was over lesbian mothers, the same kind of hysteria that "If women live like that, they can't possibly protect their children."

And I agree with you that maybe marriage should just be like a hobby or something, something people do, and really shouldn't be way in which we structure our society. But would you then not have to say, "OK. Whatever these relationships are, I'm not going to say that one woman and one man, and one man and one man, and one woman and one woman are better than three people or any other. I'm not going to say that anymore."

And it seems to me, if you really want to get marriage off the table as the privileged status to be in, you've got to say, whatever relationships people form, that's entitled to respect, and as long as children can be raised in a healthy way, that's entitled to respect.

Nancy: The way I get at that is just a little bit from a different direction, so that rather than trying to redefine what the relationship is, or what you would call it, I start with what the laws are and try to identify what the purpose of those laws are.

I mean, I often get asked about this question about more than two, and it's a very good question. But the answer isn't up or down, yes or no, do you recognize three or more people together. What it is, what law are we talking about, and what's its purpose?

And then I'll be able to give you my answer with respect to that law, so that if the government, as it does in some instance, gives deceased public-safety officers—firefighters and police officers who die in the line of duty get a $250,000 death benefit. Its purpose is a thank-you. Well, that person gets to designate who gets it. And if they want to split it among people, that's nobody's
business. You can divide that among three people.

One the other hand, there are some times when scarcity may come into play. If you're trying to deal with scarce resources, you might decide, as Salt Lake City did, one adult and all the children in the house. So, if you actually live in a group of three in Salt Lake City and one of you works for the city, no, you can't cover both those other adults. But it's because you've picked the number-one adult, in terms of dealing with scarce resources, and it may be that we have to live with that.

We can have a conversation about priorities, and it may be then that we decide: OK. We're only going to let you cover one other adult on your employee benefits, and so you can live with those other people, but we're not going to provide that there.

For medical decision-making, you can pick anybody you want. You can name more than one person—although I think that's kind of a bad idea, because if you have two people who disagree, you have a big mess, which is what happens now. If you don't name anybody and you have two parents and they disagree, that's a big mess, too.

But I would let people do it, and it's nobody's business what kind of relationship they had. The point is you're saying who's going to make your medical decisions for you.

So, rather than saying up or down on two, three, four, or however many, and certainly, for child rearing, if we're looking at the wellbeing of children, and whether decisions their parents are making are harming them or not, then that's what the criteria is, and it doesn't have anything to do with how many of the people there are.

So I think, by starting with whatever law we have that now privileges marriages and asking why and then seeing what we're going to do with that, I think that is a way to get at what you're asking. Does that work?

**Audience:** The scarcity issue. Because most of this is focused on children, the scarcity issue becomes a problem, right? Because the example that you used there, there was $100,000 if there were three or four kids and different—I mean, it gets down to little bits. Like Social Security, you get 750 if you have one child, or if you have 10 kids, they each get $75. So is it really designed, at this point, to..?

**Nancy:** And those are all conversations we should be having and making some decisions about. I just don't want the bright line to be between marriage and everybody else. I think that's the wrong line. There are still questions about allocation of resources. I mean, I talk about the Salt Lake City model, which I'm kind of fond of, but obviously the answer to the health-care problem is universal health care that doesn't have anything to do with relationship to somebody in a good enough job to have health insurance.

So, even my own plan is just a stepping stone till we get what's ideal. And if we were starting from scratch with Social Security, we might pick a universal benefit for everybody. Or the European model is usually a universal benefit, but then your employment might get you a bump
up above what everybody in the country gets just for being an old human being. There's benefits based on old age.

So there are different models for how you might do that that talk about restructuring our relationship between the government and the individual. And I'd do that a little bit, but not much.

Yeah? OK.

**Audience:** I wondered if you've looked at the Native American communities at all. One of the things that strikes me as you're talking about these issues is, a lot of times, the family unit in Native American families is not necessarily parents and their children, but aunts and uncles. And this is certainly true in other cultures as well. It appears that whatever and when those systems come in conflict with the sets of rules we have that value or privilege marriage, there are tremendous conflicts.

**Nancy:** Yeah. And we've made some progress in that area, but we need to be ever-vigilant. Exactly.


**Audience:** Two questions.

[laughter]

**Audience:** One being, what do we do with marriage? Well, what do we do with it?

[laughter]

**Nancy:** Good question.

**Audience:** And second of all, practically, how do we get to where you're suggesting we go when, besides family law, the index of marriage is so intertwined in so many areas of law--property, taxation, criminal law--just across the board, there are references to marriage. So, in a practical sense, how do we get to that? And that then comes back to my question: do we just dispense with it?

**Nancy:** Well, I'll do the second one first. The things that matter most to people; I mean, I know about the 1,100 and whatever it's up to mentions in federal law and the many in state law. But there are certain basic things that matter most to people, and I actually think, in the book, I was able to cover almost all of them, if not all of them, and say how we could do each of those things differently. That's why the book really does have a road map.

And the exciting thing about it was finding these examples. I mean, when I found out that Harvey Milk's surviving partner got death benefits, I was speechless. I mean, I don't know about you guys who might have been alive then and might remember it, but in 1978, his surviving partner collected, I mean, that's a weekly or biweekly check for the rest of your life to
compensate for the loss of an economic provider. We're talking 1978, I mean, this is like the historic icon in the gay community. It completely blew me away.

So, we know how to do these things, even if it's only one state that's done it, or these isolated things like the definition in federal law about who you can take leave to care for. So, I feel like I've put together an agenda that if this were the law, it would actually solve the lion's share of the practical problems that same-sex couples say drive them to seek marriage. So I actually think it can be done.

