

Domestic Partnership Before Same-Sex Marriage

Author : Carlos Ball

Date : November 13, 2013

Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Impact on Marriage*, 102 **Cal. L. Rev.** (forthcoming 2014), available at [SSRN](#).

The left critique of the marriage equality movement has raised important questions about the privileging of marriage in our society and whether the push for same-sex marriage reinforces the second-class status of nonmarital (and nonintimate) relationships. This critique is invaluable because it presses us to focus on what should be the ultimate objective behind the current push to gain marital rights for same-sex couples: The end goal should be to encourage society and the state to recognize, support, and value many different types of familial and personal relationships. I view same-sex marriage not as an end in-and-of-itself, but as a means for having broader (and more important) debates over the role of gender, biology, and marital status in legally recognizing and supporting relationships between adults and between adults and children.

There is much to the left critique of same-sex marriage, therefore, that I value and respect. However, there is one aspect of that critique, related to the push for the legal recognition of relationships before the age of same-sex marriage, about which I have always been skeptical. Some critics have claimed that at the time marriage equality became the LGBT rights movement's most important goal starting around the mid-1990s, there were well-organized efforts under way in different parts of the country aimed at reducing the importance of marriage, primarily by demanding the enactment of domestic partnership laws. These critics have claimed that if it had not been for the marriage equality movement, the early efforts to promote alternatives to marriage would have borne fruit, to the point where marriage today would be less central to the distribution of rights and benefits.

In his forthcoming article, Professor [Douglas NeJaime](#) looks closely at the relationship-recognition advocacy in California during the 1980s and 1990s. Through interviews with some of the participants, reviews of primary sources (including a plethora of task force reports), and analyses of contemporaneous media stories, NeJaime provides us with a rich account of the arguments made on behalf of the recognition of same-sex relationships before the issue of marriage exploded onto the national scene. NeJaime's findings complicate the simple dichotomy between pre-marriage relationship-recognition advocacy and marriage equality advocacy. NeJaime shows how LGBT rights activists in California, prior to the mid-1990s, consistently used the government's failure to recognize same-sex relationships as marital as a main justification for demanding that same-sex couples be given the opportunity to register as domestic partners. NeJaime also shows how activists repeatedly analogized between committed same-sex relationships and marital heterosexual ones.

The evidence uncovered by NeJaime shows that "LGBT work outside of marriage in significant ways built, rather than opposed, the case for marriage that we see today." (P. 5.) Advocates used marriage as the reference point to try to gain acceptance for domestic partnership regimes: "To gain support for nonmarital rights and benefits, advocates cast same-sex relationships as marriage-like and built domestic partnership in reference to marriage, thus reinscribing—rather than resisting—the centrality of marriage." (P. 3.)

The article's contribution, however, does not end there. NeJaime also astutely notes that the historical record in California shows how domestic partnership advocacy promoted an evolving understanding of marriage, one that was less "rooted in gender complementarity, procreative sex, and biological parenting." (P. 84.) This alternative view of marriage emphasized the romantic affiliation, emotional commitment, and economic interdependence of spouses. By defending this alternative understanding of marriage, domestic partnership advocates not only paved the way for same-

sex marriage, but also contributed to modifying the contours of marriage more generally.

None of this undermines the normative component of the criticisms raised by many feminists and queer theorists of the institution of marriage and of the ways in which the LGBT rights movement has pushed for the recognition of same-sex relationships as marital. But it is important to get our history right. As NeJaime shows, there was no clear divide between the advocacy that preceded the hard push for same-sex marriage and what came afterwards. This is a story of continuity rather than of paradigm shifts.

It is unrealistic, given marriage's hegemony in matters related to relationship recognition, that the institution will go quietly into the night. Nonetheless, it seems reasonable to believe that an important first step in reducing that hegemony is to try to make the institution less hierarchical and less gender-centric. These inclusionary changes to the contours of marriage will hopefully lead to additional explorations of how to further expand state recognition and support for nonmarital and nonintimate relationships. It behooves those who share this goal not to look back with rose-tinted glasses to the days before the push for same-sex marriage supposedly derailed the quest for nonmarital forms of recognition. Instead, we need to develop smart and focused advocacy strategies that will build on the successes of the marriage equality movement to gain legal recognition and protection for a broader array of relationships, including nonmarital and nonintimate ones.

Cite as: Carlos Ball, *Domestic Partnership Before Same-Sex Marriage*, JOTWELL (November 13, 2013) (reviewing Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Impact on Marriage*, 102 *Cal. L. Rev.* (forthcoming 2014), available at SSRN), https://family.jotwell.com/domestic_partnership_before_same-sex_marriage/.