LEGAL RECOGNITION OF SAME-SEX CONJUGAL RELATIONSHIPS: THE 2003 CALIFORNIA DOMESTIC PARTNER RIGHTS AND RESPONSIBILITIES ACT IN COMPARATIVE CIVIL RIGHTS AND FAMILY LAW PERSPECTIVE

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In 1999, California enacted legislation allowing same-sex couples to register with the State as domestic partners. Although the new legal status initially entailed few legal rights or obligations, incremental 2001 legislation granted some significant legal rights of marriage to registered domestic partners. In 2003, the legislature acted again, extending almost all the state law incidents of marriage to registered domestic partners. This Article places the 2003 legislation in national and international context. In the United States, California domestic partnership is uniquely legislative in origin. This Article explores the ramifications of its purely legislative genesis. Acknowledging that California domestic partnership represents an important civil rights advance for same-sex couples, the Article argues that it is not sufficient as family law. Although lesbians and gay men have enthusiastically welcomed the recognition and dignity that the legislation confers, only a small minority of same-sex couples have registered in California or in other jurisdictions offering similar opportunities. The Article attributes the low registration rates to causes that are largely extrinsic to the essential character of same-sex relationships. Consequently, the Article suggests, same-sex couples would be better served by a regime that recognizes both registered cohabitation and stable unregistered cohabitation. It notes that many other countries have followed such a two-track approach to opposite-sex and same-sex cohabitation and suggests strategies for moving American law in that direction. Finally, the Article speculates about the social effects of legally recognizing same-sex relationships.

 I thank my husband, Donald Blumberg, for his careful reading of successive drafts of this Article.

INTRODUCTION

This Article describes the California Domestic Partner Rights and Responsibilities Act of 2003[1] (Act) and places it in national and international context. The Act grants most of the state law incidents of marriage to same-sex couples registered as domestic partners, thereby extending to registered same-sex couples the state law aspects of a protected legal status historically restricted to opposite-sex married couples. The Act is exceptional in the United States in that it is the first enactment of its type that is entirely legislative in origin. Unlike the earlier Vermont Civil Union legislation,[2] the California Act was not compelled by constitutional adjudication. The Article first explores the implications of the Act's purely legislative origin.

The Article goes on to describe the international context, pointing out that there are three means of granting legal status to same-sex conjugal

1. Domestic Partner Rights and Responsibilities Act, ch. 421, 2003 Cal. Stat. 2586.

2. The Vermont Constitution includes a *Common Benefit* Clause, which provides that the government is "instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community." VT. CONST. ch. 1, art. 7. In *Baker v. State*, 744 A.2d 864 (Vt. 1999), the Vermont Supreme Court held that the Common Benefit Clause was violated by the state's exclusion of same-sex couples from the benefits and protections that Vermont accords to opposite-sex married couples. *Id.* at 864. The court concluded that the legislature had two options: It could either open the status of lawful marriage to same-sex couples; or, it could extend to same-sex couples the benefits and protections of married couples. *Id.* at 867. The Vermont legislature chose the second option. It enacted legislation that extends all the state law rights and obligations of marriage to same-sex partners who enter a legally regulated "civil union." *See* An Act Relating to Civil Unions, 1999 Vt. Acts & Resolves 91 (codified at VT. STAT. ANN. tit. 15, §§ 1201–1207 (2002)).

relationships. The first is recognition of same-sex marriage. The second is construction and recognition of a formal shadow institution to marriage, such as California registered domestic partnership. The third is legal recognition of informal conjugal relationships, that is, legal recognition for the purpose of assigning both public rights and private responsibilities to same-sex conjugal partners.[3] These three means of recognizing same-sex relationships are not mutually exclusive,[4] although the pursuit of one may have implications, positive or negative, for other courses of action.[5]

The Article next explores the question: Why, from an international perspective, has the United States been comparatively laggard in legally regularizing, that is, recognizing and regulating, same-sex relationships? Although this backwardness may largely be understood as an expression of American Puritanism or resurgent religious fundamentalism,[6] a parallel backwardness in a related area of American family law additionally suggests that American law has been slow to recognize and regulate same-sex relationships because it has taken an unusually formal, as contrasted to a functional, approach to family recognition and regulation. This theme is explored by comparing the development of American and Canadian law, with particular attention to family law reform during the last quarter of the twentieth century and the early years of the twenty-first century. The comparison ultimately suggests that although

3. The 2004 UCLA Law Review Symposium brochure promised that Molly McKay and Jon Davidson would comment on "the decision to strengthen domestic partnerships as opposed to legalizing marriages between same-sex couples." This Article points out that there is a third option: the recognition of unformalized conjugal relationships. The United States has witnessed such recognition in the employment relationship; elsewhere it has been broadly legislated. *See* text accompanying *infra* notes 96–115, 191–201.

4. On the contrary, many European countries have legislation providing for the registration of same-sex partnerships as well as legislation regulating unregistered same-sex and opposite-sex relationships. *See infra* notes 75–115 and accompanying text. The Netherlands has same-sex marriage, same-sex registered partnership, and legal regulation governing same-sex and opposite-sex cohabitants who are neither married nor registered. *See infra* notes 82, 92, 108, 182 and accompanying text.

5. *See infra* notes 191–201 and accompanying text.

6. Reporting legal developments in Canada with respect to same-sex relationships, Religious Tolerance.org reports:

> Much of the absence of opposition to [same-sex marriage] is traceable to the religious makeup of Canada. The percentage of Fundamentalists and other Evangelical denominations is only about 8% in Canada, compared with about 35% in the U.S. The largest Protestant church in the country is the United Church of Canada. Their theology and other beliefs are similar to those of the United Church of Christ in the U.S. Both have allowed gays and lesbians to be ordained. The United Church of Canada has a ritual for celebrating the union or marriage of gay or lesbian couples.

Same-Sex Marriages in Canada, Introduction: What on Earth are the Canadians Doing?, *at* http://www.religioustolerance.org/hom_marb0.htm.

the California Act may be good-enough[7] civil rights law, it does not suffice as family law. The Act is not *bad* family law; rather, it is insufficient as family law. The Article addresses what remains to be done to meet the legal needs of same-sex cohabitants, and it suggests strategies for further law reform that would meet those needs. Finally, the Article discusses the larger social implications of substantially granting same-sex couples access to the institution of marriage, in terms of the interests of gay men and lesbians, as well as those of the entire community.

I. THE CALIFORNIA ACT

A. The History of California Domestic Partnership Legislation and the Content of the 2003 Act

California is the first, and still the only, state in the United States that has, without constitutional compulsion,[8] enacted domestic partnership legislation of general applicability.[9] California domestic partnership legislation began inauspiciously in 1999.[10] It described domestic partners as "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring."[11] Requiring that the two adults share a common

7. This is in the Bruno Bettelheim sense of a "good-enough parent," meaning not a perfect parent, but one sufficient to perform the basic requirements of the role. As civil rights law, domestic partnership does not fully equate with marriage even in purely state law terms. The 2003 Act grants domestic partners all the substantive legal rights of spouses, other than those pertaining to state income tax. However, entrance is less dignified. The law does not provide for the sanctification of domestic partnerships. In contrast to marriage, which under law may be officiated by a religious figure, domestic partnership may only be registered. Yet, the law does not prohibit sanctification, which domestic partners may seek from religious sects willing to marry same-sex couples. More significantly, state law domestic partnership is not recognized as marriage for purposes of federal law or federal benefits. 1 U.S.C. § 7 (2000) ("In determining the meaning of any Act of Congress, . . . the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."). Consequently, California registered domestic partners are not eligible for the many federal benefits accorded to married persons, including immigration, social security, and tax benefits.

8. *See supra* note 2 and text accompanying *infra* notes 45–48.

9. Some states do, however, have specialized legislation providing particular benefits for state employees and their domestic partners. They include California, Connecticut, the District of Columbia, Maine, New York, Oregon, Rhode Island, Vermont, and Washington. California, Connecticut, and the District of Columbia limit benefits to *same-sex* domestic partners. Benefits vary by state. They include health, dental, and vision care, bereavement and family sick leave, life insurance, and long-term care. Details are collected in PAULA ETTELBRICK, NAT'L GAY & LESBIAN TASK FORCE, DOMESTIC PARTNER BENEFITS FOR STATE EMPLOYEES (2000), *available at* http://www.thetaskforce.org/pi/dpbstate.pdf.

10. Domestic Partners, ch. 588, 1999 Cal. Stat. 3372.

11. *Id.* § 2 (codified as amended at CAL. FAM. CODE § 297(a) (West Supp. 2004)).

residence and agree to be jointly responsible for basic living expenses incurred by either of them during their relationship, the 1999 legislation allowed two adult unmarried persons of the same sex[12] to register as domestic partners with the California Secretary of State.[13] Under the initial legislation, a domestic partnership was terminable by the death or marriage of either party, ceasing to share a common residence, or one partner's written notice of termination to the other. Notice of termination was to be filed with the California Secretary of State.[14] The original legislation created few rights for domestic partners. It required health facilities to treat a domestic partner and the children of a domestic partner as family members for purposes of hospital visitation,[15] and it authorized state and local government employers to offer health care coverage and related benefits to the domestic partners of state and local government employees.[16] More significantly, in creating a new legal status, the legislation established a toehold that could later be enlarged by incremental legislation.

The following year, 2000, saw only the most modest of increments, a provision including registered domestic partners as persons qualified to secure housing in specially designed accessible housing for the elderly.[17] The dearth of legislation in 2000 was apparently due to then Governor Gray Davis' insistence that the legislative development of domestic partnership proceed slowly.[18] Major legislation was enacted in 2001.[19] That legislation granted

12. Domestic partnership is generally unavailable to opposite-sex partners because the legislature did not wish to create a weak alternative to marriage for opposite-sex couples. However, the Act contains a special provision for elderly social security beneficiaries whose eligibility for benefits would be impaired by marriage. Initially, opposite-sex partners could register as domestic partners only when both were over the age of sixty-two and eligible for social security benefits. *Id.* In 2001, this provision was amended to require that only one opposite-sex partner be over the age of sixty-two and eligible for social security benefits. Domestic Partnerships, ch. 893, § 3, 2001 Cal. Stat. 5634 (codified at CAL. FAM. CODE § 297(b)(6)(B) (West Supp. 2004)).

13. Domestic Partners § 2.

14. *Id.* (codified at CAL. FAM. CODE § 299 (West Supp. 2004) (operative until January 1, 2005)).

15. *Id.* § 4 (codified at CAL. HEALTH & SAFETY CODE § 1261 (West Supp. 2004)).

16. *Id.* § 3 (codified as amended at CAL. GOV'T CODE §§ 22867–22869, 22871–22871.3, 22872–22875, 22876–22877 (West Supp. 2004)).

17. Senior Housing, 2000 Cal. Legis. Serv. 5520 (West) (codified at CAL. BUS. & PROF. CODE § 11010.05 (West Supp. 2004) and CAL. CIV. CODE §§ 51.2–.4, 51.11–.12 (West Supp. 2004)).

18. Jenifer Warren, *Capitol Gains for Gay Pols*, L.A. TIMES, Dec. 10, 2001, at A1 ("In 2000 . . . Davis insisted on . . . 'an off-season,' supporting no gay-related legislation and vetoing a measure that would have allowed homosexuals to use family leave to care for a sick partner.").

19. Domestic Partnerships, ch. 893, 2001 Cal. Stat. 5634 (codified as amended at CAL. CIV. CODE § 1714.01 (West Supp. 2004); CAL. CIV. PROC. CODE § 377.60 (West Supp. 2004); CAL. FAM. CODE §§ 297, 299.5, 9000, 9002, 9004, 9005 (West Supp. 2004); CAL. GOV'T CODE §§ 22871.2, 31780.2 (West Supp. 2004); CAL. HEALTH & SAFETY CODE § 1374.58 (West Supp. 2004); CAL. INS. CODE § 10121.7 (West Supp. 2004); CAL. LAB. CODE § 233 (West Supp. 2004); CAL. PROB. CODE §§ 37, 1460, 1811, 1812, 1813.1, 1820–1822, 1829, 1861, 1863, 1871, 1873–1874,

registered domestic partners the right to use stepparent adoption procedures;[20] sue for wrongful death or infliction of emotional distress for the injury or death of a partner;[21] make medical decisions for an incapacitated partner;[22] be treated as a dependent of a partner for purposes of group health and disability insurance;[23] file for state disability benefits on behalf of a mentally disabled partner;[24] be appointed conservator for an incapacitated partner;[25] use sick leave to care for an ill partner or partner's child;[26] use statutory form wills[27] and be appointed as administrator of a partner's estate;[28] receive unemployment benefits on moving to accompany a partner to a new job;[29] and receive continued health insurance as a partner of a deceased state employee or retiree.[30] The legislation also provided that the value of domestic partner health insurance coverage was not taxable as income by the state.[31]

As originally introduced, the 2001 legislation would also have treated a domestic partner as a "spouse" for purposes of intestate succession.[32] The

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1891, 1895, 2111.5, 2212–2213, 2357, 2359, 2403, 2423, 2430, 2504, 2572, 2580, 2614.5, 2622, 2651, 2653, 2681–2682, 2687, 2700, 2803, 2805, 4716, 6122, 6122.1, 6240, 8461–8462, 8465 (West Supp. 2004); CAL. REV. & TAX CODE § 17021.7 (West Supp. 2004); CAL. UNEMP. INS. CODE §§ 1030, 1032, 1256, 2705.1) (West Supp. 2004)).

20. *Id.* §§ 5–8 (amending CAL. FAM. CODE §§ 9000, 9002, 9004, 9005).

21. *Id.* §§ 1–2 (adding CAL. CIV. CODE § 1714.01; amending CAL. CIV. PROC. CODE § 377.60).

22. *Id.* § 49 (adding CAL. PROB. CODE § 4716).

23. *Id.* §§ 10–11 (adding CAL. HEALTH & SAFETY CODE § 1374.58 and CAL. INS. CODE § 10121.7).

24. *Id.* § 60 (amending CAL. UNEMP. INS. CODE § 2705.1).

25. *Id.* §§ 13–48 (adding CAL. PROB. CODE §§ 37, 1813.1; amending CAL. PROB. CODE §§ 1460, 1811, 1812, 1820–1822, 1829, 1861, 1863, 1871, 1873–1874, 1891, 1895, 2111.5, 2212–2213, 2357, 2359, 2403, 2423, 2430, 2504, 2572, 2580, 2614.5, 2622, 2651, 2653, 2681–2682, 2687, 2700, 2803, 2805).

26. *Id.* § 12 (amending CAL. LAB. CODE § 233).

27. *Id.* § 52 (amending CAL. PROB. CODE § 6240).

28. *Id.* §§ 53–55 (amending CAL. PROB. CODE §§ 8461–8462, 8465).

29. *Id.* §§ 57–60 (amending CAL. UNEMP. INS. CODE §§ 1030, 1032, 1256, 2705.1).

30. *Id.* §§ 9–9.5 (adding CAL. GOV'T CODE § 31780.2; amending CAL. GOV'T CODE § 22871.2).

31. *Id.* § 56 (adding CAL. REV. & TAX CODE § 17021.7, providing that the domestic partner of a taxpayer shall be treated as the spouse of a taxpayer for purposes of certain tax provisions). By contrast, the value of domestic partner health insurance coverage may be taxed as income by the federal government. Section 105 of the Internal Revenue Code provides that employer contributions to a health plan are not taxed as income to the employee when the coverage is for the employee, his spouse, and his section 152 dependents. I.R.C. § 105(b) (West Supp. 2004). To qualify as a section 152 dependent, an insured domestic partner must receive more than half of his or her support from the employee-taxpayer and be a member of the employee-taxpayer's household for the entire taxable year. I.R.C. § 152(a) The same dependency rules apply to the domestic partner's children, if they are also insured under the employee's plan. *Id.* To the extent that a domestic partner or the children of a domestic partner do not qualify as section 152 dependents, the fair market of their insurance coverage is taxable to the employee, and subject to federal income, social security, and Medicare taxation.

32. Assemb. B. 25, 2001–2002 Leg., Reg. Sess. §§ 43–44 (Cal. 2001) (introduced on Dec. 4, 2000). Sections 43 and 44 would have amended California Probate Code sections 6401 and 6402 to treat a surviving domestic partner as a surviving spouse for purposes of taking decedent's property not otherwise distributed by will or other testamentary transfer.

intestacy provision was abandoned at the insistence of Governor Davis, who threatened to veto the bill if that provision were not deleted.[33] However, Governor Davis reconsidered the intestacy provision and ultimately approved it the following year, stating that the bill,[34] which amended the Probate Code to include a surviving registered domestic partner as an intestate heir of a deceased partner, would assist the family members of those who died in the September 11 attacks.[35] From the initial legislation in 1999 through the end of the 2002 legislative session, six minor enactments additionally provided certain rights and benefits, local and statewide, to registered domestic partners.[36]

In 2003, the legislative campaign altered course. The cautious piecemeal approach was replaced by an omnibus effort to make California Registered Domestic Partnership a shadow institution of marriage. Assembly Bill 205, entitled the California Domestic Partner Rights and Responsibilities Act, was introduced by Assembly Member Jackie Goldberg on January 28, 2003. It cleared the legislature on September 3, 2003[37] and was signed into law by the Governor on September 19, 2003.

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33. *See* Warren, *supra* note 18 (characterizing Governor Davis as a "go-slow moderate on gay rights" and reporting that he demanded removal of the intestacy provision before he would sign Assembly Bill 25 into law).

34. Intestate Succession: Domestic Partners, ch. 447, 2002 Cal. Stat. 2133 (codified at CAL. PROB. CODE §§ 6401(c), 6402).

35. *See* Evan Halper, *Gay Activists Split Despite Successes*, L.A. TIMES, Sept. 16, 2002, at B3. Keith Bradkowski, whose registered domestic partner was a flight attendant on one of the jets that crashed into the World Trade Center on September 11, was a proponent of the provision. *Id.*

36. In 2001: Domestic Partnerships, ch. 893, § 9.5, 2001 Cal. Stat. 5634 (codified as amended at CAL. GOV'T CODE § 31780.2) (providing that in San Mateo County, subject to the approval of the County Board of Supervisors, death benefits and a survivor's allowance may be payable to a county employee's surviving domestic partner). In 2002: County Employees' Retirement: Death Benefit, ch. 373, 2002 Cal. Stat. 1137 (amending section 31780.2 to additionally include Los Angeles County, Santa Barbara County, and Marin County); Birth and Death Certificates: Certified Copies: Access, ch. 914, 2002 Cal. Stat. 4497 (including domestic partners in the list of persons authorized to receive birth and death records of a registrant); Wills and Trusts: Prohibited Transferees: Exceptions, ch. 412, 2002 Cal. Stat. 2005 (enabling domestic partners to draft wills for each other in the manner allowed for persons related by blood or marriage); Disability Compensation: Family Temporary Disability Insurance, ch. 901, 2002 Cal. Stat. 4364 (including domestic partners within a new family temporary disability insurance program that provides up to six weeks of paid leave to workers who take time off to care for a seriously ill child, parent or domestic partner, or to bond with a new child).

37. The legislators voted along party lines. In the Senate, twenty-three Democrats voted in favor, and one voted against. Thirteen Republicans voted against, and none voted in favor. *See* Carl Ingram, *Domestic Partners Bill OK'd*, L.A. TIMES, Aug. 29, 2003, at B1. In the Assembly, forty-one Democrats voted in favor and one voted against. Thirty-one Republicans voted against, and none voted in favor. *See* Nancy Vogel, *Bill Giving Gay Partners More Legal Rights Sent to Governor*, L.A. TIMES, Sept. 4, 2003, at B6.

The Act, which is effective January 1, 2005, extends to registered domestic partners the state law rights and responsibilities of spouses,[38] except for those related to the state income tax.[39] Under the Act, California domestic partnerships continue to be registered by a "Declaration of Domestic Partnership."[40] However, beginning in 2005, termination of a registered domestic partnership is subject to the requirements for terminating a marriage, that is, generally a proceeding for dissolution or judgment of nullity.[41]

The Act also contains procedural and choice-of-law provisions that respond to various issues posed by California's adoption of an institution that, at the time of enactment, existed in only one other state. In order to resolve property, support, and custody claims arising at dissolution, a court must have personal jurisdiction over the parties and, unlike a spouse, a registered domestic partner may not be able to bring a dissolution action in any jurisdiction other than California. To assure that registered domestic partners are able to dissolve a domestic partnership and settle issues of property

38. Domestic Partner Rights and Responsibilities Act, ch. 421, § 4, 2003 Cal. Stat. 2586 (codified at CAL. FAM. CODE § 297.5 (West Supp. 2004)) (effective Jan. 1, 2005). Subsection (a) of that section provides:

> Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government practice, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.

Id.

39. Domestic partners may not file joint state income tax returns, nor may the earned income of a domestic partner "be treated as community property for state income tax purposes." *Id.* As introduced, Assembly Bill 205 provided to the contrary, but the provision allowing domestic partners to file either jointly or individually was eliminated after the Franchise Tax Board estimated that joint filing would result in significant revenue losses—five million dollars in 2005–2006 and 7.5 million dollars in 2006–2007. *Changes the Tax Filing Allowances for Domestic Partners: Hearing on Assemb. B. 209 Before the Senate Revenue & Tax Comm.*, 2003–2004 Leg., Reg. Sess. (Cal. 2003) (statement of Sen. Gilbert Cedillo, Chair, Sen. Revenue & Taxation Comm.). The August 21, 2003 version of Assembly Bill 205 shows that deletion.

40. Domestic Partner Rights and Responsibilities Act § 3 (codified at CAL. FAM. CODE § 297(b) (West Supp. 2004)) (effective Jan. 1, 2005).

