

# AN ANALYSIS OF AND ALTERNATIVE TO THE RADICAL FEMINIST POSITION ON THE INSTITUTION OF MARRIAGE

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## I. INTRODUCTION

“A husband is . . . an elective obligation.”<sup>1</sup> This is the position many feminists—liberal, Marxist or socialist, and other classic feminists—take on the institution of marriage. Yet, to a radical feminist, a husband is not an option; rather women are coerced into the institution of marriage as a result of their gender inequality and male domination (i.e. women do not have a choice). The notion propounded by these radical feminists is that women cannot consent to marriage, as they may “perceive no alternatives.”<sup>2</sup> This group of feminists advocate for the complete eradication of marriage because of the inherent danger and inequality perpetuated by the institution. Further, radical feminists argue that the institution of marriage was set up as a method to further subordinate women.<sup>3</sup> No single anthropologist, sociologist, or other academic scholar has identified the origin of marriage, but there are many theories as to its beginning and history including religious purposes, as a method to civilize men, or in accord with the radical feminist view, a mechanism to oppress women.

Radical feminists place great emphasis on the patriarchal history of marriage and on the historical dominance exercised by men over the women they possessed as wives.<sup>4</sup> This “origin” identified by radical feminists is supposedly the root of the flaws in the institution of marriage. While that argument appears to be a reason against sustaining the institution, arguments presented by these feminists are inherently flawed. This paper will address these defects in the radical feminist position on the institution.

Section II of this paper will explain the historical background of the institution of marriage by identifying three periods so that one can understand the context in which feminists argue the institution is patriarchal in nature. Section III defines “radical feminism” to distinguish it from liberal feminism, and describes

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<sup>1</sup> Annette C. Baier, *Whom Can Women Trust?*, in FEMINIST ETHICS 233, 239 (Claudia Card ed., 1991) (quoting a “successful woman gynecologist”).

<sup>2</sup> D. Kelly Weisberg, *Introduction*, in APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN’S LIVES: SEX, VIOLENCE, WORK AND REPRODUCTION 5, 10 (D. Kelly Weisberg ed., 1996) [hereinafter SEX, VIOLENCE, WORK & REPRODUCTION].

<sup>3</sup> *Id.*

<sup>4</sup> See generally Karl M. Rodman, *A Brief History of Marriage and Divorce*, 23 OR. L. REV. 249 (1944) (providing an overview of the historically patriarchal nature of marriage).

the various reasons these feminists do not participate in patriarchal institutions. Section IV details the main points argued by radical feminists against marriage, focusing in large part upon radical feminist Claudia Card's essay entitled *Against Marriage and Motherhood*.<sup>5</sup> Using Card's essay, in Section V this paper will illustrate that the underlying argument for radical feminists' positions against the institution of marriage is *not* that marriage maintains the historical patriarchal society, but that human nature (or an interpretation of human nature) alters it into an undesirable institution—the Marital Trap. This paper will discuss the inherent flaws in the radical feminist positions against marriage and their arguments for the complete abolition of the institution. In the final section, this paper will introduce the author's proposed alteration of the institution of marriage, to prevent its complete obliteration, while also addressing the concerns presented by radical feminists.

Central to the argument presented in this paper is that society must transcend the historical patriarchal notion of marriage and transform it into a partnership—not between a man and a woman (with one being dominant)—but between two people in a loving, committed relationship.<sup>6</sup> In other words, marriage should not be treated as it has traditionally, but it must be changed within society (which will necessarily entail altering society's view of it) into an equal partnership, beyond a relationship perceived, established, or sustained as an institution dominated by one gender to the oppression of another.

## II. HISTORY OF MARRIAGE AS AN INSTITUTION

“There is no doubt that *traditional* marriage, as it existed in this country before the development of the women's movement, was incompatible with the achievement of freedom, equality and individuality for women.”<sup>7</sup> Married women were treated as property of the husband, thereby perpetuating the notion that marriage was a “state of slavery because of the complete lack of economic and political rights for women.”<sup>8</sup> Scholars have not been able to identify when, where, how, or why marriage as an institution came about, but several have identified the historical nature of the institution and its growth. One scholar has identified three periods of marriage, primarily covering European and Asian cultures that predate the founding of the United States: (1) “ancient or prechurch customs”; (2) “church controlled edict or law”; and (3) “civil procedure.”<sup>9</sup> The time periods for the three

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<sup>5</sup> Claudia Card, *Against Marriage and Motherhood*, 11 HYPATIA 3, 1–23 (1996) [hereinafter Card, *Against Marriage*].

<sup>6</sup> This will inevitably entail alterations of traditional gender roles and society's perception of those roles, which this paper will address generally.

<sup>7</sup> Marjorie Weinzweig, *Should a Feminist Choose a Marriage-Like Relationship?*, 1 HYPATIA 141 (1986).

<sup>8</sup> *Id.* at 142.

<sup>9</sup> Rodman, *supra* note 4, at 249.

divisions are the beginning of human civilization to 305 A.D., 305 A.D. to 1534, and 1534 to the present, respectively.<sup>10</sup>

From the beginning of the first period, the husband had complete control over his family and could thereby dispose of his wife and children by any means, without permission. During the first and second periods a man had the power and authority to bequeath his wife and his children by will, sell his daughters, and offer his children as hostages.<sup>11</sup> The man (also the head of the family) had all the power over his family. In addition to having a wife, in many cultures a man had women who served as concubines to bear his children.<sup>12</sup> Based on these historical times, radical feminists view the institution of marriage as a power play in which the male dominated the female and further subordinated women. According to these radical feminists, that historical nature of marriage is preserved in the present social institution; in other words, women are still the dominated unequal person in the marriage.<sup>13</sup>

In times gone by, women were property possessed and transferred from their father to their husband, who ultimately possessed the woman and any property she brought with her.<sup>14</sup> The woman was treated as if she were the husband's daughter because she had no authority over her own self or the family, as he did. Moreover, a woman completely lost her identity once wed.<sup>15</sup> During the first historical period, a woman was only allowed to divorce her husband for heinous acts such as murder, but could not divorce him for lesser offenses; whereas the husband could divorce his wife for any offense.<sup>16</sup> In essence, women were trapped into marriage. If a woman decided to divorce her husband for adultery, she would be deported (sent into exile) and lose all her dowry.<sup>17</sup>

The religious period (second period) brought about the establishment of marriage as a religious institution to legitimize intimate relationships in the eyes of a superior being. Couples were required to exchange their vows according to canon law and in the presence of a priest; otherwise the marriage was not considered valid.<sup>18</sup> This period also increased the barriers to a spouse's ability to obtain a divorce. Marriage was considered a life-long commitment terminable only upon the death of either spouse.<sup>19</sup> To date, marriage is perceived as primarily religious,

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<sup>10</sup> *Id.*

<sup>11</sup> This power was granted from his status as a man and the authority sanctioned by society or the government. *See generally* Rodman *supra* note 4 (discussing the male's role in family and society throughout the three identified historical periods).