The first question, I'll tell you what my answer is, but there could be a lot of discussion about this. So it turns out, I figured out in all my sort of looking around and research and paying attention to what people were saying, is that marriage seems to matter a lot to many people, and given that that's true, I don't know whether this is just me being practical or whether it's actually humility on my part that I just decided I wasn't going to tell people that they shouldn't want what they wanted.

And so, I leave marriage as an existing status in the law, although I do recommend that the name of it be changed to civil partnership as a legal matter. Many states have changed the name of divorce to dissolution. There's nothing in the statutes or the documents that refer to divorce. I'm sure people in those states still say they're divorced. I'm fine if people want to say that they're married, even though...

And I'm talking for everybody. I'm not talking for same-sex couples, I'm talking for everybody. I think the technical name should be changed to civil partnership, that it's more reflective of what that couple-relationship really is, and if we can call it a dissolution on the backside, which is also partnership language, let's just call it a partnership on the front side. And then people can say they're married, and that's fine with me.

I just don't want it to be the bright line in terms of the legal treatment, and so, you know, it takes me back to thinking about Canada, where living together for a certain period of time gets you almost all of what people get when they marry. So in Canada, when same-sex or different-sex couples choose to marry, they're choosing to do something that means something to them, for whatever reason.

And they litigated the basis for marriage in Canada on the basis of equality and love. They argued for equality, and they had their plaintiffs say, I want to show this way, I want to express in this way my love for my partner. They couldn't litigate those cases on survivors' benefits because they already got them. They couldn't litigate marriage in Canada based on the parade of disadvantages that drive the litigation here, because they didn't exist anymore, because that was taken care of for everybody outside of marriage.

So, if we can do that, we need equality for same-sex couples. I'd like to see it called civil partnership and let people say they're married, and let it mean what it means to them. And clearly, for some people, it means a lot.

I mean, the people who've married in Massachusetts, the people who married in places
momentarily when it was legal and then had them annulled, I've read what they say about it, and many of them say it was transformative in their lives, and I actually do credit that as an emotional matter. I just don't think it should have any legal significance, basically.

OK, I know you are the last question. You.

Audience: OK. As a student, I just want to check in with you because I've got my enormous [indecipherable] here.

Nancy: OK.

Audience: So, I'm totally with you on marriage being the wrong line, but the default rules have value, and you have to recognize that. I mean, we do need default things. You recognized it in terms of the advance directive context.

So, what I'm hearing from you is default rules should track the purpose for which the benefit was created. It seems to me like you're going back and divining the purpose historically by looking at sort of whether it's meant to be, you said, a gift, or replace an economic supporter or whatever. And then, in the statutes themselves, what we have is language where the plain language is effectuating a different default rule that's a very imperfect proxy for the purpose that we think it sought to effectuate.

So, in summary, everything I'm hearing from you is about amending the statutes. I don't hear any kind of judicial doctrine to institute a new canon on how we look at the statutes. I'm hearing this as legislative.

Nancy: It is almost all a legislative agenda, that is exactly right, but I actually think it's a doable legislative agenda.

I want to say another thing, though, about what you said about default rules. So, default rules are most necessary when people could pick for themselves but don't and the law has to do something. And there was a moment in time, last year, with you guys here, when I was optimistic that the first domestic partnership law that you guys passed, and I write about Washington quite a bit in here, and this is actually in the last chapter of the book.

So, you guys lose marriage, you pass a statute that, except for Washington state government employees, all it did was give the various medical care decision-making rights and intestate succession.

I have a proposal in here that creates exactly that kind of registry for any two people who want to register, and doesn't call it anything related to marriage or sexual relationships at all. I actually call it a "designated family relationship registry" because if you think about those laws, intestate succession and all the medical decision-making stuff, what the laws are saying is you start out with a family of origin, blood or adoption, you didn't choose those people. The person you marry is the person you've chosen. That person is always at the top of the list.
I want a default mechanism that easily, for efficiency basis, lets two people put each other on the top of their list, if they want to, without any connotation that would go with marriage or anything. It wouldn't require living together, it wouldn't require anything except basically we're choosing each other as family members, and we're going to let you know in a way that is unassailable and unchallengeable, so we're going to sign up the same way people, when they marry, sign up.

This is the person I've chosen, this is my person. All those people who don't have a person they would marry, if they could, some of them are going to have someone they would pick as a family member. And I'd like there to be a default rule that made that plausible.

So, I was kind of hopeful that maybe that could happen here, but instead you guys just added a bunch of other rights to it that just make it look more like civil unions and domestic partnerships in other places as sort of a marriage substitute. So if you're going to get on the valuing all families track, you're going to have to...

**Audience:** They added old people.

[laughter]

**Nancy:** Well, what do you think about that?

**Audience:** What was the question?

**Nancy:** Adding people who are, different... But those are still for couples. The idea is still that this is like your primary relationship person, and that it is a sexually-based intimacy.

I think a lot of people don't understand the law, and that's why they do that. They think you could lose your Social Security benefits if you remarry, but that only happens sometimes, so I still haven't ever had a good explanation. If somebody has it here, come tell me afterwards.

I mean, I know you may lose some things in a will if your prior spouse died, but you actually do get to remarry if you're over 62, and without losing your deceased spouse's Social Security. If you have an answer to that, Lisa, you can tell me later. It's just been a puzzle to me, and there's never been a legislative history that I could quite get about that.

But I think that's the theory, and maybe it's opening the door to let different-sex couples of all ages into a domestic partnership regime, but whatever you call it, it's still an on/off switch, and that's what I want to get us away from.

OK, you want me to stop. Thank you guys.

[applause]