41. *Id.* §§ 7–8 (repealing and adding CAL. FAM. CODE § 299). Registered domestic partnerships may only be terminated without a proceeding for dissolution or nullity of the domestic partnership when: a Notice of Termination of Domestic Partnership is signed by both parties; there are no children of the relationship; the domestic partnership is of not more than five years duration; neither party has any interest in real property wherever situated (other than a lease that terminates within one year of filing the notice of termination); there is no significant indebtedness incurred during the partnership; there are no substantial assets; the parties have entered an agreement distributing their assets and debts; and each partner waives any right to support by the other partner. *Id.* § 8. This form of summary termination largely tracks existing summary dissolution available to end short marriages when there are no children and no significant economic issues. *See* CAL. FAM. CODE §§ 2400–2406 (summary dissolution proceedings).

distribution, support, and child custody, each partner must state in the required declaration of domestic partnership:

> that he or she consents to the jurisdiction of the Superior Courts of California for the purpose of a proceeding to obtain a judgment of dissolution or nullity of the domestic partnership or for legal separation of partners in the domestic partnership, or for any other proceeding relating to the partners' rights and obligations, even if one or both partners ceases to be a resident of, or to maintain a domicile in this state.[42]

Contemplating the future, and perhaps with Vermont civil unions in mind, the Act provides that "[a] legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction, and that is substantially equivalent to a domestic partnership as defined in this part, shall be recognized as a valid domestic partnership in this state regardless of whether it bears the name domestic partnership."[43] Presumably, such recognition includes access to California courts for the purposes of dissolution or judgment of nullity, assuming that the usual jurisdictional requisites are met.[44]

Transition provisions are also an important aspect of the Act. California registered domestic partners have enrolled in an evolving institution. The Act requires that they be informed of the new content of the institution to which they have subscribed, given time to reflect on whether they wish to remain registered domestic partners, and allowed the opportunity to opt out under the exit conditions to which they initially subscribed. To accomplish these three goals, the substantive provisions of the Act do not become effective until the beginning of the second year following passage of the Act, that is, January 1, 2005. Additionally, the Secretary of State is required to send a statutorily drafted letter on three separate, specified occasions to the mailing address of all registered domestic partners. The letter must inform them in detail of the changes wrought by the Act, and, if they choose not to be subject to its new rights and responsibilities, how they may terminate their registered domestic partnership.[45]

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42. Domestic Partner Rights and Responsibilities Act § 5 (codified at CAL. FAM. CODE § 298(c)).

43. *Id.* § 9 (codified at CAL. FAM. CODE § 299.2).

44. In American law, subject matter jurisdiction for divorce is based on party domicile. Accordingly, California law requires that one of the parties to the marriage be domiciled in California for six months and in the county in which the proceeding is brought for three months preceding the filing of a dissolution action. CAL. FAM. CODE § 2320.

45. Domestic Partner Rights and Responsibilities Act § 10 (codified at CAL. FAM. CODE § 299.3); *see infra* note 57 (describing an unsuccessful effort to enjoin these mailings).

In the United States, California domestic partnership is uniquely legislative in origin. Unlike very similar Vermont civil union legislation[46] and highly dissimilar Hawaii reciprocal beneficiary legislation,[47] no judicial proceeding required or impelled California domestic partnership. Unlike Hawaii and Vermont constitutional litigation,[48] which generated rancorous debate, California legislation began quietly and modestly, allowing Californians to adjust gradually to the introduction of a new and initially inconsequential legal status. Although the first legal rights and benefits were meager, the new legal status of domestic partnership built upon and reinforced the increasingly prevalent employer practice of treating an employee's conjugal partner as a spouse for purposes of employee benefits.[49] As the status of domestic partner assumed familiarity and legitimacy, additional legal incidents were legislatively attached to that status.[50] In contrast, the Hawaii[51] and Vermont[52] litigation and ensuing legislation created widespread public controversy. The Massachusetts Supreme Judicial Court's decision in *Goodridge v. Department of Public Health*[53] and advisory opinion to the Senate of Massachusetts,[54] as well as subsequent mayoral issuance of marriage licenses to same-sex couples in various municipalities,[55] provoked even greater furor and political backlash.[56]

46. 1999 Vt. Acts & Resolves 91 (codified in scattered sections of VT. STAT. ANN.).

47. HAW. REV. STAT. ANN. §§ 572C-1 to 7 (Michie 2004).

48. *See, e.g.*, Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); Baker v. State, 744 A.2d 864 (Vt. 1999). For further discussion of *Baker*, see *supra* note 2. For further discussion of the Hawaii and Vermont litigation and legislation, see Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1275–82 (2001). Additionally, while constitutional same-sex marriage litigation was pending, New Jersey enacted a comparatively weak version of domestic partnership. Domestic Partnership Act, 2003 N.J. Laws ch. 246. The New Jersey law generally tracks the California Act but, unlike California, New Jersey does not extend either marital property law or spousal rights and responsibilities pertaining to children to domestic partners. *Id.*

49. For discussion of this development, see Blumberg, *supra* note 48, at 1282–92.

50. *See supra* notes 17–41 and accompanying text; *infra* notes 200–201 and accompanying text.

51. *See* HAW. REV. STAT. ANN. §§ 572C-1 to 7; *supra* note 48.

52. *See* An Act Relating to Civil Unions, 1999 Vt. Acts & Resolves 91 (codified in scattered sections of VT. STAT. ANN.); *supra* note 2.

53. 798 N.E.2d 941 (Mass. 2003) (holding that the equal protection and due process clauses of the Massachusetts Constitution require that same-sex couples be granted access to marriage).

54. Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) (holding that civil union legislation, as contrasted to marriage, would not satisfy the equal protection and due process clauses of the Massachusetts Constitution).

55. *See, e.g.*, Pam Belluck, *Gay Marriage, State by State*, N.Y. TIMES, Mar. 7, 2004, § 4, at 2 (reporting issuance of marriage licenses to same-sex couples in Oregon's Multnomah County (which includes Portland), and mayoral issuance of marriage licenses in New Paltz (New York) and San Francisco); Robert Hanley & Laura Mansnerus, *Asbury Park Deputy Mayor Officiates at a Gay Marriage*, N.Y. TIMES, Mar. 9, 2004, at B5; Dean E. Murphy, *San Francisco Married 4,037 Same-Sex Pairs from 46 States*, N.Y. TIMES, Mar. 18, 2004, at A26; *see also* Kate Zernike, *Gay? No Marriage License Here. Straight? Ditto*, N.Y. TIMES, Mar. 27, 2004, at A8 (reporting decision of the Benton

The far more muted public response to the substantively similar California innovation may well have been due to the quiet introduction and gradual amplification of California domestic partnership.

It is not merely that the California legislation was enacted by elected representatives of the people, as opposed to the judiciary. What additionally set the California legislation apart was the tempo, modesty, and good nature of the legislative campaign. The brake frequently imposed by Governor Davis was salutary. In 2000, he seemed an excessively timid and overly cautious supporter of domestic partnership legislation, both in demanding an every-other-year legislative schedule and threatening to exercise his veto power whenever the legislators seemed to be moving too quickly. In retrospect, however, his caution may have avoided major controversy. It is true that the legislation is currently being challenged by the original sponsor of Proposition 22, Pete Knight, as violative of that Proposition.[57] Nevertheless, relatively

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County Commission in Oregon's Willamette Valley to stop issuing marriage licenses entirely in order to treat all couples, same-sex and opposite-sex, equally).

56. *See, e.g.*, David D. Kirkpatrick, *Bush Assures Evangelicals of His Commitment to Amendment on Marriage*, N.Y. TIMES, Mar. 12, 2004, at A12 (noting Bush stating his support for a constitutional amendment banning same-sex marriage, and quoting him as stating "I will defend the sanctity of marriage against activist courts and local officials who want to redefine marriage").

57. *See* Nancy Vogel, *Foes of Partner Law File Suit*, L.A. TIMES, Sept. 23, 2003, at B1. Initiative Measure Proposition 22 section 2, effective March 8, 2000, is codified at CAL. FAM. CODE § 308.5 (West Supp. 2004) and reads: "Only marriage between a man and a woman is valid or recognized in California." Proposition 22 was responsive to concerns that Hawaii would permit same-sex marriage, Californians would marry in Hawaii, and California courts, applying usual choice-of-law rules (a marriage valid where contracted is recognized everywhere unless recognition would violate some strong public policy), would recognize such marriages in California. *See* David O. Coolidge, *Marriage Is Not Meant for Same-Sex Couples*, L.A. TIMES, Feb. 28, 2000, at B5. California enacted domestic partnership legislation a year before voters approved Proposition 22, and the proponents of Proposition 22 asserted that they did not oppose domestic partnership legislation. *See id.* Their goal was merely to preserve the special status of marriage for opposite-sex couples alone. *See id.*

On May 9, 2003, the California Legislative Counsel, which provides legal advice to the California legislature, issued an opinion stating that Assembly Bill 205 is not inconsistent with Proposition 22. It concluded that "nothing in the language of the initiative statute [CAL. FAM. CODE § 308.5], nor in the ballot arguments in support of the initiative, indicates any intent or requirement that the Legislature be limited in its authority to enact new laws regarding the rights and obligations of domestic partners." Cal. Legislative Counsel, Senate Rules Comm. Report for Assemb. B. 205 (2003) (unpublished opinion of the California Legislative Counsel) (on file with author). Nevertheless, two actions to enjoin Assembly Bill 205 and one to enjoin Assembly Bill 25, the more modest 2001 legislation, have been consolidated in Sacramento as *Knight v. Davis*. On December 18, 2003, Superior Court Judge Thomas Cecil denied the complainants' motions for preliminary injunctions. *See* Cheryl Wetzstein, *Judge Allows Same-Sex 'Marriage' Law*, WASH. TIMES, Dec. 20, 2003, at A2 (explaining that the court denied the motion for an injunction to block California from implementing the Domestic Partner Rights and Responsibilities Act by notifying domestic partners of the legal changes effective January 1, 2005, but did not dismiss movants' case; a hearing on the merits expected in spring 2004).

little attention was paid to the passage of the Act in the press or other media, and there has been no widespread interest or concern about the matter. The Proposition 22 proponents were unable to gather sufficient signatures to qualify for a ballot referendum in either of the following two elections, including the November, 2004 presidential election.[58] In addition to exciting little public controversy, the legislative route tended to be consensus and coalition building within the gay and lesbian communities. The sustained effort to achieve a functional equivalent of marriage focused community attention on that goal for a period of years in a way that litigation would not have done.

The history of California domestic partnership legislation suggests that, as a pragmatic matter, domestic partnership legislation may be surer and less socially divisive than constitutionally compelled same-sex marriage or civil union.[59] This is not to suggest that society or the state should impose that strategic choice on gay men and lesbians, for the choice is not society's or the state's to make. Only gay men and lesbians can choose to forgo ultimate rights in favor of a surer, but lesser, alternative. That choice was effectively made in Vermont when the plaintiffs in *Baker v. State*[60] did not return to the Vermont Supreme Court to challenge the legislature's decision to provide them registered civil union instead of licensed and officiated civil marriage.

The other noteworthy characteristic of the culminating legislation is its explicit reference, in both title and text, to "[r]ights *and [r]esponsibilities*."[61] Prior legislation consisted of bundles of new rights and benefits, with virtually no assumption of responsibilities.[62] Similarly, the claim of employees to employment benefits for a conjugal partner as though the partner were a lawful spouse has been an assertion of rights without any corresponding

58. Telephone Interview with Jon Davidson, Senior Counsel, Lambda Legal (Jan. 20, 2004).

59. *See supra* notes 55–56. Domestic partner legislation is "surer" in terms of initially obtaining legal status for same-sex couples and ultimately retaining it. Duly enacted legislation does not generally provoke political backlash. Compare the response of the President of the United States to judicial decisions recognizing a constitutional right to same-sex marriage, or a close equivalent. *See supra* note 56.

60. 744 A.2d 864 (Vt. 1999).

61. Domestic Partner Rights and Responsibilities Act, ch. 421, § 4, 2003 Cal. Stat. 2586.

62. The only exception was joint responsibility for each other's basic living expenses incurred during the domestic partnership. Domestic Partners, ch. 588, § 2, 1999 Cal. Stat. 3372. This duty, however, seems as much an obligation to creditors as an obligation that domestic partners owe to each other. The Act explicitly provided that creditors may enforce the duty, just as they traditionally may in the case of spousal "necessaries." *Id.* The doctrine of "necessaries," upon which creditors may rely to hold one spouse liable for the debts of the other, is predicated upon the duty of support that each spouse owes the other. Necessaries include any goods or services consistent with the parties' economic and social circumstances. *See, e.g.*, Wisnom v. McCarthy, 192 P. 337, 338–39 (Cal. Ct. App. 1920) (domestic services were necessaries for person in defendants' economic and social position).

assumption of spousal responsibilities to the conjugal partner. This "rights but no responsibilities" posture has been noted and criticized by commentators who are otherwise supportive of gay and lesbian equality claims.[63] They argue that, in the context of family relationships, equality requires the assumption of burdens as well as the acquisition of rights. In any event, "rights but no responsibilities" is clearly repudiated by the Act, which grants all the incidents of marriage, that is, the rights and benefits together with the corresponding obligations and burdens.

Using the vehicle of domestic partnership, rather than marriage, may additionally emphasize the reciprocity of rights and obligations. Any new institution prompts participants, or potential participants, to inquire about its incidents, and those incidents were prominently featured as they were enumerated one by one in the early legislation.[64] By omission, the early legislation also identified the incidents of marriage that were not extended to registered domestic partners. Similarly, the explicit statement in the Act that "[r]egistered domestic partners shall have the same rights, protections, and benefits and shall be subject to the same responsibilities, obligations and duties . . . as are granted to and imposed upon spouses"[65] is a concise and powerful instruction on the correspondence of rights and responsibilities, one that is stronger than any instruction currently delivered to prospective spouses. In this sense, the Act is more ethically satisfying than the earlier domestic partner legislation, and it may be understood to represent the maturation of a sociopolitical movement, that is, a coming of age of the gay and lesbian communities.[66]

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63. *See, e.g.*, Blumberg, *supra* note 48, at 1271–75, 1290–92, 1309–10 (observing the reciprocity of rights and responsibilities in family law and noting the absence of corresponding responsibilities in some employee claims for coverage of nonmarital partners); Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163, 163 (1995) ("To date, partnerships have conferred benefits only; the most logical progression is for partnerships to include responsibilities of support, commitment and obligation within the economic partnership construct of emerging family law."); David Brooks, *The Power of Marriage*, N.Y. TIMES, Nov. 22, 2003, at A15. Brooks states:

> When liberals argue for gay marriage, they make it sound like a really good employee benefits plan. Or they frame it as a civil rights issue, like extending the right to vote. The conservative course is not to banish gay people from making such commitments. It is to *expect* that they make such commitments. We shouldn't just allow gay marriage. We should *insist* on gay marriage.

Id.

64. *See supra* notes 10–36 and accompanying text.

65. Domestic Partner Rights and Responsibilities Act § 4 (codified at CAL. FAM. CODE § 297.5(a)).

66. *See infra* notes 271–272 and accompanying text for discussion of marriage as a life passage, an assumption of the duties of adulthood, including those of founding a family and undertaking a life commitment to another human being.

B. The Efficacy of the California Legislation as Family Law

The Act is good, albeit less-than-perfect, civil rights law. Vis-à-vis opposite-sex couples, the Act creates parity, although not full equality,[67] for same-sex couples. It dignifies their registered relationships with recognition and respect. As state family law, it largely does the job for those who elect to register as domestic partners. However, its efficacy as family law turns on the extent to which same-sex couples register as domestic partners. Family law, in its allocation of rights and responsibilities, recognizes and responds to the dependence and vulnerability that arises from family relationships, particularly conjugal relationships.[68] Yet, the existence of dependence and vulnerability does not depend on the formality of a relationship. On the contrary, dependence and vulnerability may be equally great, or even greater, in informal than in formal relationships.[69]

How family law responds to informal conjugal relationships is not a matter of concern to same-sex couples alone. For the last third of a century, rates of nonmarital opposite-sex cohabitation have been rising sharply in all Western countries, including the United States. In the United States, the rate of opposite-sex nonmarital cohabitation increased nine fold from 1970 to 2000, and that rate of increase does not show any sign of abating. According to the 2000 decennial Census, for every hundred married couples there were nine unmarried opposite-sex couples and one same-sex couple.[70] Stated

67. *See supra* note 7.

68. *See* Milton C. Regan, Jr., *Postmodern Family Law: Toward a New Model of Status*, *in* PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA 157, 168–70 (David Popenoe et al. eds., 1996). The various entitlements to family coverage under government programs, such as social security (OASDI), and tax-subvented employment benefits, such as group health insurance, recognize and reflect the dependency and vulnerability that arises from family relationships, as do the support obligations that spouses bear to each other and their children, the community and marital property regimes that distribute the spouses' property at divorce, and the elective share and intestacy laws that regulate the distribution of a spouse's property at death.

69. To the extent that the absence of marriage or registered domestic partnership reflects power inequality in a conjugal relationship, the partner with less power is likely to be even more dependent and vulnerable than his or her married or registered counterpart.

70. *See* TAVIA SIMMONS & MARTIN O'CONNELL, U.S. DEP'T OF COMMERCE, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000, at 3, *available at* http://www.census.gov/prod/2003pubs/censr-5.pdf (Feb. 2003).

There are two sources of Census data on opposite-sex and same-sex unmarried-couple households: the Current Population Survey (CPS) and Census 2000, a decennial census. The annual CPS is based on telephone interviews of a random sample of American households, which is generalized to the entire population. *See* Diane Herz, Overview, Current Population Survey, *at* http://www.bls.census.gov/cps/overmain.htm (last modified May 9, 1996). The decennial census sends a questionnaire to every household at the start of each decade. I report both sets of data for selected years. CPS data is useful for illustrating historical trends, but the 2000 Census is generally understood to provide more accurate

counts. Nevertheless, as discussed *infra* notes 71–73, the 2000 Census may substantially undercount same-sex couples.

According to CPS data, in 2002, for every 100 married-couple households, there were 8.6 households headed by a person sharing living quarters with a person of the opposite sex (POSSLQ), who may or may not have been identified as an unmarried partner of the householder, up from 1.1 per 100 in 1970. The change is shown in Table 1, compiled from U.S. CENSUS BUREAU, HOUSEHOLDS, BY TYPE: 1940 TO PRESENT, *at* http://www.census.gov/population/socdemo/hh-fam/tabHH-1.pdf (June 12, 2003) and U.S. CENSUS BUREAU, UNMARRIED-COUPLE HOUSEHOLDS, BY PRESENCE OF CHILDREN: 1960 TO PRESENT, *at* http://www.census.gov/population/socdemo/hh-fam/tabUC-1.pdf (June 12, 2003).

Table 1

Year	Married Couple Households	Unmarried Opposite-Sex Couple Households (POSSLQ)			Unmarried Opposite-Sex Couples Per 100 Married Couples
	Total	Total	Without Children Under 15	With Children Under 15	
2002	56,747,000	4,898,000	3,245,000	1,654,000	8.6
2000	55,311,000	4,736,000	3,061,000	1,675,000	8.6
1998	54,317,000	4,236,000	2,716,000	1,520,000	7.8
1994	53,171,000	3,661,000	2,391,000	1,270,000	6.9
1990	52,317,000	2,856,000	1,966,000	891,000	5.5
1985	50,350,000	1,983,000	1,380,000	603,000	3.9
1980	49,112,000	1,589,000	1,159,000	431,000	3.2
1970	44,728,000	523,000	327,000	196,000	1.2

Although the category POSSLQ may include some persons who are not cohabitants, but are instead simply roommates, other aspects of the definition of POSSLQ tend to undercount nonmarital cohabiting couples and to introduce several biases in the count. The most serious difficulty with POSSLQ is that, by definition, a household containing a cohabiting couple and a child fifteen years or older is not a POSSLQ. *See* Lynne M. Casper et al., U.S. Census Bureau, How Does POSSLQ Measure Up? Historical Estimates of Cohabitation, *at* http://www.census.gov/population/www/documentation/twps0036/twps0036.html (May 1999). Thus, the count misses all couples with a child over the age of fourteen, with the result that it substantially undercounts cohabiting women in the 35–44 age range and cohabiting men in the 45–54 age range. *See id.* Adjusting for both the overcount and the undercount, the "Adjusted POSSLQ" shows a 13 to 17 percent increase in the number of cohabiting couples. *See id.* While the greatest increase is for black and Hispanic men, there is considerable increases for all race and gender groups. *See id.* Significantly, there is a substantial increase in the proportion of unmarried couple households containing children (for example, in 1997, that proportion was 43 percent using Adjusted POSSLQ and 34 percent using POSSLQ). *See id.* The adjusted figures for the presence of a child are consistent with Census 2000 figures for the percentage of opposite-sex nonmarital-couple households containing a child under the age of eighteen. *See id.*

From 1994 to 1998, the Bureau of the Census used CPS data to report households with two unrelated adults of the same sex, which it classified as "partner of the same sex." Data for those years show a relatively constant number of same-sex-partner households, as shown in Table 2. However, failure to distinguish between same-sex roommates and same-sex partners may overcount the number of same-sex partners. *See* discussion *infra* note 72. On the other hand, to the extent that the count is simply a variant of POSSLQ, effectively PSSSLQ, "persons of the same sex sharing living quarters," the undercount may balance or exceed any possible overcount.

otherwise, 9 percent of all couple households[71] are headed by unmarried conjugal partners. Moreover, it is likely that same-sex couples are substantially underreported in Census 2000.[72] The reasons for such underreporting suggest that opposite-sex unmarried couples may also be underreported.[73]

Table 2

Year	Married-Couple Households (1000s)	Unmarried Couples (1000s)			Opposite-sex Couples Per 100 Married Couples	Same-sex Couples Per 100 Married Couples	Total Unmarried Couples Per 100 Married Couples
		Opposite-sex	Same-sex	Total			
1998	54,317	4,236	1,674	5,910	7.8	3.1	10.9
1996	53,567	3,958	1,684	5,642	7.4	3.1	10.5
1994	53,171	3,661	1,678	5,339	6.9	3.2	10.0

U.S. CENSUS BUREAU, UNPUBLISHED TABLES—MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1998 (UPDATE), 71–73 tbl.8, *at* http://www.census.gov/prod/99pubs/p20-514u.pdf (containing corrected and updated data through 1998); U.S. CENSUS BUREAU, UNPUBLISHED TABLES—MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1996 (UPDATE) 71–73 tbl.8, *at* http://www.census.gov/prod/3/98pubs/p20-496u.pdf; U.S. CENSUS BUREAU, MARITAL STATUS AND LIVING ARRANGE-MENTS: MARCH 1994, 71–73 tbl.8, *at* http://www.census.gov/prod/1/pop/p20-484.pdf.