<sup>12</sup> Valerie Witt, Comment, *A Surrogate Contract and its Enforceability under Ohio Law*, 12 U. DAYTON L. REV. 575, 576 (1987).

<sup>13</sup> *See generally* Weisberg, *supra* note 2 (presenting radical feminist viewpoint).

<sup>14</sup> *See id.* at 256–57.

<sup>15</sup> Julie Ewing, *Public Vows: A History of Marriage and the Nation*, 4 J.L. & FAM. STUD. 199, 200 (2002) (book review).

<sup>16</sup> *See* Rodman, *supra* note 4, at 258.

<sup>17</sup> *Id.*

<sup>18</sup> Rebecca Probert, *The Impact of the Marriage Act of 1753: Was it Really the Most Cruel Law for the Fair Sex?*, 38 EIGHTEENTH-CENTURY STUD. 247, 247 (2005).

<sup>19</sup> *See* Rodman, *supra* note 4, at 260–61 (identifying that marriage, under canon law, was indissoluble, though limited divorces were permitted, but without the right of remarriage).

even though it was traditionally contractual in nature—where the husband would receive a woman, along with a dowry or other property—as his wife.

Marriage became a statutory institution in the 1700s (the third period). The first identified statute that purportedly codified the oppression of women through marriage was England's Marriage Act of 1753.<sup>20</sup> The Marriage Act had increasing import on the establishment of the institution in the United States, since most American laws were based on English law, or developed therefrom.<sup>21</sup> The Marriage Act introduced more formal requirements for memorializing a marriage union, such as a license and at least two witnesses to the ceremony; informal standards not meeting such requisites were considered invalid.<sup>22</sup> From that time to the present, marriage has become a social institution regulated by government. The United States continues to regulate marriage by codifying requirements for valid marriages. Within the past forty years, however, the United States Supreme Court has struck down several laws that interfered with the fundamental privacy of the marital relationship, evidencing a trend towards decreasing government involvement in the institution of marriage so as to keep it private.<sup>23</sup> Nevertheless, marriage remains a public institution subject to statutory regulation, such as requiring licenses and court-regulated dissolutions.<sup>24</sup>

After the Civil War in the United States (post-1860s), marriage became a matter of much debate since it involved male-dominance similar to slavery, which was abolished.<sup>25</sup> Many feared that the traditional roles maintained within the marriage would also be eliminated with the creation of the thirteenth amendment, effectively making a wife equal to her husband.<sup>26</sup> Rather than drafting the thirteenth amendment to make “all persons equal before the law,” Congress used words that applied solely in the context of slavery and not in any other male-dominated institution where one person was considered inferior to another, so that the traditional marital institution would be sustained.<sup>27</sup>

Following the women's rights movement, every woman obtained property rights over her own body, mind, and spirit, as well as other intangible and tangible assets.<sup>28</sup> Although, the origin of marriage as an institution is unknown, what remains clear, and is a matter of extreme concern for feminists, is that women were

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<sup>20</sup> See Probert, *supra* note 18, at 247 (discussing the creation of the Marriage Act of 1753, the requirements it set out and the impact it had on the marital relationship).

<sup>21</sup> This is clear from the codification of family law which set out the requirements for marriage and the dissolution thereof. See Martha Albertson Fineman, *The Meaning of Marriage*, in MARRIAGE PROPOSALS 29, 46–50 (Anita Bernstein ed., 2006). In a section entitled “Marriage in Context” the author discusses the evolution of marriage from English law in the United States.

<sup>22</sup> Probert, *supra* note 18, at 248.

<sup>23</sup> *Id.*; see generally *Lawrence v. Texas*, 539 U.S. 558 (2003) (discussing the fundamental privacy in familial relationships which infers that married couples hold a paramount liberty interest under which the “zones of privacy” are protected); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

<sup>24</sup> Ewing, *supra* note 15, at 199.

<sup>25</sup> *Id.* at 204.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Katharine T. Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. 475, 484 (1999).

treated as subordinates or inferior to the husband—hence the phrase “I now pronounce you *man* and wife.”

The historical nature of the institution has left a long-lasting mark that many feminists believe is the defect in marriage. The battle, as will be shown, is over the traditional roles indoctrinated in the institution and perpetuated throughout society by the alleged inequality between genders. Nonetheless, over the past four decades the institution of marriage has seen great statutory strides. Particularly in California, the Family Code sections governing marriage contain gender-neutral language, evidencing a movement away from gender-identified roles, and the legislature has also developed several code sections to grant both spouses equal rights within the marriage and upon divorce.<sup>29</sup> In essence, the modern age has shown a trend toward equalizing women and men.

### III. RADICAL FEMINISM<sup>30</sup>

“Feminist ethics is born in women’s refusals to endure with grace the arrogance, indifference, hostility, and damage of oppressively sexist environments.”<sup>31</sup> Radical feminists are women, either homosexual or heterosexual, who do not engage in practices such as marriage, prostitution, motherhood, or the “sexual division of wage” because these are seen as oppressive environments that lead to the subordination of women.<sup>32</sup> In fact, these women are strongly opposed to all institutions that have been, or are, patriarchal in nature.<sup>33</sup>

The key to understanding radical feminists’ opposition is that these institutions foster the belief that women are intrinsically unequal; they are the “definitionally . . . disempowered group—and [these feminists] urge the legal system to eradicate that disempowerment” to make women equal.<sup>34</sup> Liberal feminists, on the other hand, believe that men and women are equal and the “legal system should respect that fundamental, empirical equality.”<sup>35</sup> Liberal feminists urge formal equality whilst radical feminists completely reject such equality

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<sup>29</sup> See, e.g., CAL. FAM. CODE §1100 (West 2006) (establishing fiduciary duties on both spouses, so if one spouse adversely affects the rights of the other spouse in the community property, that first spouse is liable for the breach of his or her fiduciary duty to the other spouse).

<sup>30</sup> Also referred to as “Dominance Feminism.” See, e.g., Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 22 (1999).