The 2000 Census offers a slightly different count for opposite-sex unmarried-couple households and a markedly different count for same-sex-couple households. *See* SIMMONS & O'CONNELL, *supra*. The 2000 Census reports fewer married couples than does the CPS (54.5 million as compared to 55.3 million) and more opposite-sex unmarried-partner households than the CPS (4.9 million as compared to 4.7 million). *See id.* at 1. The 2000 Census thus shows nine opposite-sex unmarried couples for every hundred married couples. *See id.* On the other hand, the 2000 Census shows only 594,000 same-sex-partner households, *see id.*, which represents only 35 percent of the number reported, by the 1998 CPS. For further discussion of these differences, see *infra* note 72.

With respect to the presence of children, the 2000 Census showed that 46 percent of married-couple households included at least one child under the age of eighteen. *See* SIMMONS & O'CONNELL, *supra*, at 10. More surprisingly, 43.1 percent of opposite-sex unmarried couples resided with a child under the age of eighteen. *See id.* at 9 tbl.4. Moreover, 34 percent of female same-sex-couple households included a child under the age of eighteen, as did 22 percent of male same-sex-couple households. *See id.*

71. The Census reports only heads of households and the heads' spouse or partner. Thus, it understates the number of couples to the extent that two or more couples share a household. If, for example, a married person is the head of a household that he shares with his wife, brother, and brother's domestic partner, the Census will only record the married couple.

72. The 1998 CPS data may overcount same-sex couples while the 2000 Census probably undercounts same-sex couples. To maintain historical continuity, the 1998 CPS data, *supra* note 70, counts unrelated persons of the same sex sharing living quarters. Thus, the number reported by CPS may include roommates, as opposed to nonmarital partners, even though the "unmarried partner" category was introduced in 1996 in order to count same-sex and opposite-sex nonmarital couples. E-mail from Michael Ash, Assistant Professor of Economics and Public Policy, University of Massachusetts, Amherst, and M.V. Lee Badgett, Associate Professor of Economics, University of Massachusetts, Amherst, and Research Director, Institute for Gay and Lesbian Strategic Studies, to Grace Ganz Blumberg, Professor of Law, UCLA School of Law (Feb. 24, 2004) (on file with author); e-mail from M.V. Lee Badgett to Grace Ganz Blumberg (Feb. 21, 2004) (on file with author). On the other hand, it is likely that Census 2000 substantially undercounts same-sex couples. Economists M.V. Lee Badgett and Marc A. Rogers conservatively estimate a 16 to 28 percent undercount. M.V. LEE BADGETT & MARC A. ROGERS, INSTITUTE FOR GAY & LESBIAN STRATEGIC STUDIES, LEFT OUT OF THE COUNT: MISSING SAME-SEX

II. RECOGNITION OF SAME-SEX MARRIAGE AND DOMESTIC PARTNERSHIP OUTSIDE THE UNITED STATES

This brief section is not intended to examine exhaustively all the particulars of foreign law bearing on the legal recognition and regulation of same-sex relationships.[74] Rather, it is included simply to place California and the United States in comparative perspective. This section will describe the contours of the three primary forms of recognition: marriage; some variant often called civil union or domestic partnership; and recognition of all conjugal relationships, formal and informal alike. By contrast, Part IV closely studies the divergent paths of two closely related sociolegal cultures, Canada and the United States.

COUPLES IN CENSUS 2000, at 5, *available at* http://www.iglss.org/media/files/c2k_leftout.pdf (2003). Other estimates of the undercount are much higher, suggesting that the Census missed up to 62 percent of same-sex couples. *Id.* at 12; *see also* DAVID M. SMITH & GARY J. GATES, GAY AND LESBIAN FAMILIES IN THE UNITED STATES: SAME-SEX UNMARRIED PARTNER HOUSEHOLDS 1–2, *available at* http://www.urban.org/UploadedPDF/1000491_gl_partner_households.pdf (Aug. 22, 2001). Thus, the actual number of same-sex couples could exceed 1.5 million, that is, it could approximate the CPS estimates. Same-sex partners may not have identified themselves as "unmarried partners" because of confidentiality concerns, or because that term was not explained and was listed in the category of persons "not related." Badgett & Rogers, *supra*, at 3. Moreover, the Census overcounts races that are least likely to cohabit without marriage and undercounts races that are most likely to do so. The Census overcounts whites and Asians, for whom same-sex couples represent .9 percent and .7 percent of all white and Asian couples respectively. It undercounts blacks, Hispanics and Latinos, for whom the corresponding rate is 1.4 percent. SIMMONS & O'CONNELL, *supra* note 70. Census undercount of same-sex couples has implications for estimates of the percentage of same-sex couples registered for Vermont civil unions or California domestic partnerships, *infra* notes 183–184 and accompanying text, because those estimates are based on the 2000 Census, which reports the number of same-sex couples by state. To the extent that the 2000 Census undercounts same-sex couples, estimates of the percentage of same-sex couples registered for civil unions or domestic partnership are correspondingly inflated.

73. To the extent that cautious same-sex couples prefer to list themselves as "roommates" on a public document that identifies both partners by name and address, similarly cautious unmarried opposite-sex couples may identify themselves as "married" and, to a lesser extent, "roommates." BADGETT & ROGERS, *supra* note 72, at 1, 13. To the degree that this occurs, married couples are overcounted and unmarried opposite-sex couples are undercounted. Moreover, as stated *supra* note 72, racial overcounting and undercounting increases the error. The Census overcounts whites, for whom opposite-sex nonmarital couples represent 7.3 percent of all white couples, and Asians, for whom opposite-sex nonmarital couples represent only 4 percent of all Asian couples. The Census undercounts blacks, for whom the corresponding rate is 15.5 percent, and Hispanics and Latinos, for whom it is 10.9 percent.

74. For comprehensive treatment, see YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES, THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES (2002) and LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW (Robert Wintemute & Mads Andenaes eds., 2001). Appendix I of the latter volume provides web sites for all pre-2001 provisions cited *infra* notes 76–87, 92, 97–99, and the on-line version of this Article provides links to these provisions. That Appendix, updated through September 30, 2002, is available at http://www.ilga.info/Information/Legal_survey/National Legislation Recognising Same-Sex Partnershipsnational.htm.

Formal registration of same-sex relationships began in Northern Europe, where registered domestic partnership initially provided most of the significant legal consequences of marriage, except for rights pertaining to children.[75] The Northern European countries adopting same-sex domestic partnership include, in order of enactment: Denmark,[76] Norway,[77] Sweden,[78] Iceland,[79] Greenland,[80] and Finland.[81] By the start of the twenty-first century, many other European jurisdictions had joined the Northern European nations in granting some form of legal recognition to registered same-sex couples. These include, in order of adoption: the Netherlands,[82] Spain (Catalonia[83] and Aragon[84]), France,[85] Germany,[86] and Switzerland (Geneva[87] and Zurich[88]). In England, the Labour government announced in late 2002 that it planned to introduce registered domestic partnership legislation, and the Conservative opposition immediately expressed support.[89] That legislation was introduced in 2004.[90] Some jurisdictions made registered domestic

75. However, rights with respect to children have gradually been introduced. For example, by the time the Swedish legislature entertained opening marriage to same-sex couples in 2004, it had already granted all the rights of married couples to same-sex registered partners. *Swedish Parliament Takes Steps Towards Gay Marriages*, Agence France Presse, Mar. 2, 2004.

76. Lov om registreret partnerskab [Law on Registered Partnership] (1989) (Den.).

77. Lov om registrert partnerskap [Law on Registered Partnership] (1993) (Nor.).

78. Lag om registrerat partnerskap [Law on Registered Partnership] (1994) (Swed.).

79. Lög um stadfesta samvist [Law on Confirmed Cohabitation] (1996) (Ice.).

80. Greenland is a self-governing external territory of Denmark. The Greenland Partnership Act is the Danish Act *supra* note 76.

81. Laki rekisteröidystä parisuhteista [Act on Registered Partnerships] (2001) (Fin.).

82. Aanpassingswet geregistreerd partnerschap [Registered Partnership Act], Staatsblad van het Koninkrijk der Nederlanden [Stb.] 1997, nr. 324.

83. Llei d'unions estables de parella [Law on the Stable Union of Couples] (1998) (Catalonia, Spain).

84. Ley relativa a parejas estables no casadas [Law on Unmarried Stable Couples] (1999) (Aragón, Spain).

85. Loi No. 99-994 du 15 Novembre 1999 Relative au Pacte Civil de Solidarité [Law No. 99-994 of Nov. 15, 1999 on Civil Solidarity Pacts] (Fr.) [hereinafter PaCS].

86. Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften [Law for the Ending of Discrimination of Same-Sex Communities: Life Partnerships], v. 16.2.2001 (BGBl. I S.266) (F.R.G.).

87. Loi sur le partenariat du 15 fevrier 2001 [Law on Partnership of Feb. 15, 2001] (Geneva, Switz.).

88. Gesetz über die Registrierung gleichgeschlechtlicher Paare [Law on the Registration of Same-Sex Couples] (Jan. 21, 2002) (Zurich, Switz.).

89. *See* Warren Hoge, *Britain Announces Proposal for Same-Sex Partnerships*, N.Y. TIMES, Dec. 7, 2002, at A8.

90. *See* Helen Carter & Michael White, *Rights for Gay Couples—But Not Marriage*, THE GUARDIAN, Apr. 1, 2004, *available at* http:/www.guardian.co.uk/guardianpolitics/story/3605,1183153,00.html (explaining that the government's bill would grant registered same-sex couples intestacy rights, bereavement rights, rights to compensation for fatal accidents and criminal injuries, next of kin rights in hospitals, and exemption from inheritance tax on a deceased partner's home,

partnership available to opposite-sex, as well as same-sex, couples. These include France, Hungary, Portugal, and the Spanish provinces of Aragon and Catalonia.[91] Two nations, the Netherlands[92] and Belgium,[93] have opened the status of marriage to same-sex couples, and the governments of Sweden[94] and Taiwan[95] are currently drafting same-sex marriage legislation.

In view of the ever-increasing incidence of nonmarital cohabitation, some countries have, in varying degree, assimilated long-term nonmarital (unregistered) partners, same-sex and opposite-sex,[96] to the status of marriage. These countries include, among others, Australia (The Capital Territory,[97] New South Wales,[98] Queensland,[99] Tasmania,[100] Victoria,[101] and Western

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and commenting that "the Blairite mantra of 'rights and responsibilities' is being emphasized, including maintenance of each other's children").

91. *See supra* notes 83–85.

92. Act on the Opening Up of Marriage.

93. Loi ouvrant le mariage à des personnes de même sexe, [Law Opening Marriage to Persons of the Same Sex] (2003) (Belg.).

94. *See Swedish Parliament Takes Steps Towards Gay Marriages*, *supra* note 75 ("Swedish parliament's laws committee is considering three motions that would pave the way for gay marriages, replacing a current law on same-sex civil unions that already gives gays the same rights as married couples.").

95. *See* Paul Wiseman, *In Taiwan, Not Much Ado Over Gays Saying 'I Do,'* USA TODAY, Feb. 4, 2004, at 10A.

96. I list only those jurisdictions that have included both same-sex and opposite-sex couples in their regulation of nonmarital, or unregistered, conjugal relationships. England has a patchwork of statutory provisions recognizing opposite-sex partners as family members for purposes of, inter alia, inheritance and succession, provision from the decedent's estate, succession to a tenancy, and social security (welfare) law. *See* Gillian Douglas, *Marriage, Cohabitation, and Parenthood—From Contract to Status?*, *in* CROSS CURRENTS: FAMILY LAW AND POLICY IN THE UNITED STATES AND ENGLAND 211, 219–23 (Stanford N. Katz et al. eds., 2000) [hereinafter CROSS CURRENTS].

97. Domestic Relationships Act 1994 (Australian Capital Territory, Austl.).

98. Property (Relationships) Act 1984 (New South Wales, Austl.), as amended to include same-sex relationships by the Property (Relationships) Legislation Amendment Act 1999, § 4(1).

99. Property Law Amendment Act 1999 (Queensland, Austl.) (amending "de facto spouses" to include same-sex relationships).

100. Relationships Act 2003 (Tasmania, Austl.) (giving most of the rights of marriage to same-sex and opposite-sex "significant" partners and also to nonconjugal "caring" partners, and allowing but not requiring registration of relationships); *cf.* David L. Chambers, *For the Best of Friends and for Lovers of All Sorts, A Status Other Than Marriage*, 76 NOTRE DAME L. REV. 1347 (2001). Professor Chambers proposes a weaker version of a registered nonconjugal caring relationship, which he characterizes as "designated friends." *Id.* at 1348. Registration as designated friends would entail "no financial obligations between the parties and no financial benefits from the state." *Id.* at 1355. However, designated friends would, inter alia, be empowered to make financial and medical decisions for each other in case of incapacity, be entitled to family leave to care for each other on the same terms as married persons, *id.* at 1353, and enjoy modest intestacy rights should the other die without disposing of all property by will, *id.* at 1356. For a thoughtful and comprehensive treatment of adult relationships including, inter alia, nonconjugal relationships, see LAW COMMISSION OF CANADA, BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS (2001).

101. Statute Law Amendment (Relationships) Act 2001 (Victoria, Austl.) (extending legislative definition of de facto relationships to include same-sex couples).

Australia[102]), Canada,[103] Croatia,[104] France[105] Hungary,[106] Israel,[107] Netherlands,[108] Norway,[109] New Zealand,[110] Portugal,[111] Spain (Aragon),[112] and Sweden.[113] Although many of these jurisdictions have different regimes for married or registered partners than they do for unregistered partners, in 2001, the

102. Acts Amendment (Lesbian and Gay Legislative Reform) Act 2002 (Western Austl., Austl.) (extending legislative definition of de facto relationships to include same-sex couples).

103. *See infra* Part IV.

104. Zakon o istospolnim zajednicama [Law on Same-Sex Civil Unions] (2003) (Croat.) (granting same-sex partners cohabiting for at least three years the same rights, for example, of inheritance and financial support, as are granted to similarly-situated unmarried opposite-sex partners).

105. French law has long characterized stable nonmarital cohabitation as "concubinage." Article 515-8 of the French Civil Code, added by PaCS, *supra* note 85, defines concubinage as "a de facto union characterized by stability and continuity between two persons of the same or different sex who live together as a couple." Concubinage has been assimilated to marriage for many public law purposes, including social security and employment benefits, and rights against third parties, such as wrongful death actions. *See* David Bradley, *Regulation of Unmarried Cohabitation in West European Jurisdictions—Determinants of Legal Policy*, 15 INT'L J.L. POL'Y & FAM. 22, 33–37 (2001) (discussing PaCS, *see supra* note 85, that is, French registered partnership, and the coexisting law of concubinage, that is, unregistered partnership).

106. Common Law Marriage Act 1996, Polgári Törvénykönyv (Civil Code) art. 685/A (Hung.) (applies to same-sex and opposite-sex couples).

107. *See* Menashe Shava, *The Property Rights of Spouses Cohabiting Without Marriage in Israel—A Comparative Commentary*, 13 GA. J. INT'L & COMP. L. 465, 467, 469–72 (1983) (describing the rights of "reputed spouses," or nonmarital cohabitants, which include various social rights and benefits as well as *inter se* claims against each other).

108. "Unregistered cohabitation (both for same-sex and opposite-sex couples) was first recognized in Dutch Legislation in a law of 21 June 1979 (amending Art. 7A:1623h of the Civil Code, relating to rent law)." Kees Waaldijk, *Taking Same-Sex Partnerships Seriously—European Experiences as British Perspectives?*, 2003 INT'L FAM. L. 84 app. at 93. Since then, recognition has been extended for many purposes, including inheritance tax, social security, income tax, citizenship and parental authority. *Id.*

109. Co-habitation Act 1991 (Nor.). *See generally* Turid Noack, *Cohabitation in Norway: An Accepted and Gradually More Regulated Way of Living*, 15 INT'L J.L. POL'Y & FAM. 102 (2001). Noack reports that "[t]oday, cohabiting couples who have children together or have lived together for [a] minimum [of] two years will have many of the same rights and obligations to social security pensions and taxation as their married counterparts." *Id.* However, cohabitants are not treated as married persons for purposes of *inter se* rights and obligations. *Id.* at 110. In 1999, a government commission recommended various reforms, including greater *inter se* rights and obligations in long-term relationships. *Id.* at 112–14. The Commission's Report, *Cohabitants and Society* (1999), is available only in Norwegian at http://odin.dep.no/bfd/norsk/publ/utredninger/NOU/004005-020012/index-dok000-b-n-a.html. *Id.* at 116 n.6.

110. *See infra* note 115 and accompanying text.

111. Lei No. 7/2001 de 11 de Maio, Adopta medidas de protecção das uniões de facto [De Facto Unions Act of May 11, 2001] (Port.).

112. Article 3, section 1 of the Aragon Law on Unmarried Stable Couples provides that it is applicable to registered couples *and* to unregistered couples who have cohabited for at least two years. The Aragon statute is translated into English at http://www.steff.suite.dk/eurolet/eur_69.pdf.

113. Sweden was the first country to legally regulate opposite-sex cohabitation. *See* MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 252–77 (1989). In 1987, Sweden extended that regulation to same-sex couples. Lag om homosexuella sambor [Homosexual Cohabitants Act] (1987) (Swed.).

government of New Zealand, rejected the New Zealand Law Commission's proposal to create special "domestic partner" status[114] for the one-out-of-seven New Zealand couples, same-sex and opposite-sex, who cohabit without marriage. Explicitly declining to balkanize conjugal relationships, the government instead enacted legislation equating long-term (three years or more) same-sex and opposite-sex cohabitation with marriage. The legislation treats married couples and nonmarital couples equally at the termination of a relationship, providing the same rights to economic support and equal division of property acquired during the relationship by either party. It additionally extends the principle of equality to death rights.[115]

III. WHY HAS THE UNITED STATES BEEN A LAGGARD NATION?

In family law, the United States has been a leader more often than a follower. Among western nations, particularly English-speaking nations, the United States has pioneered reform of the law regulating divorce, including no-fault divorce,[116] systematic property distribution at divorce,[117] and the rationalization and systematization of child support.[118] The United States has also led the way in such diverse areas as domestic violence,[119] international adoption,[120] and legal recognition of nonmarital children.[121] Although most

114. The domestic partnership proposal was published as LAW COMMISSION OF NEW ZEALAND STUDY PAPER 4, RECOGNIZING SAME-SEX RELATIONSHIPS (1999), *available at* http://www.lawcom.govt.nz/studypapers.htm.

115. This was accomplished in four acts. The Property Relationships Amendment Act 2001 extends to nonmarital couples the property rights and obligations of married couples at the dissolution of a relationship. Like married couples, New Zealand unmarried couples have the right to opt out of property division, provided that it is not "clearly unfair" to one of the parties at the termination of their relationship. The Family Proceedings Amendment Act 2001 grants nonmarital partners equality with spouses for purposes of claiming support ("spousal maintenance") after dissolution of the relationship. When a relationship is terminated by the death of a nonmarital partner, the Administration Amendment Act 2001 grants the surviving partner spousal intestacy rights in the decedent's estate. When a nonmarital partner dies testate, the Family Protection Amendment Act 2001 grants the surviving partner the same rights as a spouse to make a claim against a decedent-partner's estate.

116. *See generally* Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291 (1987).

117. *See* Grace Ganz Blumberg, *The Financial Incidents of Family Dissolution*, *in* CROSS CURRENTS, *supra* note 96, at 387, 393–94.

118. *See id.* at 395–97; Irwin Garfinkel & Marygold S. Melli, *The Use of Normative Standards in Family Law Decisions: Developing Mathematical Standards for Child Support*, 24 FAM. L.Q. 157 (1990).

119. *See* Elizabeth M. Schneider, *The Law and Violence Against Women in the Family at Century's End: The U.S. Experience*, *in* CROSS CURRENTS, *supra* note 96, at 471.

120. *See generally* Bridget M. Hubing, *International Child Adoptions: Who Should Decide What is in the Best Interests of the Family?*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 655 (2001); Kay Johnson, *Politics of International and Domestic Adoption in China*, 36 LAW & SOC'Y REV. 379 (2002).

American reform has been legislative, constitutional decisions have also been important in assuring equal de jure treatment of men and women in family law,[122] as well as equal legal treatment of children whether they are born in or out of wedlock.[123]

However, with respect to legal recognition and regulation of same-sex couples, the United States seems backward. In many jurisdictions, constitutional challenge to the exclusion of same-sex couples from the legal institution of marriage has been unsuccessful.[124] The four exceptions to this generalization—Hawaii,[125] Alaska,[126] Vermont[127] and Massachusetts[128]—have

121. *See* Michael Grossberg, *How to Give the Present a Past? Family Law in the United States 1950-2000*, *in* CROSS CURRENTS, *supra* note 96, at 3, 8–10.

122. *See, e.g.*, Orr v. Orr, 440 U.S. 268 (1979) (Alabama statute providing that husbands, but not wives, may be required to pay alimony upon divorce violates the Fourteenth Amendment's Equal Protection Clause); Califano v. Goldfarb, 430 U.S. 199 (1977) (men and women must be treated equally for purposes of social security benefit eligibility based upon a spouse's earnings record); Frontiero v. Richardson, 411 U.S. 677 (1973) (differential treatment of male and female members of the uniformed services with respect to eligibility to claim a spouse as a "dependent" for purposes of increased allowances and benefits violates the Fourteenth Amendment's Equal Protection Clause); Reed v. Reed, 404 U.S. 71 (1971) (state preference for fathers over mothers as administrators of the intestate estate of a deceased child violates the Fourteenth Amendment's Equal Protection Clause).

123. *See* Grossberg, *supra* note 121.

124. *See, e.g.*, Standhardt v. Superior Court, 77 P.3d 451 (Ariz. Ct. App. 2003) (rejecting equal protection, substantive due process and state constitution privacy claims to recognizing same-sex marriage); Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995) (rejecting claims under state statutes and the federal constitution that the state should recognize same-sex marriage); Morrison v. Sadler, No. 49D13-0211-PL-001946, 2003 WL 23119998 (Ind. Super. Ct. May 7, 2003) (rejecting state and federal constitutional claims to same-sex marriage); Jones v. Hallahan, 501 S.W.2d 588, 589–90 (Ky. Ct. App. 1973) (rejecting the claim of same-sex marriage applicants who invoked the constitutional rights of free exercise of religion, freedom of association, and freedom to marry); Baker v. Nelson, 191 N.W.2d 185, 186-87 (Minn. 1971) (rejecting same-sex marriage applicants' equal protection and due process claims), *appeal dismissed*, 409 U.S. 810 (1972); Lewis v. Harris, No. MER-L-15-03, 2003 WL 23191114 (N.J. Super. Ct. Law. Div. Nov. 5, 2003) (rejecting all constitutional arguments advanced by same-sex marriage applicants); *In re* Cooper, 592 N.Y.S.2d 797 (App. Div. 1993) (denial of marriage licenses to same-sex partners violates no constitutional guarantee); Singer v. Hara, 522 P.2d 1187, 1195–97 (Wash. Ct. App. 1974) (rejecting the claim of same-sex marriage applicants despite an equal rights amendment to the state constitution). For early commentary, see Note, *Homosexuals' Right to Marry: A Constitutional Test and a Legislative Solution*, 128 U. PA. L. REV. 193 (1979) (evaluating the Equal Protection Clause as a basis for the right to homosexual marriage); Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 574–83 (1973) (analyzing the Fourteenth Amendment's validity as a basis for the right to homosexual marriage).

125. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); Baehr v. Miike, 80 Haw. 341 (Ct. App. 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997).

126. Brause v. Bureau of Vital Statistics, No. 3AN-95-6592 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998), which prompted rapid adoption of a constitutional amendment barring same-sex marriages in Alaska. ALASKA CONST. art. I, § 25.

127. Baker v. State, 744 A.2d 864 (Vt. 1999).

128. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) (stating that civil union legislation, as contrasted to marriage, would not satisfy the equal protection and due process clauses of the Constitution of Massachusetts).

attracted widespread attention and commentary. Yet considerably less attention has been paid to the frequency with which constitutional actions have failed. Moreover, legislative reform has been sparse and, unless impelled by constitutional command, largely insignificant. Initial legislation was municipal, originating in small municipalities with large gay and lesbian populations and then extending to large cities with relatively progressive populations.[129] The legislation was of little effect not because of any lack of political will or purpose, but because most incidents of family law are controlled by state and federal law, with the states generally regulating access to the institution of marriage and the federal government providing many of the social benefits that accompany the legal status of marriage.

The failure of most American courts to recognize the constitutional claim as a compelling human rights claim and the failure of legislatures to extend the institution of marriage, or a parallel institution, to same-sex couples may be explained as the by-product of a highly formal and static understanding of the conjugal relationship in American law.[130] During the last three decades, most western nations have addressed two distinguishable but closely related issues concerning legal recognition of conjugal relationships. The first, historically, is the legal regulation of nonmarital families, that is, conjugal relationships in which two persons of the opposite sex live together as a couple for a significant period of time. The second is the recognition and regulation of same-sex relationships.

Until the late nineteenth century, in the absence of any formal marriage, American law generally characterized a long-term conjugal relationship between a man and a woman as a common law marriage, which was treated as a lawful marriage for all purposes.[131] In other words, informal entry into an enduring conjugal relationship was recognized as one means of assuming the rights and duties of the legal institution of marriage. However, during the past two centuries, common law marriage has been legislatively abolished in most states.[132] For the better part of the twentieth

129. *See* Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1188–95 (1992) (discussing the municipal ordinances).

130. *See* Blumberg, *supra* note 48, at 1302–09. In that Article, I relate our formal, as opposed to functional, understanding of the family to the structure and unusual lack of transparency, or "hidden" nature, of our welfare state.

131. *See generally* Walter J. Wadlington, *Marriage: An Institution in Transition and Redefinition*, *in* CROSS CURRENTS, *supra* note 96, at 235, 244–46.

132. In 1998, a common law marriage could be contracted in the District of Columbia and eleven states: Alabama, Colorado, Iowa, Kansas, Montana, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah. Georgia, Idaho and Ohio had recently abolished it by statute, while Utah adopted it by statute in 1987. *See* IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT,

century, most states did not recognize, or in any manner regulate, nonmarital conjugal relationships. In the United States generally, the legal recognition of conjugal relationships was understood in a highly formal manner. One either possessed or did not possess the necessary legal documentation. The existence of a social relationship, no matter how longstanding or productive of offspring, was unavailing.

After World War II, nonmarital cohabitation became more frequent in Europe. In the United States, the nonmarital cohabitation rate began a sharp and steady rise in the 1960s.[133] The American response to rising rates of nonmarital cohabitation differed from that of other countries.[134] America took the divergent path of contractualizing nonmarital cohabitation. Under prevailing American law, at the termination of nonmarital cohabitation any claims that one party may wish to assert against the other must be couched in and satisfy the rubric of contract. There are various possible explanations and readings of this contractual treatment, which from a comparative perspective is idiosyncratic.[135] Contractualization of nonmarital conjugal relationships is, however, consistent with the formality of the American view of marriage. Marriage itself is often characterized in American jurisprudence as a contract, even though it is a contract only in the sense that the consent of the parties is required. As marriage is constituted only by compliance with prescribed legal formalities, correspondingly, rights and responsibilities arising from nonmarital cohabitation may be created only by the parties' *inter se* contract.[136] Unlike marriage, to which the state is also a

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PROBLEMS 65–66 (3d ed. 1998). For a discussion of Utah's adoption of common law marriage, see *infra* notes 251–254 and accompanying text.

133. *See supra* note 70.

134. *See supra* notes 96–115 and accompanying text.

135. *See supra* notes 96–115 and accompanying text.

136. *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), adopted the rubric of contract: *inter se* claims should be recognized only to the extent both parties agreed they would be. *Id.* at 110. Although the dictum of *Marvin* promised the development of other equitable remedies, they never materialized. *See* Richard E. Denner, *Nonmarital Cohabitation After* Marvin*: In Search of a Standard*, 2 CAL. FAM. L. MONTHLY 229, 229 (1986). Expressing disappointment, Superior Court Judge Denner reports:

> The law of nonmarital cohabitation appeared to have been expanded in a single case to parallel the law of marital cohabitation. . . . *Marvin* contained [suggestions] that further parallels to the law of marital cohabitation would be made in future cases.
>
> In the nine years since *Marvin*, those cases have not materialized. Many appellate decisions have limited *Marvin*'s effect.

Id. In the years immediately following *Marvin*, the contract principles articulated in *Marvin* were widely adopted by appellate courts of other states. For a listing of cases, see Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1125 n.2 (1981). Despite such widespread adoption, there have been remarkably few reported cases in recent years.

Two jurisdictions require that cohabitation agreements be in writing. *See* MINN. STAT. ANN. § 513.075 (West 2002); TEX. BUS. & COM. CODE ANN. § 26.01(b)(3) (Vernon 2002). Other

party,[137] a cohabitation contract is treated as an entirely private contract that may, at most, only create rights and obligations between the two parties to the contract. Correspondingly, American law does not confer public or third party benefits on nonmarital cohabitants, even those who contractually bind themselves to one another.[138] In practice, contractual treatment of nonmarital cohabitation has proven highly unsatisfactory for reasons that have been explored elsewhere.[139] For purposes of this Article, I wish only to note that widespread dissatisfaction.[140]

In short, the existence and characteristics of the social relationship itself count for nothing in American law. This entirely formal American understanding of nonmarital cohabitation contrasts sharply with the

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states impose unusual doctrinal restrictions on cohabitation agreements. New York, for example, enforces only express, as opposed to implied-in-fact, agreements. Morone v. Morone, 413 N.E.2d 1154, 1157 (N.Y. 1980). Effectively, these jurisdictions require more formality for a cohabitation agreement than is required for many other enforceable agreements.

Washington state has been a notable exception. It applies its community property law to distribute property acquired by persons who have lived in stable nonmarital cohabitation. *See infra* notes 212–220 and accompanying text.

137. *See* Maynard v. Hill, 125 U.S. 190 (1888). Although the notion is venerable, it is still very much alive. For example, in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), the court said: "In a real sense, there are three partners to every civil marriage: two willing spouses and an approving [s]tate." *Id.* at 954 (citing DeMatteo v. DeMatteo, 762 N.E.2d 797 (Mass. 2002).

138. *See* Denner, *supra* note 136, at 34; Blumberg, *supra* note 136.

139. *Marvin* adopted the rubric of contract: *Inter se* claims should be recognized only to the extent both parties agreed they would be. *Marvin*, 557 P.2d at 110. *Marvin* has been much criticized as unworkable, inapt, artificial, and inadequately responsive to a range of worthy claims. *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03, at 931–37 (2002) [hereinafter PRINCIPLES]. Application of the rubric of contract to nonmarital cohabitation has generated considerable dissatisfaction because it tends to produce two problems: Either courts reach harsh and undesirable results by applying contract law strictly, or, in an effort to avoid harsh results, courts play havoc with contract law, distending it beyond recognition. Moreover, the contractual rubric tends to be difficult and time-consuming to administer.

140. *See, e.g.*, Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 711–12 (1996); Denner, *supra* note 136; William A. Reppy, Jr., *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44 LA. L. REV. 1677, 1678 (1984); Amy Lim, Comment, *In Defense of Washington's Equitable Treatment of Pseudomarital Property*, 29 IDAHO L. REV. 975, 995–98 (1992–1993); Kathryn S. Vaughn, Comment, *The Recent Changes to the Texas Informal Marriage Statute: Limitation or Abolition of Common-Law Marriage?*, 28 HOUS. L. REV. 1131, 1147–49 (1991). For critiques of the application of contract analysis to marriage and marriage-like cohabitation, see Blumberg, *supra* note 48, at 1292–99; Blumberg, *supra* note 136, at 1159–70; Ira Mark Ellman, *"Contract Thinking" Was Marvin's Fatal Flaw*, 76 NOTRE DAME L. REV. 1365 (2001); Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 13–24 (1989); Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435, 1450–51 (2001); Margaret F. Brinig, *Status, Contract and Covenant*, 79 CORNELL L. REV. 1573, 1594–99 (1994) (reviewing MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY (1993)). For early criticism of the unjust enrichment remedy, see Robert C. Casad, *Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?*, 77 MICH. L. REV. 47, 49–51 (1978).

functional, or social, approach employed by most other countries that have undertaken legal regulation of nonmarital cohabitation. Those countries recognize long-term, stable informal conjugal relationships and regulate them, for some or all purposes, in the same manner that they regulate formal marriages.

I believe that legal attention to the character and function of conjugal relationships led those countries to equal legal recognition of same-sex couples as nonmarital cohabitants, which in turn paved the way for recognition of gay and lesbian access to the institution of marriage itself. By contrast, the insistence of American law on formal, rather than social, indices to identify relationships worthy of legal recognition has impeded the acceptance of the concept of same-sex marriage, or some close equivalent such as civil union or domestic partnership. The American response to such claims, which has generally been highly formalistic, even tautological,[141] is unlikely in a legal culture that identifies legally cognizable relationships according to their social characteristics and functions.[142]

IV. THE UNITED STATES AND CANADA

To illustrate this point, I compare Canada and the United States, which have similar cultures and legal systems. Each has a federal constitution, which guarantees, inter alia, individual civil rights. Both the American Constitution and the Canadian Charter[143] guarantee every citizen equality

141. Consider for example the reasoning of the Kentucky Court of Appeals in *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973), where two women asserted that the refusal of the county clerk to issue them a license to marry infringed their constitutional right to marry:

> It appears to us that appellants are prevented from marrying, not by the statutes of Kentucky . . . , but rather by their own incapability of entering into a marriage as that term is defined.
>
> . . . .
>
> In substance, the relationship proposed by appellants does not authorize the issuance of a marriage license because what they propose is not a marriage.

Id. at 589–90.

142. Compare the analysis in *Jones v. Hallahan*, with that of the Ontario Court of Appeal in *Halpern v. Toronto*, [2003] 65 O.R.3d 161:

> [W]hether a formal distinction [between opposite-sex and same-sex couples with respect to access to lawful marriage] is part of the definition itself [of traditional marriage] or derives from some other source does not change the fact that a distinction has been made. . . .
>
> [A]n argument that marriage is heterosexual because it "just is" amounts to circular reasoning. It sidesteps the entire s. 15(1) [equality guarantee] analysis. It is the opposite-sex component of marriage that is under scrutiny. The proper approach is to examine the impact of the opposite-sex requirement on same-sex couples to determine whether defining marriage as an opposite-sex institution is discriminatory [the first stage of a section 15(1) inquiry].

Id. at 181.

under the law.[144] Each country has a federal system in which power is shared by a federal government and states or provinces. In the United States, marriage is largely regulated by the states. In Canada, regulation of marriage is shared by the federal government and the provinces.[145]

For the first three quarters of the twentieth century, American and Canadian legal treatment of nonmarital cohabitation was identical. Marriage was the only recognized form of conjugal relationship. Cohabitation was legally unrecognized.[146] In the 1970s, however, concern about public welfare burdens prompted two Canadian provinces to recognize stable nonmarital cohabitation for the purpose of allowing courts to impose support obligations at its termination. In 1975, British Columbia extended the right to seek spousal support to a man and a woman who had "lived together as husband and wife" for at least two years.[147] In 1978, Ontario also enacted legislation extending the spousal support obligation to nonmarital cohabitants.[148] The spousal support legislation marked the beginning of an incremental process of legislative and constitutional recognition of opposite-sex nonmarital cohabitation. By legislation in most provinces, cohabitants who live

143. CAN. CONST. (Constitution Act, 1982) pt. I, § 15(1) (Canadian Charter of Rights and Freedoms) [hereinafter Charter].

144. Compare the Fourteenth Amendment of the United States Constitution ("nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws") with Section 15(1) of the Charter ("Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."). Writing for a unanimous court in *Law v. Canada*, [1999] 1 S.C.R. 497, Canadian Supreme Court Justice Iacobucci described the purpose of section 15(1) as follows:

> It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom though the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

Id. at 529.

145. The 1867 Constitution Act grants the federal government exclusive jurisdiction over marriage and divorce. CAN. CONST. (Constitution Act, 1867) pt. VI, § 91(26). The provinces have exclusive jurisdiction over the solemnization of marriage. *Id.* § 92(12).

146. Winifred Holland, *Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?*, 17 CAN. J. FAM. L. 114, 127 (2000).

147. The current British Columbia Law is: Family Relations Act, R.S.B.C., ch. 128, § 1 (1996) (British Columbia, Can.), as amended by S.B.C., ch. 20 (1997); Definition of Spouse Amendment Act, 1999, S.B.C., ch. 29; Definition of Spouse Amendment Act, 2000, S.B.C., ch. 24.

148. For purposes of the spousal support obligation, the 1978 act defined a "spouse" to include "either of a man or woman who are not married to each other and who have cohabited, (a) continuously for a period of not less than five years, or (b) in a relationship of some permanence if they are the natural or adoptive parents of a child. Ontario Family Law Reform Act of 1978, R.S.O., ch. 2, § 14(b). In 1986, the five year period was reduced to three years. Ontario Family Law Reform Act of 1986, R.S.O., ch. F-3, §§ 29–30.

together for a specified period of time, or have a child together, may make a claim against the estate of a deceased partner.[149] Federal statutes, including the income tax statute, have also extended the rights and obligations of spouses to cohabitants. In turn, the pervasiveness of such legislation appears to have influenced Canadian courts hearing claims that the failure of a particular legislative scheme to treat unmarried cohabitants as spouses violates the equality guarantee of the Charter. In *Miron v. Trudel*,[150] for example, the Canadian Supreme Court held that Ontario insurance legislation violated the equality guarantee of the Charter by not including an "unmarried partner" as a "spouse" on accidental injury policies. Observing that "the goal or functional value of the legislation here at issue is to sustain families when one of their members is injured in an automobile accident," the Court concluded that marital status is not a "reasonably relevant marker" of conjugal relationships that are so financially interdependent and stable as to warrant provision of the benefits in question.[151] In reaching its conclusion, the Court was strongly influenced by the fact that, by 1995, sixty-three Ontario statutes made "no distinction between married partners and unmarried partners who have cohabited in a conjugal relationship."[152] Because sixty-three statutes could define which conjugal partners should be included within their purview without relying upon a discrimination based on marital status, the Court was persuaded that the insurance provision could have been alternatively drafted in a manner "substantially less invasive of Charter rights."[153] Following *Miron v. Trudel*, the Alberta spousal support law was challenged as violative of the equal treatment guarantee of the Charter. Unlike other provinces, Alberta did not treat long-term cohabitants as spouses for purposes of spousal support. In *Taylor v. Rossu*,[154] the Alberta Court of Appeal, following the logic of *Miron v. Trudel*, held that such unequal treatment violated the Charter.

This account of Canadian constitutional interpretation of the Charter is not intended to suggest that it is readily exportable to the United States.[155]

149. The 1980 Ontario provision is discussed in *Miron v. Trudel*, [1995] 2 S.C.R. 418.

150. *Id.* at 499.

151. *Id.* at 503, 507.

152. *Id.*

153. *Id.* at 506. The rubric is analogous to the "carefully tailored" component of the heightened-review "strict scrutiny" test.

154. [1998] 216 A.R. 348.

155. On the contrary, Canadian courts have generally taken a more expansive view of the equal protection clause of their Charter than American courts have taken of the Fourteenth Amendment's Equal Protection Clause. *Compare supra* notes 150–154 and accompanying text, *with* Nieto v. Los Angeles, 188 Cal. Rptr. 31 (Ct. App. 1982) (finding no constitutional infirmity in state statute allowing a spouse, but not a dependent unmarried cohabitant, to bring a wrongful

Instead, Canadian experience is described in order to illustrate the powerful impact of a social, or functional, definition of the family on legislative and constitutional development, as well as to show the synergy of legislation and constitutional litigation once a functional definition of the conjugal relationship has generally been accepted by lawmakers. Although the Canadian constitutional courts are effectively employing a variant of the searching American "strict-scrutiny" test,[156] the Canadian judges would seem unwilling to conclude that the challenged legislation would survive even a sharply focused "rational basis" test.[157] This is because the challenged legislation makes no sense to them. It is simply a holdover, or throwback, from an earlier era of formalistic thinking.

By contrast with the United States, which isolated and contractualized nonmarital cohabitation, Canada selectively assimilated opposite-sex cohabitation to marriage.[158] Cohabitants are variously characterized by Canadian case law and legislation as "unmarried partners," "conjugal partners," "partners," "non-traditional couples," and "partners in an unmarried relationship." Their relationship is described as a "marriage-like conjugal relationship," "near marriage," and "conjugal relationship outside marriage."[159] From the legal recognition of nonmarital opposite-sex couples, it was a relatively short step to the inclusion, by case law and legislation, of similarly situated same-sex

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death action). Compare *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988), where the California Supreme Court declined to extend a cause of action for negligent infliction of emotional distress or loss of consortium to unmarried couples with stable and significant relationships akin to a marital relationship. The court's reasons included, inter alia, the state's interest in promoting marriage and the administrative inconvenience of requiring courts to determine the existence of "the emotional attachments of a family relationship." *Id.* at 587 (quoting Mobaldi v. Regents of Univ. of Cal., 127 Cal. Rptr. 720 (Ct. App. 1976). *But cf.* Graves v. Estabrook, 818 A.2d 1255 (N.H. 2003); Dunphy v. Gregor, 642 A.2d 372 (N.J. 1994); Lozoya v. Sanchez, 66 P.3d 948 (N.M. 2003) (extending the claim of loss of consortium to unmarried cohabitants and rejecting the reasoning of *Elden v. Sheldon*).

156. *See supra* notes 150–153 and accompanying text. In *Miron v. Trudel*, for example, the statute was found violative of the Charter because it was not sufficiently "narrowly tailored" to accomplish its legitimate objectives. *Miron*, 2 S.C.R. at 420.

157. I have in mind a case like *Turner v. Safley*, 482 U.S. 78, 99 (1987), where Justice O'Connor, purporting to apply the rational basis test, concludes that a Missouri prison regulation allowing a prisoner to marry only when there is a compelling reason for marriage "is not reasonably related to [legitimate] . . . penological objectives." *Id.* at 97.

158. For most purposes, qualified cohabitants are treated as spouses under prevailing legislation, some of which has been amended to conform to constitutional decisions. However, this is not the case with property rights. Married persons have statutory marital property rights and possessory rights in the family home. By contrast, nonmarital partners must, under Canadian case law, rely on the doctrine of constructive trust, with account generally taken of each spouse's contribution to the conjugal enterprise as well as the material assets. This different treatment of married couples and nonmarital couples was upheld by the Canadian Supreme Court in *Walsh v. Bona*, [2002] 4 S.C.R. 325. Thus, future Canadian property rights reform must be legislative in character.