<sup>31</sup> Claudia Card, *The Feistiness of Feminism*, in FEMINIST ETHICS, *supra* note 1, at 3, 4 [hereinafter Card, *Feistiness of Feminism*].

<sup>32</sup> Ann Ferguson, *Prostitution as a Morally Risky Practice from the Point of View of Feminist Radical Pragmatism*, in DARING TO BE GOOD: ESSAYS IN FEMINIST ETHICO-POLITICS 199, 205 (Bat-Ami Bar On & Ann Ferguson eds., 1998).

<sup>33</sup> Male-dominance is the core of patriarchy. See Becker, *supra* note 30, at 35–40 (identifying and discussing the meaning and significance of a patriarchy, for which male-dominance and control are the driving force of a patriarchy).

<sup>34</sup> Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, in SEX, VIOLENCE, WORK & REPRODUCTION, *supra* note 2, at 162, 168.

<sup>35</sup> *Id.*; see also Elizabeth Fox-Genovese, *Feminism, Children and the Family*, 18 HARV. J.L. & PUB. POL’Y 503, 503 (1995) (identifying that feminists struggle between seeking substantive equality or equality of results (or equality of burdens)).

because it only works on those occasions when women are similarly situated with men.<sup>36</sup> To radical feminists, women are submissive to two sovereigns: the state and the “superior power” of men.<sup>37</sup> The institution of marriage is considered to perpetuate the inequality and disempowerment of women. The subordination of and domination over women by men is the core of a patriarchal institution.<sup>38</sup>

According to these feminists, the basis of women’s inherent inequality is found in their sexuality. Sexuality is “the mechanism of women’s oppression.”<sup>39</sup> In other words, women are objectified through their sexuality which thereby causes further oppression. Radical feminists proclaim that women are objectified through their sexuality by the male-dominated and centered world, which must be changed. One radical feminist, Carole Pateman, declares that women are not thought of as parties to contracts, or individuals capable of making them; instead they are the subjects of contracts.<sup>40</sup> Pateman explains that women are controlled by men through contracts because men “transform their natural right over women into the security of civil patriarchal right.”<sup>41</sup> For this reason, women cannot possibly give their consent to contractual relations with men because of their lack of individuality and dominance by men.

Another significant point urged by radical feminists, is that women participate in their own oppression through exploiting sexuality because they perceive their own desires as equivalent to those of the men who objectify them. Consequently, women are vulnerable to male violence since they depend on the protection of men. As long as women believe they are fulfilling their own desires, they will not, cannot, and do not recognize their own subordination.<sup>42</sup> Accordingly, radical

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<sup>36</sup> See generally CATHERINE MACKINNON, FEMINISM UNMODIFIED DISCOURSES ON LIFE AND LAW 33–45 (1987) (arguing that the legal system should recognize the differences between men and women to rectify those situations where women are unequal); see also Becker, *supra* note 30, at 36 (discussing MacKinnon’s theories on the inequality of women and her argument that women’s differences disadvantage women and advantage men).

<sup>37</sup> West, *supra* note 34, at 168.

<sup>38</sup> *Contra* Becker, *supra* note 30, at 24 (citing ALLAN G. JOHNSON, THE GENDER KNOT: UNRAVELING OUR PATRIARCHAL LEGACY 28–29 (1997)) (stating that “Patriarchal culture values ‘control and domination’ most.” *Id.* Johnson concludes that the driving force behind “[p]atriarchy as a system . . . is a dynamic relationship between control and fear.” In other words, men fear other men’s ability to take their control and harm them. *Id.* Thus, Johnson believes that the oppression of women is *not* the point of patriarchy. *See id.*).

<sup>39</sup> Jody Freeman, *The Feminist Debate over Prostitution Reform: Prostitutes’ Rights Groups, Radical Feminists, and the (Im)possibility of Consent*, in SEX, VIOLENCE, WORK & REPRODUCTION, *supra* note 2, at 237, 242. The author compares and contrasts radical and liberal feminism in general, then as it relates to prostitution. The section goes into depth about the general radical feminist theory on women’s subordination and inability to contract because women are objectified and lack freedom. These general theories apply with equal force to the institution of marriage, because it involves a social contractual relation between a man and a woman.

<sup>40</sup> CAROLE PATEMAN, THE SEXUAL CONTRACT 6 (1988); see also Freeman, *supra* note 39, at 242 (discussing Pateman’s theory on a woman’s inability to consent to sexual contracts with men, such as prostitution, because they are never seen as individuals).

<sup>41</sup> See Freeman, *supra* note 39, at 242.

<sup>42</sup> *Id.* at 244 (citing CATHERINE MACKINNON, FEMINISM UNMODIFIED DISCOURSES ON LIFE AND LAW (1987)). MacKinnon’s theories have been widely criticized by feminists, including Freeman, because her theory “distrusts women and discounts the possibility of consensual submission.” *Id.*

feminists promote a system that recognizes the subordination of women and corrects it, since “a social system that is male-identified, male controlled, male-centered will inevitably value masculinity and masculine traits over femininity and feminine traits. In such a system, men (and women) will be encouraged to regard women as beings suited to fulfill male needs.”<sup>43</sup>

Thus, radical feminists urge for the complete abolition of social institutions that have historically oppressed women or continue to do so by not recognizing women’s equality. Radical feminists further urge for a system that is adjusted to equalize men and women.

#### IV. THE RADICAL FEMINIST POSITION ON THE INSTITUTION OF MARRIAGE

According to one radical feminist, the institution of marriage “in the history of modern patriarchies [has] been mandatory and oppressive to women and . . . criticized by feminists on those grounds.”<sup>44</sup> Radical feminists view the institution of family as “dangerous to women,” because it results in the loss of the woman’s identity, subordination, and as stated, oppression.<sup>45</sup> The most common phrase used to describe the institution is “patriarchal” (dominated by men). Pursuant to radical feminist beliefs, marriage is the “central institution of women’s oppression.”<sup>46</sup> The act of marrying and being married is considered immoral by these feminists because it is a social institution “which has never admitted to the equality of women.”<sup>47</sup>

The most puzzling aspect of the arguments presented by radical feminists urging for the complete elimination of marriage, is the focus on the historically patriarchal nature of the institution.<sup>48</sup> Modernly, women have many more rights than were available prior to the marriage reform laws of the 1960s to the present. Women now have the availability of no-fault divorce in jurisdictions like California, and the ability to share equally in property acquired during the

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Although, the criticism appears to be *the point* of MacKinnon’s argument—that women cannot possibly consent to such relations with men because of the superior dominance men maintain through objectifying the woman’s sexuality and placing a high value on said sexuality as it pleases the man’s desire. *Id.* In other words, a woman’s worth is based only on her ability to exploit her sexuality, which is true in the American culture where weight, beauty and sex appeal are constantly valued over intellect.

<sup>43</sup> Becker, *supra* note 30, at 25.

<sup>44</sup> Card, *supra* note 5, at 4.

<sup>45</sup> Victoria Davion, *Integrity and Radical Change*, in *FEMINIST ETHICS*, *supra* note 1, at 180, 182.

<sup>46</sup> Bartlett, *supra* note 28, at 487 (quoting Ellen DuBois, *The Radicalism of the Woman Suffrage Movement: Notes Toward the Reconstruction of the Nineteenth-Century Feminism*, 3 *FEMINIST STUD.* 63, 70 (1975)).

<sup>47</sup> Card, *Fiestiness of Feminism*, *supra* note 31, at 4 (quoting a letter written to *The Ladder*, a lesbian magazine, in 1957 by Lorraine Hansberry, later a famous playwright).

<sup>48</sup> See, e.g., Ferguson, *supra* note 32, at 205 (arguing that heterosexual feminists who engage in marriage are involved in “risky practices” because they are attempting to change the patriarchal institution, but instead lose their identity and place the husband above all other priorities, such as her career).

marriage.<sup>49</sup> It would appear that women who marry do so by choice. However, radical feminists would argue that a woman's subordination and objectification renders them incapable of consenting to participation in any institution that is traditionally male-dominated and male-centered.

Radical feminists proclaim that male-dominance is the key flaw of the institution of marriage; and thus, participating in the marriage is considered a "risky practice."<sup>50</sup> Yet, they do not offer reasons why the same dominance does not endanger women in unmarried relationships, nor do they emphasize the growing changes in marriage laws and societal views of traditional gender roles in domestic family situations. This aspect of the radical feminist perception of marriage as a "risky practice" is further explored in Claudia Card's piece entitled *Against Marriage and Motherhood*.<sup>51</sup>

Card identifies four interconnected problems with marriage:

- (1) Employers, government, and others make benefits available only to legally married couples;
- (2) The consequences of divorce are so difficult that people who should divorce, do not;
- (3) Marriage is monogamous, requiring only one spouse at a time; and
- (4) Lack of privacy and protection because married couples have legal rights of access to their partner's person, property and lives that makes it all but impossible for a spouse to defend herself (or himself).<sup>52</sup>

Based on the above-stated problems, Card calls for a complete abolition of marriage.<sup>53</sup> She believes that the institution is "so deeply flawed that [it is] unworthy of emulation or reproduction."<sup>54</sup> To Card, the first three problems may be remedied, but the last she doubts is fixable.<sup>55</sup> Even if the first are remedied, she believes that the primary incentive to become married will be removed, thereby resulting in fewer marital unions.<sup>56</sup>

With regard to the first problem, Card assumes that these economic benefits given to married couples push people to marry because married couples receive larger pay for the same labor as unmarried persons since they attain benefits for

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<sup>49</sup> See CAL. FAM. CODE § 2550 (West 2006) (stating that community property, in California, is equally divided between married couples upon divorce).

<sup>50</sup> See generally Ferguson, *supra* note 32, at 205.

<sup>51</sup> See generally Card, *supra* note 5, at 3 (Claudia Card is considered a radical feminist for her views/positions on social institutions).

<sup>52</sup> See *id.* at 7–8.

<sup>53</sup> See *id.* at 2.

<sup>54</sup> *Id.* (arguing that gay and lesbians should not fight for the right to marry because of the problems she identified).

<sup>55</sup> See *id.* at 7.

<sup>56</sup> See *id.* 7.

their spouse ancillary to their salary.<sup>57</sup> She concludes that unmarried persons “who do not have independent access to an income often find themselves economically pressured into marrying.”<sup>58</sup>

Due to the second problem and the economic motives resulting therefrom, Card believes that married couples “preserve emotionally disastrous unions.”<sup>59</sup> She believes that this problem follows from the first problem, in that individuals who receive health benefits through their spouse (due to that spouse’s employment) have an economic motive to sue the working spouse for support or a share of those assets.<sup>60</sup> Her line of thinking does not follow with the argument that married couples “preserve emotionally disastrous unions,”<sup>61</sup> rather it appears that the non-working spouse’s right to sue the working spouse for support or assets provides an incentive to divorce and receive the same benefits as if he or she were still married.

As to the third problem, monogamy, Card states it is “seriously troublesome for many lesbians.”<sup>62</sup> Even though not all feminists are lesbians and the subject of marriage is not important only to lesbians, Card focuses her arguments on lesbians, rather than generalizing her arguments to apply to all women. She declares that “many of us [lesbians?] have more than one long-term intimate relationship during the same time period.”<sup>63</sup> In essence, she is arguing that marriage laws should allow for people to have more than one spouse at the same time.

She assumes the fourth problem (the lack of protection because married couples have legal rights of access to their partner’s person, property, and lives), leads to and provides a motive to violence that is “made worse by the second problem,” (consequences of divorce).<sup>64</sup> She proceeds to state that not “all marriages are violent,” but that marriage “places obstacles in the way of protecting spouses” who need protection, because the law protects husbands and preserves marriages.<sup>65</sup> Card asserts that “spousal murder accounts for a substantial number of murders each year,” although she does not provide any support for this conclusion.<sup>66</sup> This argument conforms to the views of radical feminists, who identify the institution as within the private realm of society, beyond the reach of the law, which thereby enables and affirms men’s ability to abuse and retain power over women.<sup>67</sup>

All four of these “problems” address human behavior, societal attitudes and Card’s perception of human nature and the troubles derived therefrom. The first

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<sup>57</sup> *See id.* at 8.

<sup>58</sup> *See id.*

<sup>59</sup> *See id.*

<sup>60</sup> *See id.*

<sup>61</sup> *See id.*

<sup>62</sup> *See id.*

<sup>63</sup> *See id.*

<sup>64</sup> *See id.*

<sup>65</sup> *See id.*

<sup>66</sup> *Id.* at 8.