159. *Miron*, 25 S.C.R. 418.

couples. In British Columbia, the legislature acted without constitutional compulsion. In 1998, British Columbia enlarged its definition of "spouse" for purposes of spousal support to include same-sex, as well as opposite-sex, cohabitants.[160]

In contrast to British Columbia, the inclusion of same-sex couples was constitutionally compelled in Ontario. In *M. v. H.*,[161] a woman who had been a homemaker in a five-year lesbian relationship brought an action against her partner under the Ontario spousal support provision, which allows opposite-sex persons who cohabit for more than three years to seek spousal support after the termination of the relationship. The lower courts and the Canadian Supreme Court agreed that the exclusion of same-sex partners from the protection of the spousal support provision violated the equality guarantee of the Charter. The Supreme Court characterized the discrimination as one of sexual orientation, recognizing that "[g]ays, and lesbians form an identifiable minority who suffer serious social, political and economic disadvantages.'"[162] Identifying the interests advanced by spousal support as the provision of "basic financial needs following the breakdown of a relationship characterized by intimacy and economic dependence" and the protection of the taxpayer from public welfare claims that should be borne instead by former partners, the Court concluded that the exclusion of same-sex couples was not rationally connected to either objective. The Court acknowledged that there is evidence suggesting that, in general, same-sex conjugal partners may not experience the same level of economic inequality as opposite-sex partners. However, the Court treated that evidence as immaterial because any award of spousal support necessarily entails a hearing on the underlying issues, that is, economic dependence and its degree.[163] Again, although much of the Court's analysis tracks the "heightened scrutiny"

160. Family Relations Act, R.S.B.C., ch. 128, § 1 (1996) (British Columbia, Can.) (amended Oct. 1, 1998). For purposes of spousal support, a "spouse" includes a person who "lived with another person in a marriage-like relationship for a period of at least 2 years . . . and, for the purposes of this Act, the marriage-like relationship may be between persons of the same gender." *Id.*

161. [1999] 2 S.C.R. 3.

162. *Id.* (quoting Egan v. Canada, [1995] 2 S.C.R. 513). In *Egan*, the Canadian Supreme Court held that sexual orientation is analogous to those grounds specifically enumerated in section 15(1) of the Charter, observing that "[s]exual orientation is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs." *Egan*, 2 S.C.R. at 528; see *supra* note 144 for the text of section 15(1).

163. *M.*, 2 S.C.R. 3. For similar analysis, see *Orr v. Orr*, 440 U.S. 268, 281–82 (1979), which held violative of the Fourteenth Amendment Equal Protection Clause an Alabama statute that allowed an award of alimony, or spousal support, to wives but not to husbands, pointing out that even though sex might in other contexts be a reliable proxy for need, it may not be used as such when, in any event, individualized spousal support hearings determine the dependency of one spouse on the other and the extent of need.

analysis of American constitutional cases, the bottom line seems to be a mere "rational basis" approach. Having identified the relationship in terms of its social characteristics and its potential for leaving one partner economically needy at its termination, the Court could not identify any rational basis for distinguishing between opposite-sex and same-sex relationships. Although *M. v. H.* involved an Ontario statute, the federal government responded to the Supreme Court's decision by extending many federal benefits and obligations to all unmarried couples cohabiting in a conjugal relationship for at least one year, without regard to sexual orientation.[164]

V. CANADA AT THE CROSSROADS: THE CHOICES AND THE IMPLICATIONS OF CHOICE FOR CANADA AND THE UNITED STATES

Following the 1999 Canadian Supreme Court decision in *M. v. H.*, Canadian family law reformers considered three distinct, albeit not mutually exclusive,[165] approaches. They could follow the logic of *M. v. H.* and invoke the equality guarantee of the Charter to press the claim of same-sex couples for full access to the formal status of marriage. They could legislatively pursue an alternative formal legal status, such as some variety of registered civil union or domestic partnership. Or, they could pursue ad hoc case law and legislative assimilation of same-sex conjugal partners into the parallel but, as compared to lawful marriage, incomplete status of nonmarital opposite-sex conjugal partners.[166] The question was vigorously debated.[167]

Other English-speaking jurisdictions had recently followed both the second and third paths. Modest domestic partnership legislation for same-sex couples had already been enacted and incrementally augmented in California.[168]

164. Modernization of Benefits and Obligations Act, R.S.C., ch. 12 (2000) (Can.). In this Act, "Parliament amended 68 federal statutes in order to give same-sex couples the same benefits and obligations as opposite-sex couples." Halpern v. Toronto, [2003] 65 O.R.3d 161, 172.

165. I do not wish to suggest that these courses of action are mutually exclusive. However, pursuit of one may have implications, positive or negative, for subsequent pursuit of another. *See infra* notes 190–201 and accompanying text. Nevertheless, one can envisage a legislative strategy that contemplates all three approaches, for example, legislation of a domestic union regime that is re-legislated as marriage some years later when society has more fully adjusted to the notion of gay and lesbian unions, with simultaneous expansion of the rights and obligations of nonmarital partners. *See* discussion of Dutch legislation *supra* note 4. This Article later argues that, for same-sex couples, such a two-track strategy is essential. A complete response to the needs of gay and lesbian couples requires recognition of informal, as well as formal, gay and lesbian relationships.

166. *See supra* note 158.

167. *See, e.g.*, Symposium, *Domestic Partnerships*, 17 CAN. J. FAM. L. 11 (2000); ALBERTA LAW REFORM INSTITUTE, RECOGNITION OF RIGHTS AND OBLIGATIONS IN SAME SEX RELATIONSHIP (2002), *available at* http://www.law.ualberta.ca/alri/.

168. *See supra* notes 8–36 and accompanying text.

Constitutionally compelled civil union legislation, indistinguishable from marriage in terms of state law rights and obligations, had been enacted in Vermont.[169] Contradistinctively, Australian states had assimilated same-sex relationships into the legal status long enjoyed by opposite-sex nonmarital relationships. New South Wales, for example, had expanded its definition of "de facto relationship" to include "a relationship between two adult persons . . . who live together as a couple, and . . . who are not married to one another."[170] In New South Wales, de facto relationships give rise to support and property rights at the termination of the relationship by separation or death, as well as to quasi-marital rights against third parties and the state.[171] Similarly, in 2001, New Zealand enacted legislation assimilating long-term same-sex and opposite-sex cohabitation to the status of marriage with respect to *inter se* rights at the termination of a relationship by separation or death.[172]

Canadian family law reform followed the first path. This section will first describe that development and then explore its implications, positive and negative, as they relate to both Canada and the United States. Although *Halpern v. Toronto*,[173] decided by the Ontario Court of Appeal in 2003, was the most widely reported decision, prior decisions in two other provinces, British Columbia[174] and Quebec,[175] had already held that exclusion of same-sex couples from the legal institution of marriage violated the equality guarantee of the Charter. However, those cases, like the Vermont Supreme Court's decision in *Baker v. State*,[176] suspended their declarations of

169. *See supra* notes 2, 48 and accompanying text.

170. Property (Relationships) Act 1984, § 4(1) (New South Wales, Austl.), as amended to include same-sex relationships by the Property (Relationships) Legislation Amendment Act 1999, *available at* http://www.legislation.nsw.gov.au. To similar effect, see Domestic Relationships Act 1994 (Australian Capital Territory, Austl.), *available at* http://www.legislation.act.gov.au/a/1994-28/current/pdf/1994-28.pdf; and Statute Law Amendment (Relationship) Act (2001) (Victoria, Austl.), *available at* http://www.dms.doc.vic.gov.au (extending legislative definition of de facto relationships to include same-sex couples).

171. Property (Relationships) Act 1984.

172. *See* text accompanying notes 114–115 *supra*.

173. Halpern v. Toronto, [2003] 65 O.R.3d 161. The government decided not to pursue an appeal from this decision.

174. EGALE Canada Inc. v. Canada, No. CA029048, 2003 BC. C. LEXIS 2711, at *99–*100 (declaring the common law definition of marriage unconstitutional, substituting the words "two persons" for "one man and one woman," and initially suspending the declaration of unconstitutionality until July 12, 2004, that is, two years from the decision of the trial court). However, on July 8, 2003, the British Columbia Court of Appeal lifted the suspension of remedies, effectively ordering the government of British Columbia to begin immediately issuing marriage licenses to same-sex couples. EGALE Canada Inc. v. Canada, No. CA029048, 2003 BC. C. LEXIS 3427, at *4.

175. Hendricks v Québec, [2002] R.J.Q. 2506 (declaring invalid the prohibition against same-sex marriages in Quebec, but staying the declaration of invalidity for two years).

176. 744 A.2d 864, 887 (Vt. 1999) (suspending the effect of the ruling "for a reasonable period of time"); *see supra* note 2.

invalidity for some time in order to grant the legislature opportunity to respond—and perhaps some latitude in responding—to the Charter mandate. *Halpern*, by contrast, declared unconstitutional, with immediate effect, the existing common law definition of marriage as "the union of one man and one woman to the exclusion of all others,"[177] and redefined marriage as "the voluntary union for life of two persons to the exclusion of all others."[178] In response to *Halpern*, the British Columbia Court of Appeal issued a supplementary ruling ordering the government of British Columbia to begin immediately issuing marriage licenses to same-sex couples.[179]

Pursuing access to the formal institution of marriage, as contrasted to seeking (i) assimilation of same-sex couples with opposite-sex nonmarital couples and (ii) further expansion of the rights of all nonmarital couples, has important implications for both same-sex and opposite-sex couples. Nonmarital cohabitation shows no sign of abating. On the contrary, striking increase in opposite-sex cohabitation is evidenced by each new census.[180] (The frequency of same-sex cohabitation, by contrast, has been relatively constant,[181] presumably because marriage has not been an available alternative.) Same-sex marriage represents an important human rights advance for gays and lesbians; my purpose is not to minimize its importance in terms of the values of respect and dignity. However, even though same-sex marriage has been energetically sought and welcomed by the gay and lesbian communities, relatively few same-sex couples have taken advantage of the legal opportunity to marry or register as domestic partners. This has been true in the Netherlands, the first country to legislate same-sex marriage,[182] as well as

177. *Hyde v. Hyde*, 1 L.R.-P. & D. 130 (1866), is the source of the traditional English common law definition of marriage.

178. *Halpern*, 65 O.R.3d at 197.

179. *Halpern* was decided on June 10, 2003. *Id.* The supplementary opinion of the British Columbia Court of Appeal was issued on July 8, 2003. *British Columbia OKs Gay Marriage*, L.A. TIMES, July 9, 2003, § 1, at 12.

180. *See supra* notes 70–73 and accompanying text.

181. *See supra* notes 70–72 and accompanying text.

182. In the Netherlands, registered partnership has been available for same-sex and opposite-sex couples since January 1, 1998. Registered partnership resembles marriage in that it creates support duties and may create property rights. However, registered partnership is easier to enter and exit than marriage and there are differences with respect to parenthood of children. Since April 1, 2001, the Netherlands has allowed same-sex couples to marry.

On January 1, 2002, there were an estimated 48,000 same-sex conjugal households in the Netherlands. (Interestingly, this represents an increase of 9 percent since January 1, 1995, which primarily reflects an increase in male domesticity. Male same-sex couples increased from about 20,000 couples in 1995 to 26,000 couples in 2002. The increase in female same-sex couples was from about 19,000 to 22,000. The reasons for this increase are worth exploring.) Five percent of same-sex cohabiting couples (about 1300 male couples and about 1100 female couples) were married and 10 percent of them had registered as domestic partners. Thus, in 2002, only 15 percent of same-sex

in Vermont (civil union).[183] Even the earlier weaker form of California domestic partnership had relatively few takers. Only 23 percent of the 92,138 California same-sex couples identified by the 2000 Census elected to register as domestic partners during a period in which the status of domestic partner conferred many benefits and virtually none of the obligations of marriage.[184]

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cohabiting couples were married or registered as domestic partners in the Netherlands. LIESBETH STEENHOF & CAREL HARMSEN, STATISTICS NETHERLANDS, SAME-SEX COUPLES IN THE NETHERLANDS 8–10, *available at* http://www.cbs.nl/en/publications/articles/population-society/population/same-sex-couples.pdf.

Subsequent data from 2002 and the first three quarters of 2003 show that marriage is displacing domestic partnership as the relationship of choice for same-sex couples in the Netherlands. In 2002, 1838 same-sex couples married, while only 740 registered as domestic partners. During the first nine months of 2003, 590 male couples married, while 340 couples chose domestic partnership. During the same period, 617 female couples married, while 351 instead chose domestic partnership. CENTRAL BUREAU OF STATISTICS NETHERLANDS, *available at* http://statline.cbs.nl/en/.

Applying a generous rate of growth for same-sex households, 2 percent a year, there would have been approximately 50,000 same-sex conjugal households in the Netherlands at the end of the third quarter of 2003. By that time, 5459 of those couples, or 11 percent, had married, and 6231 couples, or 12 percent, had registered as domestic partners. As the data refer only to marriage and partnership registration, it is likely that some couples registered as partners before marriage became available have since chosen to marry. Thus, there is likely to be some, perhaps even considerable, overlap in registration and marriage figures. Nevertheless, adding the two percentages without adjusting for dual registration and without adjusting for the possibility that some of the relationships have ended, the combined marriage and registered partnership rate is only 23 percent.

183. The 2000 United States Census reports same-sex couples (persons sharing living quarters and having a close personal relationship with each other) by state. SIMMONS & O'CONNELL, *supra* note 70. In Vermont, the 2000 United States Census reports 762 male and 1171 female same-sex households, or a total of 1933 same-sex households, representing a relatively high 1.3 percent of all coupled households. *Id.* at 4 tbl.2. The first year in which Vermont civil union was made available to same-sex couples (July 1, 2000 to June 30, 2001), 2475 civil unions were registered, of which 21 percent were registered by Vermont couples. Sondra E. Solomon et al., *Pioneers in Partnership: Lesbian and Gay Male Couples in Civil Unions Compared With Those Not in Civil Unions and Married Heterosexual Siblings*, 18 J. FAM. PSYCHOL. 275, 275–76 (2004). Thus, 520 Vermont couples, or 27 percent of Vermont same-sex couples entered civil unions. To the extent that the 2000 Census undercounts Vermont same-sex couples, the percentage entering civil unions is lower, perhaps substantially lower, than 27 percent. *See supra* note 72.

184. In 2000, the year of the most recent census, California, which has a high rate of same-sex couples (1.4 percent of all coupled households) had 49,614 male couples and 42,524 female couples, a total of 92,138 same-sex couples. SIMMONS & O'CONNELL, *supra* note 70, at 4. Beginning in 1999, same-sex California couples could register with the California Secretary of State as domestic partners and thereby obtain some of the benefits of marriage. At first these benefits were meager, but subsequent legislation in 2001 and 2002 made the status of domestic partners increasingly attractive. By April, 2003, 18,400, or 20 percent, of the 92,138 same-sex couples identified in the 2000 Census had registered with the Secretary of State. Statement of R. Bradley Sears, Director of the Williams Project, UCLA School of Law, Assembly Appropriations Committee, Testimony on AB 205, Apr. 2003, *at* http://www1.law.ucla.edu/~williamsproj/news/testimony4-03.html. On September 4, 2003, when Assembly Bill 205 was approved by the legislature, its sponsor, Assembly Member Jackie Goldberg, reported that 21,471 couples were registered with the California Secretary of State, representing 23 percent of same-sex couples identified in the 2000 Census. *See* Nancy Vogel, *Bill Giving Gay Partners More Legal Rights Sent to Governor*, L.A. TIMES, Sept. 4, 2003, at B6. It is noteworthy that only 23 percent elected to register as domestic partners during a period in which the status of domestic

Moreover, it is reasonable to expect that it will be some time before gay men and lesbians embrace the notion of a formalized relationship, be it marriage or domestic partnership, to the extent that heterosexuals do, if they ever do. Having lacked access to the institution of marriage, gay men and lesbians do not have the habit of marrying. Some same-sex couples, particularly lesbians, are wary of, and even hostile to, an institution often identified as a locus of oppression of women.[185] Marriage normally occurs relatively early in long-term opposite-sex conjugal relationships. Having managed to establish a long-term relationship without marriage, that is, having gotten along without marriage, a well-established same-sex couple may experience no imperative or impulse to marry. To the extent that the imperative or impulse to marry is religiously based, gays and lesbians tend to be less religious than heterosexuals. Furthermore, to the extent that they are religious, gays and lesbians are much less likely to adhere to traditional Christian religions that require marriage to sanctify a conjugal relationship.[186]

Opposite-sex couples may marry to satisfy their families and to express solidarity and connection with their kin networks.[187] By contrast, same-sex couples frequently rely more heavily on friendship networks,[188] which are less likely to pressure them to marry. As marriage, civil union, and domestic

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partner conferred many benefits but virtually *none* of the obligations of marriage. *See supra* notes 15–36. To the extent that the 2000 Census undercounts same-sex couples, the percentage of California registered same-sex couples is correspondingly lower.

185. *See, e.g.*, Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1536 (1993); Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 9, 10. Nevertheless, in the first year that Vermont civil unions were available, the ratio of female to male same-sex unions was two to one. Solomon et al., *supra* note 183, at 276.

186. The Vermont Study compared lesbians and gay men who entered civil unions with coupled lesbians and gay men in their friendship circle who did not enter civil unions as well as with heterosexual married men and women who were the civil union couples' siblings and their spouses. Solomon et al., *supra* note 183, at 276. Although the sample did not differ significantly in religion while growing up, the difference in current religion was significant among groups. About 40 percent of lesbians in both types of couples (registered and unregistered) reported that their spiritual beliefs did not fit a formal religion, compared with 16 percent of heterosexual married women, most of whom still identified as Catholic or Protestant. *Id.* at 278 & tbl.1, 281. Married women also attended religious services more frequently than did lesbians in both types of couples. *Id.* By contrast, the percentage of women who were Jewish, a small portion of the sample, had remained relatively constant over time in all three groups of women. *Id.* The researchers found similar results for men. Although the same percentage of men were still Jewish in adulthood, fewer gay men remained Catholic or Protestant. *Id.* at 280 tbl.2, 282. Compared with heterosexual married men, gay men were more likely to report that their spiritual beliefs did not fit a formal religion, or that they had no current religion at all. Gay men also rated the importance of religion significantly lower than did heterosexual married men. *Id.*

187. *See id.* at 282.

188. *See id.* at 276 and sources cited therein.

partnerships are a matter of public record, same-sex partners who are not fully "out" may hesitate to enroll in these legal institutions.[189] Thus, we ought not expect to see, and are not in fact seeing, gay and lesbian couples flock to enroll themselves in the institution of marriage or civil union. It should not be assumed that the relationships of gay and lesbian couples that do not enroll in these legal institutions are qualitatively different from those relatively few that do or from opposite-sex couples that marry. On the contrary, the relationships are qualitatively very similar. The two groups of couples are instead distinguished by extrinsic factors bearing on the decision to marry or register a relationship.[190]

In consequence, although the opportunity to marry may substantially advance the dignity interest of gays and lesbians, the mere opportunity to marry will not provide many, perhaps most, same-sex couples with the panoply of legal protections that they may need during a conjugal relationship and at its termination by inter vivos separation or death. Stated differently, access to formal marriage or a shadow institution, such as domestic partnership, is a more impressive achievement in civil rights law than it is in family law.

Moreover, the mere opportunity for same-sex couples to marry or enter a domestic union, even though that opportunity is not extensively taken up, undermines a powerful argument in favor of the legal recognition of nonmari-

189. The Vermont study compares same-sex couples that registered Vermont civil unions during the first year of their availability with couples in their friendship group that did not register Vermont civil unions. *Id.* The study did not find significant differences between these two groups in the character of the relationships. *Id.* at 284. It did find, however, that lesbians in civil unions were more open about their sexual orientation than those not in civil unions, *id.* at 282, 284, and gay men in civil unions were closer to their family of origin than gay men not in civil unions, *id.* at 284.

190. *See id.* at 284. This is not to say that there were no differences, but rather that a substantial majority of couples in each of the three groups shared common behaviors and characteristics. For example, the percentage holding a home in the name of both partners was 73 percent for lesbians in civil unions, 65 percent for lesbians not in civil unions and 88 percent for heterosexual married women. The percentage holding joint bank accounts was 84 percent for lesbians in civil unions, 74 percent for lesbians not in civil unions and 89 percent for heterosexual married women. The percentage considering themselves "married" to their partner was 95 percent for lesbians in civil unions and 72 percent for lesbians not in civil unions. *Id.* at 279. The percentages were similar for gay men in civil unions, partnered gay men not in civil unions and heterosexual married men. *Id.* at 281. In a related vein, Lawrence Kurdek in his longitudinal study found that "in the overall affective appraisals of their relationships, married heterosexual partners are more similar to than different from cohabiting gay or lesbian partners." Lawrence Kurdek, *Relationship Outcomes and Their Predictors: Longitudinal Evidence From Heterosexual Married, Gay Cohabiting and Lesbian Cohabiting Couples*, 60 J. MARRIAGE & FAM. 553, 574 (1998). Surveying the recent literature, Charlotte Patterson observed that "[L]esbians and gay men report as much satisfaction with their relationships as do heterosexual couples; the great majority describe themselves as happy. . . . There were no differences as a function of sexual orientation on any of the measures of relationship quality." Charlotte K. Patterson, *Family Relationships of Lesbians and Gay Men*, 62 J. MARRIAGE & FAM. 1052, 1053 (2000).

tal cohabitation. In recent years, a strong argument in favor of extending quasi-marital legal recognition to long-term, stable nonmarital cohabiting couples, opposite-sex and same-sex, has been that same-sex couples have not been legally allowed to marry.[191] To the extent that same-sex couples are now allowed to marry or enter a domestic union, whether or not they take advantage of the opportunity, that argument is no longer available. Thus, legally recognizing the right of same-sex couples to marry or otherwise register their union may undermine further development of the law regulating nonmarital cohabitation in countries such as Canada, and may discourage any such developments in American law.

With respect to American law, one might conclude that there is little or nothing to lose in any event because American legal regulation of nonmarital cohabitation is so underdeveloped, or poorly developed. In terms of statutes and case law, this is surely true. However, there is a quasi-governmental regime that often recognizes same-sex conjugal relationships. This is the regime of employee benefits. This regime is ostensibly non-governmental, because these benefits arise from the employer-employee relationship, whether private-sector or public-sector. Nevertheless, from a social welfare perspective, many employee benefits may be understood as tax-subsidized welfare benefits, albeit conditioned upon gainful employment and nominally distributed by an employer. They have been variously characterized by commentators as components of the American "employee," or "shadow," welfare state,"[192] or as constitutive of a "hidden welfare state."[193]

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191. This argument was made in the commentary and pre-adoption discussion of the American Law Institute's *Principles of the Law of Family Dissolution*. *See* PRINCIPLES *supra* note 139, § 6.02 cmt. a. At the inter vivos termination of stable long-term cohabitation, whether the couple be same-sex or opposite sex, chapter 6 of the *Principles* would apply most of the support obligations and property distribution rights of marriage.