<sup>67</sup> *See* Bartlett, *supra* note 28, at 495 (discussing the United States’ recognition of domestic family violence and efforts to curtail incidents through feminist concerns with a woman’s individual freedom and equality).

problem has nothing to do with the institution of marriage itself, but rather the societal views, government policies, and employer conditions to receive compensation benefits that demand marriage for the acquisition of particular benefits, such as medical insurance. Card is focusing on the human actors within the marital relationship by placing the blame for their conduct on the institution, rather than the behavioral defects of the individuals. Furthermore, Card concentrates on the nature of society, such that she should be arguing for a change in governmental and employer policies, as well as societal perceptions of legitimized relationships, to allow unmarried partners (personal, not business) to attain benefits, rather than claiming that this is a problem with the institution of marriage.<sup>68</sup>

To fully change the character of marriage, and allow non-traditional<sup>69</sup> families to attain employer benefits or other statutory benefits, would require a complete overhaul of centuries' worth of public beliefs, societal attitudes toward unwed couples, and social institutions beyond marriage. Governmental policies, regulations, and laws are based largely on social views because the elected officials legislate according to popular view (or more likely the louder groups with the most money). Card is claiming that the problem is the institution of marriage, but this particular problem is based on social views that are enforced by the government, due to extensive lobbying.

The second identified problem also is not a problem with marriage as an institution; rather it is a problem with both the family law system—which makes obtaining a divorce difficult—and human desires that drive couples to want to hurt or make the other unhappy. If society could get these married (now divorcing) couples to come together by putting emotions aside and working to equitably dissolve the marriage, then no one would be stuck in a disastrous union. In fact, family law courts in California have attempted to resolve this problem with divorcing spouses through mandatory settlement conferences and mediation to dissolve the union as easily and smoothly as possible.<sup>70</sup> However, the attitudes of the people involved and their unquenchable need to “win” (if winning is at all possible in such situations) remains a major obstacle.<sup>71</sup>

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<sup>68</sup> See *infra* Part V.

<sup>69</sup> The term non-traditional is used to mean that it does not entail historical or “normal” conceptions of particular families or relationships.

<sup>70</sup> See generally CAL. R. CT. R. 3.1380. The judge has discretion to require mandatory settlement conferences between the parties prior to trial to resolve issues. The family courts in California usually require mandatory settlement conferences on all issues, so as to quickly resolve issues amongst the parties.

<sup>71</sup> See, e.g., TIMOTHY G. HORGAN, WINNING YOUR DIVORCE: A MAN'S SURVIVAL GUIDE 6 (1995). The author advises the man to initiate divorce proceedings when it is in his best economic interest, since family support obligations will depend on his present income, so that he should wait until his income is on its “low ebb.” *Id.* He further states that a man “simply cannot afford to abdicate [his] traditional role as the aggressor” because “[t]he economic consequences of divorce are enormous and will demand [his] keenest competitive interests.” *Id.* He continues to recite methods and tactics of how to “win” the battle against the wife from the husband's perspective. One reader of this particular book stated: “I purchased this book to find out the “tactics” my cheating husband would be using in negotiation to grab as much of the goodies as he could.” Law Offices of Timothy J.

In regards to the third problem, it is difficult to accept as true that many lesbians do not desire a monogamous relationship. Monogamy is sought after by heterosexual and lesbian/gay persons alike. It appears that Card puts this problem as her own personal lifestyle choice. Since it is a crime to be married to more than one person at a time, she states that this is a problem with marriage and she would not want to be criminally penalized for making this decision. It is part of being human to desire an exclusive monogamous relationship with another person. Although modernly many people are not faithful to their partner, that problem exists in any relationship, whether married or not.<sup>72</sup> Several studies have been conducted, the conclusions of which declare that women have “a need for a relationship.”<sup>73</sup> Again, this is *not* a problem with marriage, but with individual tastes/preferences.

If a person does not want to be in a monogamous relationship, they do not have to be married or in any sort of exclusive relationship. Although the law does not allow individuals to marry more than one person at a time, it does not necessarily follow that married couples cannot have unmarried relationships with other people. Also, it is likely that if a person who does not desire a monogamous relationship, that person would not marry; but if he or she *does* marry, then there is no legal prohibition against maintaining an open marriage or committing adultery, though it may be frowned upon by society in general. To this point, Card would agree that a married person could certainly be adulterous since she recognized that this is no longer a criminally sanctioned act within the laws of several states.<sup>74</sup> Individuals are still capable of making their own choices and developing relationships according to their individual tastes. As previously stated, there is a recent trend toward keeping marital relationships in the private realm.

In her explanation of the fourth identified problem, Card does not provide support for her argument that right of access to a partner’s information, property, and person motivates an individual to commit acts of violence. Many relationships involve violence because of anger management problems, aggression, or other behavioral problems that develop from within a particular person—not as a result of being married. However, there are ways to get access to a partner, which lead to death, rape, and other violent conduct in relationships between unmarried couples. For instance, in 2004, thirty-three percent of female murder victims were killed by their husbands or *boyfriends*, while among the incidents in which a victim knew his or her killer, thirty percent were murdered by family members and seventy

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Horgan, <http://www.horganlaw.com/winning.htm> (last updated Feb. 22, 2001) (last visited Nov. 29, 2008).

<sup>72</sup> Cf. Lawrence Rosen, *Anthropological Perspectives on the Abolition of Marriage*, in MARRIAGE PROPOSALS 147–50 (Anita Bernstein ed., 2006). The author declares that women have a “need for a relationship [which] often leads them to settle for less than is acceptable to men, who can more readily treat particular relationships like any other ‘inelastic’ good they can do without.” *Id.* (citing, CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP, 233–63 (1994)).

<sup>73</sup> *Id.*

<sup>74</sup> Card, *Against Marriage*, *supra* note 5, at 8.

percent were killed by acquaintances.<sup>75</sup> Simply put, Card cannot justify her argument that the institution of marriage is a death sentence for a woman and therefore it is flawed. In essence, her argument boils down to identifying the inherent evil in people, and, in this situation, men. Card would not be satisfied until all women were lesbians, which would reduce the chance of being in possibly violent situations with purportedly evil men.