192. Incident to employment, employers provide workers and their families with a wide variety of essential welfare benefits, including health, disability, and retirement benefits. *See, e.g.*, MARIE GOTTSCHALK, THE SHADOW WELFARE STATE: LABOR, BUSINESS, AND THE POLITICS OF HEALTH CARE IN THE UNITED STATES 1–16 (2000); David Charny, *The Employee Welfare State in Transition*, 74 TEX. L. REV. 1601, 1601–02 (1996).

193. The "employee welfare state," or "shadow welfare state," overlaps but is not coextensive with the "hidden welfare state," which is described by Christopher Howard in *The Hidden Welfare State: Tax Expenditures and Social Policy in the United States*. Howard's definition of the "hidden welfare state" includes all:

> [T]ax expenditures with social welfare objectives, meaning those that parallel direct expenditures for income security, health care, employment and training, housing, social services, education, and veterans' benefits. Familiar examples include tax deductions for home mortgage interest and charitable contributions. Altogether, tax expenditures with social welfare objectives cost approximately $400 billion in 1995.

CHRISTOPHER HOWARD, THE HIDDEN WELFARE STATE: TAX EXPENDITURES AND SOCIAL POLICY IN THE UNITED STATES 3 (1997).

In the United States, private and public employers were the first to recognize the claim of same-sex couples to equal treatment with married opposite-sex couples. They did so on two grounds: fairness, or equality of treatment, and competitive advantage. The most powerful argument in favor of recognition of same-sex conjugal relationships, as contrasted with nonmarital opposite-sex relationships, was that same-sex couples could not marry and therefore could not bring themselves within the traditional qualification for spousal and family health and welfare benefits. Thus, although some employers did extend benefits to both same-sex and opposite-sex partners of employees, many extended them only to same-sex partners.[194] The University of California's adoption of health benefits for same-sex partners is illustrative. Despite the vehement opposition of then Governor Pete Wilson, Regent Ward Connerly persuaded the governing Board of Regents that the principle of equality required the University of California to extend the same health benefits to an employee's same-sex partner that it did to an employee's opposite-sex spouse. However, benefits were not extended to opposite-sex nonmarital partners, because an employee and an opposite-sex partner could qualify themselves by marrying.[195]

The 2003 California domestic partnership legislation requires that registered domestic partners be treated as spouses for all state-law purposes. In so doing, it undercuts the dominant rationale for treating unregistered same-sex partners as "spouses" for purposes of employee benefits.[196] Whether this will prompt California employers to retract benefits already extended to unregistered nonmarital partners, or will discourage further extension of employee benefits to unregistered nonmarital partners, remains to be seen. Such employer behavior would, however, be a plausible, albeit unintended, response to the 2003 legislation.[197] The University of Vermont eliminated

194. For discussion of this development, see Blumberg, *supra* note 48, at 1282–92.

195. *See id.* at 1288–89.

196. Competitive advantage is the other rationale, or motive. If a California employer competes with out-of-state enterprises that are unaffected by the California domestic partnership law, competition may remain a strong consideration. This is the case, for example, with the University of California, which competes for faculty in a national market. However, businesses that compete for employees in a local market may drop a benefit that no longer seems compelled by a principle of equality or by fairness, particularly in times of economic downturn or plentiful supply of labor. The movement to include same-sex partners in employee benefit schemes developed apace in the 1990s, a period of unusually sustained economic development and high demand for skilled employees.

197. Employers generally require that employees and their partners sign declarations of domestic partnership in order to obtain domestic partner benefits. Some declaration forms strongly suggest that the employer will withdraw domestic partner benefits when legal recognition of a couple's relationship becomes available. California-based Oracle Systems Corporation, for example, requires that the parties declare: "We would legally marry each other if we could, and we intend to do so if marriage becomes available to us in our state of residence." SALLY KOHN, POLICY INST. OF THE

domestic partner benefits after civil union became available to same-sex couples in Vermont.[198] Likewise, several prominent Massachusetts employers announced the elimination of domestic partner benefits after marriage became available to same-sex couples in Massachusetts.[199] Elimination of domestic partner benefits is most likely among employers offering domestic partner benefits only to same-sex nonmarital partners, as opposed to all

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NAT'L GAY & LESBIAN TASK FORCE, THE DOMESTIC PARTNERSHIP ORGANIZING MANUAL FOR EMPLOYEE BENEFITS app. at 56 (1999) (reprinting the form), *available at* http://www.thetaskforce.org/downloads/dp/dp_99.pdf. Similarly, the domestic partnership declaration of Fox, Inc., a California corporation, requires that an employee attest: "In addition, if we live in a jurisdiction which permits registration of domestic partners, including Spousal Equivalents, I declare and attest that I and my Spousal Equivalent have registered or will register within the next 31 days, as domestic partners in that jurisdiction." *Id.* app. at 77.

The 2003 Act may also have unintended consequences for the parenting rights of an unregistered same-sex partner who is not the child's biological or adoptive parent. To the extent that parenting rights have been extended, in part because same-sex partners had no means of establishing a legal identity as a family, the 2003 Act undercuts the rationale for extension to unregistered partners. Other developing areas of law may be similarly truncated. For example, after Diane Whipple was killed in 2001 by vicious dogs in the hallway of her San Francisco apartment house, Sharon Smith, her unregistered same-sex partner of seven years, was allowed to bring a wrongful death action even though the California wrongful death statute covered only married couples. Sharon's attorney argued, and the trial judge agreed, that California law had created an insurmountable barrier by not allowing same-sex partners to marry and thus bring themselves within the statute. *See* Hang Nguyen, *Mauling Victim's Partner Can Sue*, L.A. TIMES, July 28, 2002, § 2, at 8. Diane and Sharon had exchanged rings in a private ceremony, but they had not registered their relationship, even though registration had been available to same-sex couples since 1999. *See* Anna Gorman, *Mauling Death Creates an Activist*, L.A. TIMES, Mar. 18, 2002, at B1. After Sharon's claim was settled, Assembly Bill 25 extended coverage of the wrongful death statute to *registered* domestic partners. *See supra* note 21 and accompanying text. If Diane's wrongful death had occurred after the effective date of Assembly Bill 25, Sharon's winning argument would no longer have been available.

198. The University of Vermont extended health benefits to the same-sex partners of its employees in 1993. In 2000, after Vermont civil union became available to same-sex partners, the University eliminated partner benefits. Partners are now required to register a civil union in order to receive benefits. Marshall Miller & Dorian Solot, Alternatives to Marriage Project, UVM Off-Base in Requiring Civil Unions for Benefits, *at* http://www.unmarried.org/uvm.html.

199. They include Beth Israel Deaconess Medical Center, one of Massachusetts' largest employers, and Babson College. Same-sex marriage became effective in Massachusetts on May 17, 2004. Beth Israel and Babson are ending domestic partner benefits on December 31, 2004, effectively giving employees six months to marry and thus retain benefits for a same-sex partner. *See Employers Cutting Domestic Partner Benefits After Gay Weddings*, ASSOCIATED PRESS, April 28, 2004, *available at* http://news.bostonherald.com/localRegional/view.bg?articleid=23. The mayor of Springfield rescinded all prior executive orders granting unmarried same-sex partners and their dependents insurance coverage, but allowed same-sex partners a ninety-day grace period to become legally married and retain insurance coverage. *See Springfield, Mass., Rescinds Benefits to Unmarried Domestic Partners*, ASSOCIATED PRESS, May 28, 2004, *available at* http://www.freerepublic.com/focus/f-news/1144271/posts. Harvard University, which had been providing domestic partner benefits to same-sex couples for more than 15 years before gay marriage was legalized in Massachusetts, is retaining them for the immediate future, but will consider the issue within the next two years and contemplates that it may require marriage of all couples, as it currently does for opposite-sex couples. *See Employers Cutting Domestic Partner Benefits After Gay Weddings*, *supra*.

nonmarital partners, same-sex and opposite-sex. For such employers, when all couples, same-sex as well as opposite-sex, are eligible to marry or obtain equivalent legal status, there is no longer any reason to grant benefits to the nonmarital, or unregistered, same-sex partners of employees. Parity between opposite-sex couples, who must marry to obtain benefits for a partner, and same-sex couples may only be achieved by requiring the latter to marry, enter a civil union, or register a domestic partnership, as the case may be.[200] Indeed, once marriage, or a shadow institution, becomes available to same-sex couples, employers who provide domestic partner benefits only to same-sex couples may be legally required either to extend them to opposite-sex couples or to withdraw them entirely.[201]

VI. MEETING THE LEGAL NEEDS OF SAME-SEX COUPLES: STRATEGIES FOR SUPPLEMENTARY LAW REFORM

I will now turn my attention to strategies for hastening both recognition of formal same-sex relationships, whether same-sex marriage or a shadow institution, and recognition of stable long-term nonmarital cohabitation, same-sex and opposite-sex.[202] As this Article[203] and my professional history indicate,[204]

200. Laura Kiritsy, *Mass. Marriages May Alter Employee Benefits*, BAY WINDOWS, Apr. 22, 2004, *available at* http://www.baywindows.com/global_user_elements/printpage.cfm?storyid=667554.

201. In *Foray v. Bell Atlantic*, 56 F. Supp. 2d 327 (S.D.N.Y 1999), a male domestic partner challenged his employer's refusal to grant benefits to his female partner while granting benefits to his co-workers' same-sex partners. Claiming unlawful sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2000), and the Equal Pay Act, 29 U.S.C. §§ 206 (d), 215a(1)–(2) (2000), plaintiff emphasized that if he were a woman cohabiting with his female partner, his partner would have been granted benefits. Therefore, he argued, he had been treated differently on the basis of his sex. Observing that sex discrimination requires a showing that plaintiff was treated differently from *similarly situated* persons of the opposite sex, the court reasoned that "a woman with a female domestic partner is differently situated from plaintiff in material respects because under current law, she, unlike plaintiff, is unable to marry her partner" and thus qualify her partner for benefits. *Foray*, 56 F. Supp. 2d. at 330. By parity of reasoning, once same-sex couples are able to marry or secure equivalent legal status, the employer practice of granting employment benefits to nonmarital, or unregistered, same-sex partners, but denying them to unmarried opposite-sex partners is no longer legally justifiable in terms of Title VII or, in the case of public employers, the Fourteenth Amendment's Equal Protection Clause.

202. This subpart was not part of my original conception of this Article. After I delivered a synopsis of a preliminary draft at the UCLA Law Review Symposium on January 30, 2004, Jennifer C. Pizer, Senior Staff Attorney at Lambda Legal, and R. Bradley Sears, Director of the Williams Project on Sexual Orientation Law at UCLA School of Law, urged me to devote some attention to developing strategies for solving the problem that I had identified. This section represents a first response to that challenge.

203. *See supra* notes 46–60 and accompanying text.

204. I spent thirteen years working on the American Law Institute's *Principles of the Law of Family Dissolution*, *see* PRINCIPLES, *supra* note 139, nine of them as a reporter.

legislation is my preferred mode of social reform. Nevertheless, I recognize that the American path to recognition of informal conjugal relationships may not be entirely legislative in character. Moreover, Canadian experience suggests that movement on any front may advance all fronts. Thus, I will not specify whether particular matters should be addressed in legislation or litigation, to the extent that either option is viable.

I will discuss the strategies in terms of three interrelated themes, or principles: functionality, equivalence, and the correspondence of rights and obligations in so far as they pertain to coparenting and *inter se* legal relationships. In this analysis, I will not separate out the two tracks, recognition of formal relationships and recognition of informal relationships, on the theory that experience in Canada and elsewhere suggests they can be mutually reinforcing[205] and they can be equally conceived and advanced in terms of the three interrelated themes.

Functionality emphasizes the nature and structure of conjugal and family relationships, with particular emphasis on the roles that family members play, and the benefits and strengths of family association, as well as the pitfalls of dependence and vulnerability that arise from differential role assumption. Functionality underscores the important role that the state plays and should play in sustaining families and in establishing appropriate *inter se* remedies when families break down. Functionality eschews formal bars to recognition of informal family units and rejects tautological and exclusive definitions of families entitled to state solicitude and protection.

Equivalence recognizes that conjugal families resemble each other far more than they differ from each other,[206] that the legal needs of unregistered same-sex partners are generically the same as those of opposite-sex nonmarital partners, and the needs of nonmarital partners are generically the same as those of marital, or registered, partners. All conjugal families need legal rules that respond to dependence and vulnerability, the hallmarks and pitfalls of the conjugal relationship.[207] These legal rules must establish their *inter se* rights

205. *See supra* notes 158–178 and accompanying text.

206. *See, e.g.*, data reported *supra* note 190. American commentators justifying differential treatment of nonmarital and marital cohabitation are prone to emphasize difference rather than similarity, in particular, observed attitudinal differences between nonmarital partners and married couples, as contrasted to behavioral similarities. *See, e.g.*, Regan, *supra* note 140, at 1439–40 (suggesting that differences in treatment are justified by the lesser commitment expressed by nonmarital partners). For further discussion of "commitment," see *infra* note 266. Likewise, those who would deny same-sex partners access to marriage or some parallel institution focus on difference rather than similarity. By contrast, equality of treatment is predicated on the behavioral similarities of marital and nonmarital cohabitants.

207. *See* Regan, *supra* note 68, at 168–70.

and obligations, as well as recognize their couplehood vis-à-vis third parties and the state. When unregistered same-sex partners coparent children, they (and their children) need law that is responsive to their social roles as parents.

The correspondence of rights and obligations recognizes the reciprocity, or mutuality, of the family's claims on the state and society and the obligations of family members, qua family members, to assume responsibility for each other. The correspondence of rights and obligations also recognizes the reciprocal, albeit often different, obligations of family members to one another. For example, after the dissolution of a conjugal relationship, the noncustodial parent may have an obligation to pay child support to the custodial parent, and the custodial parent in turn may have an obligation to facilitate the support obligor's social relationship with the child. This Article has so far largely concerned the conjugal relationship and has only incidentally touched on the coparental aspects of formal and informal families. In this section, however, both aspects will be treated in terms of their capacity to generate law reform strategies.

The remainder of this section will examine how these three themes can be propounded in various areas of law to set the stage for, and support claims to, recognition of formal and informal same-sex relationships. Those areas are constitutional discourse, *inter se* property relationships of nonmarital partners, parent-child relationships, *inter se* support obligations, and equitable estoppel to deny the existence of a legally cognizable conjugal relationship.

A. Constitutional (Judicial) Discourse

Interpreting the Charter in the context of claims for recognition of informal families and same-sex access to formal institutions, Canadian courts emphasized the themes of functionality and equivalence. They discussed the nature of conjugal and family relationships, both in terms of their strengths and the vulnerabilities to which they exposed family members. They pointed out the extent to which families, nonmarital and marital, opposite-sex and same-sex, resemble each other.[208] By contrast, *Baehr v. Lewin* and, to a somewhat lesser extent, *Baker v. State*, are quintessentially constitutional cases, dwelling on the minutia of procedural points and complex argumentation, and offering relatively little nuanced description of the particular claim before the court.[209] It is not until *Goodridge v. Department of Public Health* that we see

208. *See supra* notes 150, 156–164 and accompanying text.

209. The Hawaii Supreme Court opinion in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), contains little discussion of marriage, the family, or the state's interest in the family. (The single brief description of marriage, *id.* at 59, makes "it sound like a really good employee benefits plan," to quote

an equally robust and sensitive account of marriage and the family as routinely appears in the Canadian Charter cases. The opening lines of Chief Justice Marshall's opinion address marriage and the conjugal family:

> Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. In return it imposes weighty legal, financial, and social obligations.[210]

In four sentences, Justice Marshall identifies the centrality of marriage as a social institution, the universality of coupling and its benefits to society as well as to individuals, and the reciprocity of rights and duties, both *inter se* and between family members and the state. Only then does the opinion broach the legal issue, and then only in the most general terms. *Goodridge* never loses its focus on marriage and the family. In terms of constitutional analysis, *Goodridge* never essays anything more than the bare minimum necessary to decide the case. *Goodridge* effectively lets civil marriage speak for itself, which renders elaborate constitutional analysis unnecessary. If one thinks carefully and thoughtfully about families as we know them, as *Goodridge* helps us to do, the outcome is self-evident. There is no rational secular basis for withholding the right to enter civil marriage from same-sex couples.[211] Thus, denial of the right violates both the equal protection and

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Brooks, *supra* note 63.) Plaintiffs, who were same-sex couples, sought declaratory and injunctive relief from denial of marriage licenses. Reversing the trial court's dismissal of their complaint on the pleadings, the Hawaii Supreme Court remanded to the trial court for a hearing. The supreme court agreed that the plaintiffs had no fundamental substantive due process or privacy right to same-sex marriage, but held that denial of a license discriminated against the plaintiffs on the basis of their sex and, under the Hawaii Constitution's equal protection clause, which explicitly prohibits sex discrimination, the state must satisfy the heightened, or strict scrutiny, standard of review. *Baehr*, 852 P.2d at 67. Although denial of same-sex marriage may plausibly be understood as a variety of sex discrimination (because the essential vice of sexual orientation discrimination and sexual discrimination is gender stereotyping), the supreme court failed to explain its reasoning, with the result that the holding seems shallowly clever. The Vermont Supreme Court's opinion in *Baker v. State*, 744 A.2d 864 (Vt. 1999), contains more germane discussion of the family than does *Baehr*, but that scattered discussion is lost in a morass of procedural and constitutional detail.

210. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

211. The most recent decisions sustaining the constitutionality of denying same-sex couples access to the institution of marriage, which are collected at *supra* note 124, appear to recognize that they are skating on thin ice. However, applying the weak "rational basis" test, they find support for the distinction between same-sex and opposite-sex couples in the fact that the latter are "inherently procreative" and the former are not, although the former do in fact procreate, adopt, and rear children almost as frequently as the latter. *See supra* note 70. The argument that the state does not require opposite-sex couples to demonstrate their fertility is, of course, inapt because the state need not draw lines so precisely. However, that argument suggests a hypothetical that may better reach the issue. Suppose that a meteor strike rendered all men in the southern half of State X infertile, so

substantive due process guarantees of the Massachusetts Constitution. Like the Canadian Charter cases, *Goodridge* is a good family law opinion. It is steeped in the history and content of state regulation of marriage and the family, as well as in an understanding of coupling and family formation. It recognizes the extent to which the welfare of children may be affected by the state's recognition and protection of their parents' conjugal relationship. The method and content of a case like *Goodridge* transcend the particular issue before the court. *Goodridge* teaches us to carefully focus attention on the nature of the relationship requiring recognition or protection, to avoid obscure, clever or hypertechnical argument, and to invoke the importance of the social, as opposed to formal, relationship.

B. *Inter Se* Property Relationships of Nonmarital Partners

Implicitly relying on principles of functionality, equivalence, and the reciprocity of rights and obligations, Washington state has, by case law, essentially applied its community property law to distribute property acquired by persons while they lived together in stable cohabitation.[212] Washington does not treat cohabitants as spouses for all purposes, but instead restricts such treatment to one incident of marriage, the distribution of property acquired during the conjugal relationship. In determining whether to apply community property law, the court must determine whether there is:

> a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist . . . . Relevant factors establishing [such a] relationship include, but are not limited to: continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the relationship.[213]

Once a court finds such a qualifying relationship, it makes a just and equitable distribution of property acquired during the relationship, presumptively a community property distribution.[214] Under Washington law community

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that their wives could not conceive without assisted reproduction, which became the standard mode of reproduction for all couples including a man from the southern half of State X. Could State X constitutionally deny those readily identifiable couples access to the institution of marriage on the ground that they were not "inherently procreative"? Surely not, for the state's interest lies in protecting families that do procreate, whether "inherently" or otherwise. Stated otherwise, "inherently" expresses a difference between same-sex and opposite-sex couples, but it is not a difference that constitutionally justifies a distinction between two procreating groups.

212. *See* Connell v. Francisco, 898 P.2d 831, 835–37 (Wash. 1995).

213. *Id.* at 834.

214. *See id.* at 836; *see also In re* Marriage of Lindsey, 678 P.2d 328, 331 (Wash. 1984) ("[C]ourts must 'examine the [meretricious] relationship and the property accumulations and make a just and

property is divided equally unless a party requesting more than half demonstrates one of a variety of need-based factors.[215] Although the law is not entirely settled, Washington courts seem to have extended to same-sex cohabitants the property distribution principles historically developed for opposite-sex cohabitants.[216] Washington's functional definition of qualifying relationships[217] essentially compelled that result.

It is noteworthy that property distribution is the only incident of marriage that Washington ascribes to nonmarital cohabitation. Property distribution entails no new or continuing obligations, but refers only to the distribution of wealth acquired by the parties while they lived together in nonmarital cohabitation. In terms of the parties' claims *inter se*,[218] property distribution is the easy issue.[219] Consideration of the parties' cooperative conjugal roles in the acquisition of property invokes the themes of

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equitable disposition of the property.'" (alteration in original) (quoting Latham v. Hennessey, 554 P.2d 1057, 1059 (Wash. 1976)); Foster v. Thilges, 812 P.2d 523, 526 (Wash. Ct. App. 1991) (holding that the court need not resolve the parties' conflicting claims regarding their intentions in acquiring property, because "[w]here the relationship was long-term, stable, pseudomarital and the undertakings were joint projects as in the instant case, . . . the couple's property is to be divided justly and equitably, applying community property principles").