According to Card, people marry “because it is a tradition, glorified and romanticized.”<sup>76</sup> She discredits those persons who marry for reasons other than tradition, such as love. It is difficult for Card to perceive this reason for marriage, but there *are* many people who marry for love. Essentially, she is denying that people can marry for any other reason than economic motivations and male-dominance. To the argument that many marriages are created and endure out of love, Card points out that this is analogous to the slave-owner who proclaims that slavery is good because that particular owner does not whip their slave and is emotionally tied to their slaves.<sup>77</sup> This is an outlandish analogy for the modern institution of marriage, because women and men have equal rights in the marriage that did not exist in the pre-1970s era. Her argument is more accurate in the historical context of marriage, identified above, when women were treated as property and had no rights to their own bodies, families, or life. She cannot possibly state that loving marriages are the same as slave-owners bonding with their slaves, because couples now marry after careful consideration and usually out of love for each other. She seems to place more credence on lesbian relationships that are created and maintained in love, than she does to a truly loving married couple or even to a heterosexual unmarried couple. She believes that *only* lesbians and gay men, who form partnerships, can truly love the other because they choose to be together.<sup>78</sup>

Apparently, Card assumes that heterosexual persons cannot form the same partnerships and make the daily choice to stay with their partner. This assumption is, more likely than not, the result of her radical feminist position that the patriarchal nature (male dominance) of society results in oppression to women in all relations with men. What is more interesting is that she thinks people who stay married are *only* married for the economic status, or to avoid the consequences of divorce, rather than a daily decision to remain married. Then, she contradicts herself by proclaiming that half of all marriages end in divorce, and yet she assumes people remain married because of their ulterior economic motives and inability to escape the marriage institution.<sup>79</sup>

Ostensibly, she is stating that to be married automatically indicates an ulterior economic motive. However, would the same not be true in relationships maintained between unmarried couples? Would the ulterior motives in those

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<sup>75</sup> FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., CRIME IN THE UNITED STATES 2004 at 23 (2005); *see also*, Bartlett, *supra* note 28, at 495.

<sup>76</sup> Card, *Against Marriage*, *supra* note 5, at 9.

<sup>77</sup> *Id.* at 11.

<sup>78</sup> *See Id.*

<sup>79</sup> *Id.* at 9.

relationships not also be self-serving, for example, quenching the desire for an intimate association, abandoning loneliness or even sharing emotional situations with the other person?

In describing the problems she identifies with marriage, Card argues that marriage is akin to slavery. She describes the similarities between marriage and slavery, as well as the dissimilarities between marriage and the military.<sup>80</sup> Like slavery, Card states that marriage, because “its impact on our lives is usually greater . . . [it] tends to be coercive, especially [for] women in a misogynist society.”<sup>81</sup> She believes that marriage is a “dangerous trap” in a lifetime commitment, whereas military service is limited.<sup>82</sup> Yet, if one were to ask a person who gets drafted or enlists, they would say that it is a lifetime service and not by choice. She further states that “being killed is a risk in either case.”<sup>83</sup> On this point, it is also true that life involves the risk of being killed anywhere and in any situation—married, single, or separated. Part of living includes the risk of dying, because death is inevitable.

Card declares her position in statements of fact using the occurrence of spousal murder as support that marriage endangers the lives of the spouses and particularly that of the woman. It appears that one would be in more danger of being killed in the military than being married, because of the nature of military. Not every person is at risk of being killed by their partner, contrary to what Card explicitly argues. In fact, one need not be married to be at risk of being a victim of murder or mayhem.<sup>84</sup> Any emotional connection attained in an intimate relationship opens the door to abuse and violence.<sup>85</sup> In one study, the occurrence of rape “committed on dates” among United States college students was estimated at fifty percent and the occurrence of dating violence was estimated at twenty-one percent.<sup>86</sup> This goes back to the realities of human behavior and other circumstances not within society’s control. Card should argue for behavioral modification of people through programs, workshops, or other methods focusing on altering particular behaviors, rather than the complete abolition of marriage, since that is the underlying basis for her problems with marriage.

She moves from this point to explain that domestic partner legislation remedies discrimination against lesbians, gay men, and unmarried heterosexual couples, or at least it is a “step in the right direction.”<sup>87</sup> She states that these are “much more voluntary relationships [and] more easily dissolved,” without reference to any support or authority for such statement.<sup>88</sup> In fact, in California, only lesbian or gay couples can register as domestic partners, and the dissolution of

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<sup>80</sup> *Id.* at 11.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> See FED. BUREAU OF INVESTIGATION, *supra* note 75, at 23.

<sup>85</sup> Cf. SANA LOUE, INTIMATE PARTNER VIOLENCE: SOCIETAL, MEDICAL, LEGAL AND INDIVIDUAL RESPONSES 7–8 (2000).

<sup>86</sup> *Id.* at 6.

<sup>87</sup> Card, *Against Marriage*, *supra* note 51, at 12.

<sup>88</sup> *Id.*

said partnership follows the laws of divorce almost exactly.<sup>89</sup> Moreover, the California Supreme Court in the 2008 “*In re Marriage Cases*,” recognized that same-sex couples registered as domestic partners were given the same rights and obligations as married couples, but not permitted to use the marriage title.<sup>90</sup> There are no real differences between registered domestic partners and married couples, but Card states that they are voluntary,<sup>91</sup> whereas, in her thinking, marriage is not. This again is another contradiction Card has in her arguments against marriage. Domestic partnership registration is supposed to be the same as marriage, just without the title.<sup>92</sup> Yet, she believes that this is better than marriage. Her argument is flawed, for the following reasons: (1) domestic partner registration perpetuates the unequal status of gays and lesbians; (2) the registration system is another means of discrimination based on sexual orientation, since heterosexual couples are not allowed to register; and (3) the same family law rules govern these relations.<sup>93</sup> It follows that these relationships have the same problems identified by Card and therefore domestic partnerships are *not* better than marriage.

Card believes that social unions sanctioned by the state are “state-defined.”<sup>94</sup> It appears from this statement that Card rejects marriage because it is solely defined by the government. Yet, she fails to recognize that many partners establish a marital relationship for their own reasons and define that relationship for themselves, such as maintaining an open marriage, rather than following the government defined “marriage.”

Card further declares that marital obligations are ill defined and that it is difficult to hold spouses accountable for abuse of any marital obligations they do hold.<sup>95</sup> Yet, part of the “state-defined” marriage requires certain obligations, such as fiduciary duties to manage the marital property to the benefit of both spouses, the breach of which could lead to remedies for the other spouse, for example,

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<sup>89</sup> See generally CAL. FAM. CODE §§ 298–299.6 (West 2006). Dissolution of these partnerships is treated substantially similar to dissolution of marriages.