215. WASH. REV. CODE ANN. § 26.09.080 (West 2004).

216. In *Vasquez v. Hawthorne*, 994 P.2d 240 (Wash. Ct. App. 2000), Division 2 of the Washington Court of Appeal reversed a trial court summary judgment recognizing the property distribution claim of a same-sex cohabitant. The court of appeal held that same-sex relationships are not qualifying relationships, reasoning that only opposite-sex relationships can be "marital-like" because Washington does not allow same-sex couples to marry. *Id.* at 242–43. The Washington Supreme Court reversed and remanded to the trial court on the ground that summary judgment had been improperly granted because there were disputed material facts. 33 P.3d 735, 737 (Wash. 2001). In dictum, however, the supreme court observed:

> Vasquez presented claims for equitable relief under several theories, including meretricious relationships [the term the Washington courts use to describe cohabitation that gives rise to rights in property acquired during the relationship], implied partnership, and equitable trust. When equitable claims are brought, the focus remains on the equities involved between the parties. Equitable claims are not dependent on the "legality" of the relationship between the parties, nor are they limited by the gender or sexual orientation of the parties. For example, the use of the term "marital-like" in prior meretricious relationship cases is a mere analogy because defining these relationships as related to marriage would create a de facto common-law marriage, which this court has refused to do.

Id. at 737–38. Subsequently, a Division 3 panel of the Washington Court of Appeal affirmed a trial court's application of the meretricious relationship doctrine to same-sex cohabitants in dividing their assets and liabilities. Gormley v. Robertson, 83 P.3d 1042 (Wash. Ct. App. 2004).

217. *See supra* notes 212–214.

218. By contrast, in terms of the state's interests, mutual support is the easy case. *See* discussion of Ontario law, *supra* note 148, and Utah law, *infra* note 252.

219. Similarly, to the extent that *Marvin* contract claims, *see supra* notes 136–139, have succeeded at all, they have done so with respect to distribution of property acquired during the relationship, as contrasted with post-dissolution support. Courts have been more willing to find an agreement to share property acquired during cohabitation than an agreement to support a former cohabitant after the relationship has ended, because the former is far more plausible than the latter.

functionality, equivalence and *inter se* reciprocity. As such, it is an entering wedge for a fuller recognition of informal relationships.

Although Washington has the most well developed law on the subject, a few other states have also pursued Washington's approach, sometimes in tandem with contract notions.[220] In all of those states, case law has introduced this innovation, though it could also be introduced by legislation. Statutory reform simply requires amending the word "spouses" for purposes of community, or marital, property distribution to include, for example, "persons who have cohabited in an intimate relationship" for a specified number of years. While such legislation would set a jurisdiction on the path of piecemeal development of the law of nonmarital cohabitation, it would at least be a start.

C. Parent-Child Relationships

Although compared to Western Europe the United States has been laggard in according formal status to same-sex relationships and recognizing nonmarital relationships generally, it has been more responsive to the parenting interests and roles of all adults (and children's need for nurture), paying less attention to matters of sexual orientation and marital status than the otherwise more progressive Northern European countries. This has been evidenced in American paternity law, divorce adjudication, and adoption practice. In American paternity law, unwed fathers have both strong parental rights and strong support obligations. Largely shaped by constitutional adjudication, children born out of wedlock enjoy de jure equality with children born in wedlock, and the paternal rights of unwed fathers, although not equal to those of married fathers, receive a relatively high level of legal protection.[221] At divorce, a parent's sexual orientation is not a per se ground for curtailment of his or her custodial rights.[222] The pioneering Scandinavian domestic partnership legislation gave same-sex partners all the rights of marriage *except* the right to adopt children.[223] By contrast, while American same-sex partners were accorded none of the *inter se* privileges and obligations

220. There is some case law to similar effect in Mississippi and Oregon. *See, e.g.*, Pickens v. Pickens, 490 So. 2d 872, 875–76 (Miss. 1986) (holding that a homemaker has an equitable claim to property accumulated during a long-term, cohabiting relationship, without regard to a contract inquiry); Wilbur v. DeLapp, 850 P.2d 1151, 1153 (Or. Ct. App. 1993) ("[We] may distribute property owned by the parties in a non-marital domestic relationship. . . . [I]n distributing the property of a domestic relationship, we are not precluded from exercising our equitable powers to reach a fair result based on the circumstances of each case." (citations omitted)); Shuraleff v. Donnelly, 817 P.2d 764, 768–69 (Or. Ct. App. 1991) (involving a fourteen-year cohabitation).

221. *See supra* note 121.

222. See collected cases and statutes in PRINCIPLES, *supra* note 139, § 2.12.

223. *See supra* notes 75–81.

of marriage, many jurisdictions allowed them to foster and adopt children.[224] Moreover, as compared to European countries, the relative absence of legal constraints on alternative reproductive technology in the United States[225] has encouraged and enabled same-sex partners to have children of whom at least one of the partners is the biological parent. The social progress in Northern Europe has been from a regime that allows same-sex couples all but parental rights to one that allows same-sex couples all rights.[226] In contrast, the movement in the United States has been from state-law regimes that allow same-sex couples nothing but parental rights to regimes that offer them the full panoply of marital rights and obligations. What is striking about the comparison is not that Western Europe and the United States had different, and ostensibly opposite, starting places, but that the process of regularizing, or normalizing, same-sex relationships ultimately (and surprisingly rapidly) arrives at the same conclusion, equal treatment of same-sex and opposite-sex couples. The comparison suggests that it matters less where the process of normalization begins, than that it does begin. Once begun, the process toward full normalization seems inexorable.

A prominent American rationale for denying same-sex couples access to marriage, or some close equivalent, has been that such couples are not "inherently procreative"[227] and the true secular purpose of marriage is to provide a protected status for the procreation and rearing of children.[228] Accepting arguendo both assertions, the increasing frequency with which American same-sex couples "have" and rear children tends to belie the implication of the rationale, which is that the interests of children do not require, or justify, recognition of same-sex relationships. The 2000 Census showed that 46 percent of married-couple households included at least one child under the age of eighteen. More surprisingly, 43.1 percent of opposite-sex unmarried couples resided with a child under the age of eighteen. Thirty-four percent of female same-sex household included a child under the age of eighteen, as did 22 percent of male same-sex householders.[229] The interests of children thus offer

224. Sanford N. Katz, *Dual Systems of Adoption in the United States*, *in* CROSS CURRENTS, *supra* note 96, at 279, 297. Cases and commentary on same-sex partner adoption of the other partner's child are collected in PRINCIPLES, *supra* note 139, § 2.12 cmt. f reporter's note.

225. George J. Annas, *The Shadowlands: The Regulation of Human Reproduction in the United States*, *in* CROSS CURRENTS, *supra* note 96, at 143, 143 (complaining that "there is virtually no governmental regulation of human reproduction in the United States").

226. See, for example, the movement in the Netherlands from adoption-restricted same-sex domestic partnership to unqualified same-sex marriage, *supra* note 182. Similarly, in 2004, Swedish registered domestic partners have all the substantive rights of spouses. *See supra* note 94.

227. *See supra* note 211.

228. *See* cases cited *supra* note 124.

229. SIMMONS & O'CONNELL, *supra* note 70, at 9.

opportunities to legally ground parent-child relationships in same-sex families, as well as to hasten *inter se* recognition of formal and informal same-sex relationships.

As the *inter se* relationship of couples is, or should be, characterized by rights and corresponding obligations, so too should the coparental relationship be defined in terms of reciprocal rights and obligations. When same-sex partners separate and one of them is not the biological or adoptive parent of a child whom the partners were coparenting, that person may have difficulty asserting parental or quasi-parental rights to custody or visitation of the child. Where the assertion of parental "rights" vis-à-vis the child has been unsuccessful,[230] a more productive approach may be initially to establish parental obligations, as opposed to parental rights. In terms of law reform litigation, the claim of a lesbian mother who wishes to enforce a child support obligation against a former partner with whom she planned to conceive and bear the child may be a better starting place than the former partner's claim to maintain a social relationship with the child. Unlike claims to custody or visitation, which may turn on state law definition of the term "parent" or the claimant's marriage to the child's parent, a support obligation to a child can generally be established by contract or by the doctrine of equitable estoppel to deny a support obligation to a child.[231] Moreover, in claims to custody or visitation, it is not always evident that custody or visitation by a nonparent would serve a child's interests. By contrast, child support (from any source) always serves a child's interests, as well as the larger public interest.[232]

In the first reported case of its type, the 1996 decision in *W v. G*,[233] the Supreme Court of New South Wales (Australia) applied the doctrine of equitable estoppel to require child support from a same-sex cohabitant for two children conceived by artificial insemination during her cohabitation with the children's biological mother. The Supreme Court held that the cohabitant's agreement to and participation in the insemination and her occupation of the role of parent to the children equitably estopped her to deny a support obligation to them. Two years later, the New Zealand High Court relied on similar facts to require child support payments from a lesbian ex-cohabitant.[234]

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230. *See* collected cases in PRINCIPLES, *supra* note 139, § 2.04.

231. *See* cases cited *infra* notes 233–238.

232. I refer not only to the narrow state interest in protecting the public purse, but also to the broader public interest in assuring that sufficient resources are devoted to the health, welfare and education of the next generation.

233. W. v. G., (1996) 20 Fam. L.R. 49 (New South Wales S. Ct., Austl.).

234. A. v. R. [1999], N.Z.F.L.R. 249, *available at* http://www.ilga.info/Information/Legal_survey/Asia_Pacific/supporting files/a_v_r_.htm (Feb. 10, 1999). The New Zealand High Court relied on a statute allowing the court to impose the parental support duty on a person who, inter alia, has previously

In the United States, a Pennsylvania appellate court and a Delaware trial court have employed the doctrine of equitable estoppel in cases presenting similar facts.[235] However, in a support action brought by the state, the California Court of Appeal declined to equitably estop a lesbian cohabitant from denying a support obligation to children even though she affirmatively intended the birth of those children, participated in all aspects of their procreation, and considered herself their mother.[236] In March 2004, the

assumed responsibility for the maintenance of the child. The statutory criteria guiding the court's exercise of discretion resemble those proposed by the PRINCIPLES, *supra* note 139, § 3.03, discussed in *infra* notes 239, 240, 243–245 and accompanying text.

235. In *L.S.K. v. H.A.N.*, 813 A.2d 872 (Pa. Sup. Ct. 2002), the Superior Court of Pennsylvania sustained a ruling of the Court of Common Pleas directing a same-sex former cohabitant to pay child support on the ground that her prior conduct estopped her from claiming that she was not liable for support. For additional discussion of *L.S.K.*, *see infra* notes 236 and 246. *Chambers v. Chambers*, No. CN00-09493, 2002 WL 1940145 (Del. Fam. Ct. Feb. 5, 2002), an unpublished opinion of the Delaware Family Court, held that a woman's prior behavior equitably estopped her from asserting that she owed no support obligation to the child of her former same-sex cohabitant.

236. Maria B. v. Superior Court, 13 Cal. Rptr. 3d 494 (Ct. App. 2004). Vacating a trial court order imposing a child support obligation on a former lesbian cohabitant, the court of appeal rejected application of the doctrines of promissory estoppel and equitable estoppel, emphasizing that the lesbian cohabitant had never explicitly promised to support the children if the partners separated. *Id.* at 505–08. However, the issue, for purposes of equitable estoppel, should be whether the cohabitant undertook the role of parent, which the cohabitant clearly did. The court of appeal opinion reports: "Elisa [the cohabitant] considers herself and Emily [the biological mother] to both be the mothers of all the children." *Id.* at 498. A person who consents to be a parent need not specifically undertake the obligation of child support, which is instead a legal duty that attaches to the status of "parent."

In *Maria B.*, the court of appeal was concerned about a line of California cases that would have denied the status of "mother" to Elisa should she have initiated an action seeking custody or visitation of the children. The court reasoned that "it is unfair for the court to impose a child support obligation under an estoppel theory when the court cannot grant and enforce parental rights, such as custody and visitation, under the same theory over Emily's objections." *Id.* at 508. The court distinguished *L.S.K v. H.A.N.* on the ground that in that case the support obligor had already been granted generous custodial rights. *Id.* at 508–09. *L.S.K.* is further discussed in *supra* note 235 and *infra* note 245.

Fairness does require correspondence between parental support obligations and custodial claims. Fairness is achievable in actions between two former cohabitants. If a legal parent successfully invokes the doctrine of estoppel to establish a support obligation, the legal parent should be equitably estopped to assert that the support obligor is not a parent for custodial purposes. See discussion of the ALI provisions at text accompanying *infra* notes 238–245. However, as in *Maria B.*, when the state seeks to estop a former cohabitant from denying parenthood in order to avoid or recoup public assistance payments made on behalf of a child, it is not clear that the child's legal parent should or would be similarly estopped. In such case, the support obligor might have no cognizable claims to visitation or custody. This possibility concerned the Washington Court of Appeal in *State ex rel. D.R.M.*, 34 P.3d 887, 894 (Wash. Ct. App. 2001) which held that sufficient evidence supported the trial court ruling that, although equitable estoppel, promissory estoppel, or contract may generally be available, the facts of the case did not support any of those theories. On the other hand, whenever a public child support agency establishes and imposes a child support obligation on an absent parent, the custodial parent is exposed to claims for custody and visitation that might not otherwise have been asserted by the absent parent. Insulation of the legal or custodial parent from such claims should not turn on whether the support obligor is a legal parent or a "parental child support obligor by estoppel."

Massachusetts Supreme Judicial Court heard oral argument in *T.F. v. B.L.*, in which a biological mother seeks child support from a former lesbian cohabitant. The trial court found that the two women agreed to create a child and "went forward together to accomplish it" by means of the artificial insemination of one of them. The trial court reserved judgment and reported the case to the appeals court for decision pursuant to a Massachusetts statute allowing a family court judge to reserve final determination and report the evidence and questions of law to the appeals court, where "thereupon like proceedings shall be had as upon appeal."[237] The Supreme Judicial Court granted direct appeal. The biological mother's pleadings and briefs rely on contract and equitable estoppel to deny a support obligation. With respect to equitable estoppel, the mother's briefs invoke the American Law Institute's *Principles of the Law of Family Dissolution*.[238] Section 3.03 of the Principles provides that a court "may . . . impose a parental support obligation upon a person who may not be the child's parent under state law, but whose prior course of affirmative conduct equitably estops that person from denying a parental support obligation to the child." Under that section, estoppel may arise when "there was an explicit or implicit agreement or undertaking by the person to assume a parental support obligation to the child" or "the child was conceived pursuant to an agreement between the person and the child's parent that they would share responsibility for raising the child and each would be a parent to the child."[239] Commentary on the latter clause mentions "same-sex couples who wish to have children together [and] seek a sperm donation or surrogate mother, as the case may be."[240]

Once a child support obligation is established as a matter of general principle, whether by legislation or case law, the way is smoothed for recognition of the support obligor's associational claims with respect to the child. The history of the legal relationship of unwed fathers and their children is illustrative. The law first required that fathers equally support children born in and out of wedlock,[241] and once that norm was well-established, courts and legislatures became more willing to recognize the associational claims of unwed fathers.[242] A similar pattern

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Maria B. is further confused by the atypical circumstance that each partner conceived and bore one or more children during their relationship. The court of appeal inferred from this that each woman may have intended to be a mother only to her biological children, *Maria B.*, 13 Cal. Rptr. 3d at 505, despite evidence, quoted above, to the contrary.

237. MASS. GEN. LAWS ch. 215, § 13 (2004).

238. Appellant's Brief at 3, 13–16, 33–39, T.F. v. B.L. (on file with author); Rebuttal Brief at 14–17, T.F. v. B.L. (on file with author).

239. PRINCIPLES, *supra* note 139, § 3.03(1)(a), (c).

240. *Id.* § 3.03 cmt. c.

241. *See supra* note 121.

242. *See supra* note 121.

is evidenced in the ALI Principles. For purposes of child support, a person who is not a parent may nevertheless be estopped to deny a support obligation to a child.[243] By contrast, for purposes of allocation of custodial and decision-making responsibility for a child, a claimant must qualify as some form of "parent," either a parent under state law (a legal parent), a parent by estoppel, or a de facto parent. The three parental categories are ordinarily defined in terms of various substantial social connections to the child.[244] Nevertheless, even when those social connections do not exist, a person will be treated, for custodial purposes, as a "parent by estoppel" if the person is obligated to pay child support for the child because he or she has been estopped to deny a child support obligation under section 3.03. Recognizing the reciprocity of duties and rights, the ALI Principles move from the imposition of a support duty to the acquisition of associational rights.[245]

D. Establishing *Inter Se* Support Obligations

Similarly, with respect to nonmarital cohabitants, same-sex and opposite-sex, I would begin by establishing *inter se* legal obligations, such as those

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243. *See supra* notes 239–240 and accompanying text.

244. *See* PRINCIPLES, *supra* note 139, § 2.03(1). A parent by estoppel is one who believed that he was the child's biological parent and fully accepted the responsibilities of a parent; or who lived with the child for at least two years or since the child's birth, holding out and accepting full responsibilities as a parent pursuant to a coparenting agreement with the child's legal parent; or who is obligated to pay child support for the child because he or she is estopped to deny a child support obligation under section 3.03. A de facto parent is an individual other than a legal parent or a parent by estoppel who, for a significant period of time, not less than two years, lived with a child and, for reasons other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship or due to the inability of a legal parent to care for the child, regularly provided a major share of child care.

245. Effectively, the ALI is more willing to impose a support obligation on a nonparent than it is to recognize a nonparent as a claimant for purposes of child custody. However, once a nonparent is required to pay child support as though he or she were a parent, that person is treated as a parent for custodial purposes. In cases where a nonparent would not otherwise qualify as a parent for custodial purposes, but would be estopped to deny a support obligation to the child, the choice whether to insist on support, and consequently to submit to a reciprocal custody claim, is left to the legal parent. Compare this with *L.S.K. v. H.A.N.*, 813 A.2d 872 (Pa. Super. Ct. 2002), where a woman requested and was awarded joint decisionmaking authority ("legal custody") and substantial visitation with respect to the five children born to her same-sex cohabitant during their relationship. She was also ordered to pay child support to the custodial mother. The woman appealed from the award of child support, on the ground that she was neither the biological nor the adoptive mother of the children. Although the superior court sustained the lower court's child support order on the ground that the woman's prior behavior equitably estopped her to deny a support obligation to the children, it expressed incredulity that she would claim parental custodial rights but disclaim parental support obligations: "Moreover, equity mandates that H.A.N. cannot maintain . . . an action as to the children, alleging [that] she has acquired rights in relation to them, and at the same time deny any obligation for support . . . ." *Id.* at 878.

proposed by the American Law Institute.[246] Canadian experience is instructive. The support obligation established by the provinces of British Columbia and Ontario[247] initially was intended to protect the public treasury from unwarranted[248] public assistance claims. It was not understood as a civil rights provision. It was, however, the harbinger of civil rights, first the right of unmarried opposite-sex couples to have their relationships recognized for purposes of benefits as well as obligations, and later the right of same-sex couples to have their relationships recognized informally and, ultimately, formally. By contrast, when *M. v. H.* subsequently required that same-sex partners be treated as "spouses" for the purpose of imposing that same duty of support, its holding was clearly understood as a forerunner of significant civil rights to come.[249] Moreover, the imposition of *inter se* obligations represents another type of social advance. The economic effect of imposing *inter se* obligations is redistribution from haves to have-nots. When families (whether formal or informal) dissolve, income redistribution is a matter of social justice. Insofar as same-sex couples rear children, redistribution also tends to serve the interests of children, who are most likely to reside with the have-not parent.[250]

Although common law marriage has waned in this century, with three states abolishing it in the last decade,[251] one state has chosen to adopt it. Utah legislated common law marriage in 1987.[252] Like the initial Canadian legislation treating long-term cohabitants as spouses for purposes of spousal support, the Utah legislation was at least partly motivated by the desire to economize on public welfare expenditure.[253] The Utah experience emphasizes

246. Chapter 6 of the PRINCIPLES, *supra* note 139, would generally subject same-sex and opposite-sex couples cohabiting in stable, long-term relationships to the support and property regimes applicable to married persons.

247. *See supra* notes 146–149 and accompanying text.

248. "Unwarranted" in the sense that the applicant's need should be the responsibility of a former cohabitant, rather than the state.

249. *See supra* notes 159–164 and accompanying text.

250. *See* PRINCIPLES, *supra* note 139, § 3.04.

251. *See supra* note 132.

252. Act of Feb. 25, 1987, 1987 Utah Laws ch. 246 (codified at UTAH CODE ANN. § 30-1-4.5 (2003)), provides that a marriage that is not solemnized according to Utah legal requirements shall nevertheless be legal and valid if it arises out of a contract between two persons who are capable of marrying, have cohabited, have mutually assumed marital rights, duties and obligations, and who hold themselves out as married and are generally reputed to be husband and wife.

253. The legislature was concerned that couples were evading public assistance rules, which combine the incomes of husband and wife for eligibility purposes, by not marrying even though they were living in all respects as husband and wife. Consequently, the legislature married them off. *See* David F. Crabtree, Note, *Development, Recognition of Common-Law Marriages: Recent Development in Utah Law*, 1988 UTAH L. REV. 273, 280–81; Ryan D. Tenney, Note, *Tom Green, Common-Law Marriage, and the Illegality of Polygamy*, 17 BYU J. PUB. L. 141, 148–49 (2002). The legislature may only have intended to avoid certain public expenditure, but the treatment of the parties as common

the powerful role that duty, as contrasted with right, may play in achieving recognition of nonmarital families. This Article earlier acknowledges that Canadian acceptance of informal relationships may be related to the character of religious belief in Canada, as contrasted to the United States.[254] Nevertheless, it is noteworthy that Utah, a religiously conservative state, behaved in a characteristically Canadian manner, which suggests that the desire to impose financial duties on cohabitants may be a stronger factor than religious belief in the recognition and regulation of nonmarital relationships.

E. Estoppel to Deny the Existence of a Formal Conjugal Relationship

The Article has pointed out that the United States has been unusually formal in recognizing and regulating family relationships, which has resulted in widespread nonrecognition of informal family relationships and obtuseness to the equality claims of same-sex couples. Ultimately, there is not a great distance between insisting on compliance with formal requirements and substituting a tautological definition for reasoning and analysis. The challenge in both cases is to move the law from an insistence on formality and contract to a legal understanding of the family that rests on the social characteristics of families, in other words, a law of status. The correspondence between benefits and burdens may have some capacity to move the law toward status: As both same-sex and opposite-sex relationships are formalized, there may be room to develop doctrines of estoppel as a counterweight to contract.