<sup>90</sup> 183 P.3d 384 (2008). In an attempt to remedy this inequality, the court held that since marriage is a fundamental right the state’s prohibition against same-sex marriages violated the California constitution. In response, the California voters effectively passed new legislation that amends the California constitution to include a section defining marriage as between a man and a woman, only. Proposition 8 was passed on November 4, 2008, to add a section to Article I of California’s constitution that is entitled “California Marriage Protection Act.” The new section reads: “Only marriage between a man and a woman is valid or recognized in California.” Text of Proposed Laws: Prop 8 (2008), <http://www.voterguide.sos.ca.gov/argu-rebut/argu-rebutt8.htm>. Subsequently on November 19, 2008, the California Supreme Court has issued a news release that it will review the constitutionality of the new legislation in six separate cases filed with the court. *California Supreme Court Takes Action on Proposition 8: High Court Denies Requests to Stay Enforcement of Proposition 8 and Agrees to Decide Issue Arising Out of Proposition 8*, MEDIA ADVISORY, (Judicial Council of California), Nov. 19, 2008.

<sup>91</sup> Card, *Against Marriage*, *supra* note 5, at 11.

<sup>92</sup> CAL. FAM. CODE §§ 297–299.6 (West 2006) (describing the eligibility requirements for domestic partnership registration as well as the governing law for said relations).

<sup>93</sup> *Id.* at § 297.5.

<sup>94</sup> Card, *Against Marriage*, *supra* note 5, at 12.

<sup>95</sup> *Id.* at 13.

100% disgorgement of any concealed community assets.<sup>96</sup> Nevertheless, she believes the basis of the government's inability to hold spouses accountable for breaching their obligations comes from the lack of training, skill, and knowledge required to marry. The remedy she recommends is to increase the requirements for obtaining a marriage license beyond those that people need only be of a certain age, not already married, and free of communicable diseases.<sup>97</sup> Her reasoning is that these requirements to marry are relatively lax and thus there must be more requirements for getting married, even though this seems impossible without "considerable state intrusion into our lives."<sup>98</sup> It appears once again that Card has contradicted her argument against marriage because it is "state-defined" by stating there should be more state intrusion into the marital relationship to better define obligations in the marriage. She also fails to realize that unmarried couples lack the fiduciary legal obligations imposed on married couples, which results in *no* recourse for the injured partner, such as that available to married individuals.

She concludes her discussion on marriage by arguing that the complete abolition of legal marriage might be a better solution, and that lesbian and gay activists probably should not to seek legalizing marriage, because it will turn "a personal commitment into a license regulable and enforceable by the state."<sup>99</sup> Still, her conclusion does not conform to her argument for more requirements to obtain a marriage license. Although her position is not to maintain marriage as it functions in modern society defined by the state, she would have the state increase the regulations on obtaining marriage licenses and decrease the ability for individuals to marry. Card does not provide any proposed methods of altering the societal view to recognize non-marital relationships as legitimate personal commitments nor does she identify the steps necessary or obstacles to achieving her goal.

The next section of this paper discusses a proposed change which will address the problems of inequality between men and women as well as present an alternative to the institution as it presently exists. However, the proposal does not call for the complete eradication of the institution of marriage. It merely presents another viable option for individuals in committed "partnerships," with which Card may agree society should recognize.

## V. PROPOSED ALTERNATIVE TO THE INSTITUTION

The proposed alternative to the institution of marriage follows the radical feminist position on the inherent flaw of the institution, though it does not conform

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<sup>96</sup> See generally CAL. FAM. CODE §1100 (West 2006) (establishing fiduciary duties on both spouses, so if one spouse were to adversely affect the rights of the other spouse in the community property, that first spouse would be liable for the breach of his or her fiduciary duty to his or her spouse); see also *In re Marriage of Rossi*, 108 Cal. Rptr. 2d 270, 276-77 (Cal. Ct. App. 2001) (affirming a trial court order awarding all lottery winnings concealed by wife during dissolution proceedings to husband as a penalty for wife's conduct).

<sup>97</sup> Card, *Against Marriage*, *supra* note 5, at 14.

<sup>98</sup> *Id.* at 15.

<sup>99</sup> *Id.*

to the radical feminist point of view. This section does *not* advocate for the complete abolition of marriage; rather in this author's personal opinion, it offers an alternative to the traditional conception of the institution. The easiest and perhaps obvious solution is to remove the title "marriage" from every relationship, because that term has held traditional and historical significance throughout the world, as discussed previously. Of course removing the title will not change the institution, but it will be a starting point for surpassing the patriarchal idea of the institution.

Relationships between loving couples, who are in a long-term committed relationship, could instead be entitled "Civil Unions" or "Partnerships" as proposed by Card and other scholars. Although California has created civil unions for homosexual couples, it would be proper to make all long-term commitments between two people a civil union (instead of marriage). Then the United States would not have a problem with discrimination against same-sex couples. Yet, this may not resolve the problems identified by most radical feminists, because those feminists have an absolute disdain for all patriarchal institutions. Thus, it would be more appropriate to alter marital relationships into partnerships, governed by laws similar to business partnership regulations, but less formal and constrained. The idea is to step away from the historical nature of the institution and approach it as a business practice of sorts. Rather than committed individuals marrying, these *equal* partners would enter a contractually defined relationship with complete knowledge of the situation and circumstances.<sup>100</sup>

For instance, every partnership would be required to develop and enter into "prenuptial" agreements, though they would be renamed partnership agreements. With these agreements, the partners would have equal bargaining power, where one gender or partner does *not* have more supremacy over the other. Accordingly, the partners will be able to take a step back from the emotional aspect of the relationship to clearly assess the nature of it, the consequences of an early termination, and circumstances of a breach.

Some marriage reformers advocate for "contracts in lieu of marriage" so that partners are given "the liberty to set other terms to their relationship."<sup>101</sup> These reform advocates identify the point argued here; that is, providing contractual relationships as an alternative to marriage "replaces the gender stereotyping and protectionism of traditional marriage law with the recognition of the individuality and equal agency of the partners."<sup>102</sup> However, these reformers present the contractual relationship as a "marriage" contract and use terms such as "marriage

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<sup>100</sup> *But see* Fox-Genovese, *supra* note 35, at 504. Fox declares that it is impossible to divide domestic responsibilities between men and women "without considerable private and social costs." Conversely, my argument provided is based on the assumption that there is little to no cost associated with equalizing the domestic responsibilities between the two genders. Additionally, Fox starts with the assumption that the inherent inequality among the sexes lies within the domestic realm (for example, caring for children and the household); whereas this paper focuses on the overall aspects of a marital or committed relationship beyond the traditional "domestic responsibilities."

<sup>101</sup> Mary Lyndon Shanley, *The State of Marriage and the State in Marriage*, in MARRIAGE PROPOSALS 188, 198 (Anita Bernstein ed., 2006).

<sup>102</sup> *Id.* at 199.

partners.”<sup>103</sup> Instead, my proposal does not utilize the title of marriage, rather it presents another social relationship legitimized and recognized by society, but still focuses on the individuality and rationality of partners entering these relations.

One drawback to these types of agreements is the likelihood that they will result in a number of civil causes of actions on issues, such as: the meaning of phrases or words in the contract, the intent of the parties, the capacity of the parties to contract, and their understanding of the legal ramifications. In such cases, the court could use rules such as those that govern contracts and partnership laws that govern business partnerships. The law would have to be fashioned in a manner that recognizes the nature of the intimate relationship as well as the partnership characteristic. This is not difficult to achieve, because as the California family law is codified today, fiduciary rules that apply to business partnerships also govern the confidential relationship of a marriage.<sup>104</sup> Although this proposition will not alleviate the concerns discussed by radical feminists, since according to their theories a woman cannot consent to such a contractual relationship with a man, and said woman is considered to be under the dominance of the man, thereby conforming to his desires and further subordinating herself.

However, the central idea of changing marriage into an equal partnership is to eliminate the dominance of one gender over the other. To surpass the patriarchal nature of these types of relationships, the public must re-classify gender roles for a particular sex (such as traditional domestic roles). Society has seen a shift within the past decade, in which men have had the option to take paternity leave as well as paternity pay—like a woman’s maternity leave—in order to care for a newborn child.<sup>105</sup> “If we are to encourage mothers to put children first, we *must* encourage fathers and especially employers and public policies to do the same.”<sup>106</sup>

Certainly, the key to an equal partnership between the opposite sexes is to transcend the traditional notion of gender roles. Some feminists argue that gender is a social construction:<sup>107</sup> the relevant culture in which a person lives defines that person’s gender, rather than their biology.<sup>108</sup> In order to change the traditional conceptions of gender and the roles persons of a particular sex take, one feminist argues that gender identity should be exposed as “phantasmic” (i.e. a fantasy or

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<sup>103</sup> *See id.*

<sup>104</sup> *See* CAL. FAM. CODE §1100 (West 2006).

<sup>105</sup> This appears to be the employer’s option to allow working fathers to take paternity leave. *See* The Family and Medical Leave Act, Pub. L. No. 103-3, 107 Stat. 26 (codified at 29 U.S.C. § 2654 (1993)) (allows some employees to take unpaid leave or to substitute appropriate paid leave if the employee has earned or accrued it for up to twelve workweeks).

<sup>106</sup> Fox-Genovese, *supra* note 35, at 507 (emphasis added).

<sup>107</sup> *See* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 11 (1999). The author poses questions on the manner or mechanism of gender as the “cultural interpretation of sex” and asks whether gender can be “constructed differently, or does its constructedness imply some form of social determinism, foreclosing the possibility of agency and transformation.” *Id.*

<sup>108</sup> *Id.* at 13.

figment of the imagination).<sup>109</sup> In that sense, gender identity can take on a different structural form.

In accord with this line of reasoning, if gender is merely a social construction (which changes from culture to culture) then it follows that the perception of traditional gender roles can be constructed differently to establish equal partnerships. In other words, the social perception of a woman as a nurturing caretaker, homemaker, and satisfier of the husband's desires can be changed to allow for said woman to take on the traditional male roles of provider and career professional. The method of changing societal gender roles begins with intellectual discourse and shifting the law to facilitate the transformation.

Modernly, these roles have shifted to an environment where more women are in the workplace, start families later in life, or decline to have a family altogether; and men have become stay-at-home fathers who take on the traditional roles of the female. Moreover, the law has seen transformations in removing division between the sexes, by creating gender neutral language in family law and also recognizing a man's preference to exercise paternity leave by requiring "family leave" to be provided by employers. Thus, it is not impossible to alter the traditional gender roles to allow for the establishment of equal partnerships between the two sexes or individuals of the same sex.

## VI. CONCLUSION

Card and other radical feminist philosophers believe that women who engage in the practice of marriage are either trapped or forced into it, hence the phrase: "The Marital Trap." In other words, for women in the institution of marriage, it is not a choice, because of the social importance placed on being or getting married and the fact that the society is male-dominated and male-centered.

Most feminists have not attempted to change the patriarchal nature of the institution of marriage. It appears that these women have merely focused on its historical nature and chosen to abandon the idea of marriage altogether. However, the focal point should be on women striving to change the patriarchal nature of the institution, which is in fact ongoing. Undoubtedly, this task is more difficult than eliminating or abandoning the institution. The complete destruction of the institution will not solve the "problems" of marriage, identified by Card and others, because the underlying argument necessitates changes in human behavior, societal views, and public policies. Feminists should concentrate on increasing societal awareness of the human behavioral problems affecting marriage and other non-marital relationships by changing the traditional conception of gender and legitimate relationships.

Though it may be difficult to transcend the historical aspect of the institution of marriage because it is so engrained in the American culture, it is certainly possible with time, efforts, and public knowledge. Most feminist philosophers have directed their attention and efforts on the patriarchal nature of the institution, as

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<sup>109</sup> *Id.* at 41.

well as the behavioral aspect of humans who engage in such practice, such as the arguments presented in Claudia Card's piece. Plainly, society cannot predict which persons will have behavioral problems (such as a propensity for violence), but once husbands or significant others begin to abuse women (or vice versa), we should focus on curing those behavioral traits, which are at the root of violence, instead of blaming the institution of marriage as the enabling force.<sup>110</sup>

Moreover, the rich patriarchal history of the American culture indicates that the role of patriarch cannot be easily destroyed, unless social views of gender roles and the traditional family and marriage are transformed into a different unit that values equality between the partners, as with an equal partnership. Since marriage has traditionally been a social institution defined by the state and policies, which are presumably the will of the public, marriage must be altered into a more amiable perception of the private family realm, by offering an alternative to marriage such as that discussed in this paper.

This paper does not argue that the transformation of marriage to an equal partnership is something that can readily be achieved. There are recognizable limitations to the proposition, because marriage is a long-standing tradition spanning over centuries, from the beginning of time. Of course this proposed alternative will take several decades to be accepted as a viable alternative to marriage, but intellectual discourse of the issue is only the foundation to surpassing the so-called marriage "trap" for either spouse.<sup>111</sup>

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<sup>110</sup> See Bartlett, *supra* note 28, at 495 (stating that "to the extent family violence is beyond the reach of the law, men's abuse of and power over women is enabled and affirmed." *Id.*).

<sup>111</sup> According to the radical feminist perspective marriage is a dangerous trap for women only, not men. See, e.g., Card, *Against Marriage*, *supra* note 5; see also, Davion, *supra* note 45.