Opposite-sex nonmarital partners often pass themselves off as lawfully married when it works to their advantage, for example, by asserting lawful marriage to qualify one partner for the other's family health insurance, or by filing joint income tax returns when it would be economically advantageous for a family earner to do so. Such facts appear frequently in cohabitation cases that largely fail as contract actions.[255] To illustrate, in *Friedman v. Friedman*,[256] a nonmarital partner who had recently become severely disabled sought spousal support at the termination of a twenty-one year relationship in which two children were born. Failing to establish that her partner agreed to pay her support should their relationship end, the woman sought to estop her partner

law spouses confers upon them all the rights, as well as all the duties, of married persons. What may be understood as a rather mean bit of law may also be understood as socially progressive legislation.

254. *See supra* note 6 and accompanying text.

255. *See, e.g.*, Friedman v. Friedman, 24 Cal. Rptr. 2d 892 (Ct. App. 1993) (unmarried partner in twenty-one-year procreative relationship filed joint income tax returns); Rissberger v. Gorton, 597 P.2d 366 (Or. Ct. App. 1979) (cohabitant represented his nonmarital cohabitant as his wife in order to claim coverage for her on his health insurance plan).

256. 24 Cal. Rptr. 2d 892.

from denying that they were married on the ground that he represented to the government that they were married when he repeatedly signed and filed income joint income tax returns in order to reduce his tax liability. She argued that "accordingly, he should not be permitted to deny the legal responsibilities which would otherwise flow from that representation (presumably, an obligation to provide temporary spousal support)."[257] The California Court of Appeal rejected her argument on the ground that in order to raise an estoppel, she had to have been ignorant of the true facts. However, she always knew that she and her partner were not lawfully married.

This analysis would be more persuasive if the matter were truly between the two parties alone. However, such is not the case. It has traditionally been said that the state is a party to every marriage.[258] The notion was historically invoked to rationalize the inability of the parties to regulate many of the legal incidents of their marital relationship.[259] They could not, for example, agree to terminate their relationship.[260] The state alone held the power of divorce and, at least in theory, wielded that power only in narrowly defined circumstances. With the adoption of no-fault divorce grounds, now available in some form in every jurisdiction, albeit usually not as the exclusive ground for divorce,[261] some commentators suggest that the state has "receded" from marriage, that marriage has been "privatized," and the state is effectively no longer a party to marriage.[262]

However, the state's interest in marriage extends beyond the grounds for exit. Most obviously, the state's interests are expressed in the terms, as opposed to the grounds, of exit. As exit became, at least nominally, more freely available, the terms of exit became more highly regulated. The final third of the twentieth century witnessed the doctrinal development of marital property distribution and child support theory and enforcement.[263] The

257. *Id.* at 897.

258. *See supra* note 137.

259. *See supra* note 137; *see also* Graham v. Graham, 33 F. Supp. 936 (E.D. Mich. 1940).

260. *See, e.g.*, Lester v. Lester, 87 N.Y.S.2d 517 (Fam. Ct. 1949).

261. In fifteen states and the District of Columbia, a no-fault ground is the sole ground for divorce. In another thirty-two states, a no-fault ground has been added to traditional fault grounds, which include, inter alia, adultery and desertion. In most jurisdictions, the no-fault ground is "living separate and apart" for a specified period of time ranging from sixty days to three years. *See* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Redefining Families, Reforming Custody Jurisdiction, and Refining Support Issues*, 34 FAM. L.Q. 607, 656 chart 4 (2001).

262. *See, e.g.*, Mary Ann Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663 (1976). *But see supra* note 137.

263. *See* Grace Ganz Blumberg, *New Models of Marriage and Divorce: Significant Legal Developments in the Last Decade*, *in* CONTEMPORARY MARRIAGE: COMPARATIVE PERSPECTIVES ON A CHANGING INSTITUTION 349 (Kingsley Davis ed., 1985).

American Law Institute, which in its long history had never examined any family law issue, ended the twentieth century with *Principles of the Law of Family Dissolution*, the product of a thirteen-year-long examination of the terms of exit. Properly understood, and as ultimately understood by the American Law Institute, the state's welfare interests extend not merely to marriage, but to all conjugal, or coupled, relationships.[264]

Although the state may decline to extend state and third-party benefits to nonmarital relationships, reserving them for those who enroll in the state institution of marriage or domestic partnership, when nonmarital partners have in fact claimed state and third-party benefits of marriage or domestic partnership during their relationship, they should be estopped to disclaim the obligations of marriage or domestic partnership at the termination of the relationship. In these circumstances, estoppel would vindicate both the state's interest in not having its institutions abused and the state's welfare interests.

California case law offers some support for this treatment in its liberal application of the doctrine of estoppel to deny a marriage. In California, when a man and a woman comply with the formal requirements of marriage with full awareness that their marriage is entirely void, and they live together and hold themselves out as married, at the termination of their relationship each is estopped to deny the marriage for purposes of their *inter se* obligations.[265] Estoppel does not arise because either misled the other as to the lawfulness of their marriage. On the contrary, both knew that it was not lawful. Instead, estoppel arises because the person seeking to avoid obligation treated the relationship as a marriage and enjoyed the benefits of marriage. In the case of nonmarital partners, they treated their relationship as a marriage by claiming benefits that are, by law, reserved for married persons, thus holding themselves out as married, as well as living like a married couple. Application of the doctrine of estoppel to deny a marriage to persons who knowingly enter a void marriage, or to nonmarital partners who claim the public and third-party benefits of marriage, does not revive the doctrine of common law marriage because it would not entitle a party to state and third-party benefits reserved to married persons. Rather, it would simply

264. *See* PRINCIPLES, *supra* note 139, at 33–34; *Id.* § 6.02 cmts. a, b (discussing nonmarital cohabitation issues); *see also id.* §§ 7.02 cmt. c, 7.05 cmt. c (discussing public policy limitations on the enforceability of contracts affecting economic issues at dissolution).

265. In the case *In re Marriage of Recknor*, 187 Cal. Rptr. 887 (Ct. App. 1982), both parties knew that the woman was married to another man when they married. They knew that their marriage was void. After they lived together for fifteen years and had two children together, the man resisted the woman's claim for spousal support on the ground that the marriage was absolutely void for bigamy and both parties knew that.

estop persons who have claimed those benefits during their relationship from denying that they are married for *inter se* purposes at termination.

As with opposite-sex nonmarital cohabitants, unregistered same-sex partners may represent themselves as California registered partners in order to secure the benefits provided by domestic partner legislation, ostensibly without assuming the reciprocal obligations that the 2003 Act imposes. When such relationships break down, application of the doctrine of estoppel would effectively right the balance. Nonmarital cohabitants wishing entirely to avoid the institution of marriage or domestic partnership may do so by not claiming the benefits of those institutions. The state should not, however, tolerate abuse of its institutions. The vigorous use of estoppel would regain a good deal of the ground ceded to contract by *Marvin* and its ilk.

Milton Regan suggests that the state should impose the *inter se* burdens of marriage on cohabitants, but should deny them some of the public and third-party benefits of marriage, on the ground that their failure to marry bespeaks a lesser commitment[266] to their relationship.[267] Equitable estoppel approaches the issue from the opposite direction. It posits that many nonmarital cohabitants already enjoy the public and third-party benefits of marriage, because we are not a closely policed society.[268] Equitable estoppel would predicate obligations on the enjoyment of benefits.[269]

VII. THE SOCIAL IMPLICATIONS OF REGULARIZING AND NORMALIZING SAME-SEX RELATIONSHIPS

Whether or not same-sex couples substantially embrace the institution of marriage in the short term, the availability of marriage, or a parallel legal institution, such as domestic partnership or civil union, has great symbolic

266. The data on relative commitment may not be as telling as some commentators suggest. It is true that some studies show a lesser degree of commitment in cohabitation than in marriage. However, causality is not clear. Commentators generally assume that those who are more committed marry and those who are less committed cohabit. Yet, as other studies show, it is also possible that people marry or cohabit for reasons quite apart from commitment. Those that marry effectively join an institution that itself enhances their sense of commitment. This possibility is suggested by clinical discussion of the negative effect on same-sex couples of not having access to an institution that prescribes behavioral norms. *See infra* notes 274–277 and accompanying text.

267. *See* Regan, *supra* note 140.

268. Indeed, in forty-four years of marriage, I cannot recall that either my husband or I have ever been asked to produce our marriage certificate.

269. Milton Regan and I agree that the ALI status treatment of *inter se* rights and responsibilities is the best approach, Regan, *supra* note 140, at 1450–51. I suggest equitable estoppel only as a second-best alternative, given the prevailing American view that nonmarital cohabitation should be regulated by principles of contract, as opposed to status. *See supra* notes 134–140 and accompanying text.

significance. It bespeaks acceptance and respect for the relationships of same-sex couples. The ultimate integration of opposite-sex and same-sex couples in identical or similar legal institutions has the potential to effect positive social change that will benefit everyone.

Although social scientists have in the past compared gay and lesbian individuals and couples with their heterosexual male and female counterparts, sometimes invidiously and misleadingly,[270] we cannot know whether and, if so, how individuals and couples fundamentally differ, with respect, for example, to social behavior, sexual behavior, coupling behavior, and mental and physical health, until gay men and lesbians are socially accepted and their conjugal relationships are legally recognized. But we can hypothesize possible consequences of the normalization and regularization of same-sex relationships for gay men and lesbians, as well as for the larger community, and anticipate that social scientists will ultimately consider and confirm or reject these hypotheses.

The legal recognition of same-sex couples should have a positive effect on the mental and social well-being of gay and lesbian youth, most of whom grow up in heterosexual households. Like their heterosexual counterparts, young gays and lesbians will be able to look forward to a full and meaningful family life with a partner and with children, adopted or conceived by assisted reproduction.[271] Insofar as marriage is a rite of passage to adulthood, denying access to marriage, or its equivalent, to gay men and lesbians has, at least symbolically, confined them to perpetual adolescence.[272]

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270. Consider, for example, the myth that most gay men are sexually hyperpromiscuous. *See infra* note 279.

271. In the 1980s, some gay and lesbian law students still thought it socially and even physically hazardous to reveal their sexual identity in law school. During that period, I regularly taught Family Law. One semester, my best student was a young man who was passionately interested in all issues relating to the family. At the end of the semester, after he received the highest grade in the class, he came to my office and, revealing that he was gay, told me about the saddest moment in his life. He was raised in a vibrant and loving family with a mother, father, and siblings. From childhood, he looked forward to marrying and founding a family, just as his parents had. When he realized in early adolescence that he was gay, he was disturbed not so much by the recognition of his sexual orientation as by the profound disappointment that he would never be able to marry and have a family like the one in which he was raised. Instead, he was closeted, and his emotional and sexual life was restricted accordingly. After graduation, he returned to the Midwestern city in which he had grown up. From time to time, he called me on the telephone to chat. The last time I heard from him we talked about his interest in doing graduate work in law. It transpired that he was receiving disability payments and being treated for AIDS. He promised to call me again when he recovered sufficiently to contemplate going back to school. I never heard from him again. When gay marriage and its look-alikes became a reality, I thought of him and how the normalization and recognition of same-sex relationships might have profoundly changed his life.

272. Certain organized public manifestations of "gay pride" may be read to suggest that the effect of denial may have been more than merely symbolic. Flamboyant, exhibitionistic parades, for example, combine the narcissism of adolescence with the raucousness of a college fraternity extravaganza. However, heterosexual adolescents grow up and graduate from college. Perennial adolescence,

Denial of legal recognition of same-sex relationships has historically impelled a substantial percentage of family-oriented gay men and lesbians to conceal their sexual orientation and marry persons of the opposite sex, often with unhappy consequences for themselves, their spouses and their children.[273] Legal recognition of same-sex relationships should reduce the incidence of those difficult and unfulfilling marriages.

The legal recognition of same-sex couples also has the potential to strengthen and maintain the relationships of same-sex couples.[274] Clinicians working with same-sex couples in therapy note what they characterize as "boundary and commitment ambiguity," that is, lack of clarity in how same-sex couples define their relationship to themselves and others. The clinicians believe that "this is partly because lesbian and gay couples (in contrast to legally married heterosexual couples) lack a socially endorsed, legally framed, normative template for how couplehood should be."[275] One of the stronger

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by contrast, has been embraced by some adult gays and lesbians as a mark of distinction, a virtue, a more fully realized state of being than that experienced by adult heterosexuals. Effectively, they turned a badge of oppression into a mark of distinction. As same-sex marriage, or domestic partnership, becomes a norm for same-sex relationships, it will be interesting to see whether such attitudes persist.

273. *See, e.g.*, AMITY PIERCE BUXTON, THE OTHER SIDE OF THE CLOSET: THE COMING-OUT CRISIS FOR STRAIGHT SPOUSES AND FAMILIES (1994); Trip Gabriel, *Left Behind—A Special Report; When One Spouse is Gay and a Marriage Unravels*, N.Y. TIMES, Apr. 23, 1995, at A1 (reporting that abandoned heterosexual spouses "typically undergo their own sexual crisis, a collapse of faith in their judgment, and a sense of embarrassed isolation"). In *The Married Homosexual Man*, Michael W. Ross estimated that 20 percent of gay men marry. MICHAEL W. ROSS, THE MARRIED HOMOSEXUAL MAN (1983). Gabriel reports that other researchers estimate that 18 to 35 percent of lesbians marry. Gabriel, *supra*. Buxton estimated that there are 2 million gay men, lesbians, or bisexuals who were once married or remain so. BUXTON, *supra*, at xiii.

274. I assume that gay and lesbian relationships should be socially supported for all the reasons that we favor and foster marriage. In short, coupling is good for the health of individuals and communities. Coupling can be fostered or impeded. Legal recognition and support fosters coupling; the lack thereof and social ostracism impede it. I do not suggest that coupling can cure all ills, such as poverty, mental disorder and partner abuse. But given any particular couple with the potential to thrive, the more that shores up the relationship, the better. Maintenance of relationships requires barriers to leaving relationships as well as conditions that attract persons to relationships. Lawrence Kurdek notes:

> [T]he prediction that married partners whose relationships are formally supported by social and cultural institutions would report stronger barriers to leaving their relationship was supported [by empirical research]. This finding highlights the importance of barriers as a unique dimension of relationship quality and underscores previous claims that the processes that maintain a relationship need to include forces that prevent a partner from leaving the relationship, as well as forces that attract a partner to the relationship.

Kurdek, *supra* note 190, at 564.

275. Robert-Jay Green & Valory Mitchell, *Gay and Lesbian Couples in Therapy: Homophobia, Relational Ambiguity, and Social Support*, *in* CLINICAL HANDBOOK OF COUPLE THERAPY 552 (A.S. Gurman & N.S. Jacobson eds., 3d ed. (2002)). Sondra E. Solomon, Esther D. Rothblum, and Kimberly F. Balsam cite this observation to underscore the importance of studying same-sex relationships that are legally defined. Solomon et al., *supra* note 183, at 285.

arguments in favor of state support for the institution of heterosexual marriage has been that it does create a desirable, perhaps even necessary, "socially endorsed, legally framed normative template" for couples. As one commentator asserts, "the bonds of kinship and marriage are valuable ties that bind."[276] Another persuasively argues that the legal recognition of family relationships, that is, the creation of family status, sustains a needed continuity of identity, intimacy, and connection between husbands and wives, and parents and children. Status, in the form of marriage, attaches us to our past and to our future. In sponsoring the status of marriage, the state also effectively affirms the responsibilities that derive from the dependence and mutual vulnerability that arises from maintaining an intimate family relationship.[277] To the extent that marriage solidifies conjugal relationships, we should expect to see more committed and enduring relationships. Even though "married" same-sex couples may, at first, only constitute a minority of all same-sex couples, they will have a powerful formative impact on the template with which same-sex couples conceive and experience their relationship.

Another closely related claim made generally, but not exclusively, by the conservative "marriage movement" is that marriage makes us healthier, wealthier, and happier,[278] as compared to the alternatives of nonmarital cohabitation or singlehood. Although there is a problem of causality, that is, whether those who initially have better endowments are also more marriageable, we can nevertheless reasonably posit, all things being equal, that more people will prosper and more relationships will endure within marriage than outside it. From this perspective, the legal recognition of same-sex nonmarital relationships should similarly enhance the well-being of gays and lesbians.

A number of disciplines, most particularly psychobiology, tell us that an essential function of marriage is to tame the human male. For the human male, marriage transforms lust into love and links men to specific children.[279] To the extent that men do need taming, and to the extent that

276. Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1, 31.

277. *See* Regan, *supra* note 68.

278. *See, e.g.*, LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER AND BETTER OFF FINANCIALLY (2000).

279. *See* GEORGE GILDER, MEN AND MARRIAGE 5–6 (1986). Gilder was the first to fully develop this argument, which has since been propounded by others, particularly in connection with the fathers' rights and marriage movements. *See, e.g.*, David Popenoe, *Life Without Father*, *in* LOST FATHERS: THE POLITICS OF FATHERLESSNESS IN AMERICA 33, 36 (Cynthia R. Daniels ed., 1998) ("Left culturally unregulated, men's sexual behavior can be promiscuous, . . . their commitment to families weak.").

In the context of same-sex marriage, this perspective resonates with the unfounded vilification of gay men as highly promiscuous. It is true that a minority of gay men do have many sexual

the institution of marriage does tame men, we might expect to see similar consequences for gay men. In a related vein, there is evidence from the Netherlands that the introduction of domestic partnership and marriage for same-sex couples has been accompanied by a marked increase in the formation of male same-sex households, that is, by increased male domesticity.[280]

Like the conservative "marriage movement," I am concerned about insuring the strength of the institution of marriage. Unlike the conservative marriage movement, which perceives same-sex marriage as a threat to the institution of heterosexual marriage, I see the exclusion of gay men and lesbians as a threat to the institution of marriage. Institutions insure their viability by assimilating the excluded. When they do not, the excluded tend to become angry and obstreperous.[281] They may do their best to undermine the institutions that exclude them. The genius of America has been its capacity for inclusion, and assimilation tends to enrich everyone. Assimilation of the other, whether the immigrant or the same-sex couple, tends to show us new ways of behaving and thinking.

There are areas in which same-sex marriage promises to enrich opposite-sex marriage. For the last quarter century or so, the social, legal and constitutional paradigm of marriage has been the egalitarian marriage.[282] Same-sex couples are more able to achieve egalitarian relationships than

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partners, as do a minority of heterosexual men. However, a recent analysis of the General Social Survey data set (1991–2002) shows that, in terms of median number of sexual partners since the age of eighteen, gay men have somewhat more, but not dramatically more, sexual partners than heterosexual men. This analysis was performed by Joseph Doherty of the Empirical Research Group of UCLA Law School and is reported, with a critique of assertions to the contrary, by Professor Eugene Volokh. *See* Eugene Volokh, *More About Sexual Partner Counts*, THE VOLOKH CONSPIRACY (May 22, 2003) *at* http://volokh.com/2003_05_18_volokh_archive.html#200329266; Eugene Volokh, *The Myth of the Median Hyper-Promiscuous Gay Male*, THE VOLOKH CONSPIRACY (May 22, 2003), *at* http://volokh.com/2003_05_18_volokh_archive.html#200329250. The analysis indicates that the median number of sexual partners since the age of eighteen was ten for gay men and six for heterosexual men. The corresponding median for lesbians was four; for heterosexual women, it was three. Volokh, *More About Sexual Partner Counts*, *supra*.

280. *See supra* note 182. The number of female same-sex households also increased, but not nearly so dramatically.

281. The denial of access to legal institutions surely has the potential to fuel gay rage, which may be expressed in the rejection of marriage as an institution and participation in the radical feminist project to dismantle the traditional nuclear family in order to undermine the patriarchal power of men. *See* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 228–35 (1995) (proposing abolition of marriage as a legal status and definition of the family in terms of the mother-child dyad); sources cited *supra* note 185.

282. *See, e.g.*, John Demos, *Images of the American Family, Then and Now*, *in* CHANGING IMAGES OF THE FAMILY 43, 43–60 (Virginia Tufte & Barbara Myerhoff eds., 1979).

opposite-sex couples.[283] On the other hand, the increasing tendency of gay and lesbian couples to create child-centered families should better enable us to distinguish sex-role socialization from the imperatives of child-rearing and home maintenance. In particular, gay male co-parenting strips away issues of female sex-role socialization.[284]

Studies of same-sex and opposite-sex couples tend to show varying reliance on family and friendship networks for social support. Women in both types of relationships tend to rely on friendship networks and family but, in general, heterosexual women rely more heavily on family than do lesbians. Married heterosexual men, by contrast, largely rely on family to the exclusion of friendship networks, while gay men rely on friendship networks as well as on family.[285] The explanation for such differences is largely social. At worst, rejected by family and, at best, simply feeling "different" and isolated, gay men have historically congregated in large metropolitan areas where they can meet other persons like themselves.[286] In the best of all worlds, spouses, same-sex and opposite-sex, would rely on both friends and family for social support. Exclusive reliance on one or the other, particularly on family, can be treacherous. Although deep connection with one's family of origin probably serves heterosexual men well in prompting them to marry, when a marriage breaks down such men may be set adrift, particularly if family members blame them for the demise of the marriage.

Finally, as relative newcomers to the sociolegal institution of marriage, many gays and lesbians have thought long and hard about the meaning of

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283. Solomon et al., *supra* note 183, at 276, 282, 284 and sources cited therein (finding more equality in gay and lesbian couples than in married heterosexual couples); Kurdek, *supra* note 190, at 564 (initially predicting greater equality for gay and lesbian couples than for married heterosexual couples, but study supported that prediction only for lesbian couples); Patterson, *supra* note 190, at 1053–54 (surveying recent literature and finding gay and lesbian couples generally value and report egalitarian division of labor and equality of power). Although gay and lesbian couples may express greater interest in and demonstrate greater capacity for egalitarian relationships, to some degree their behavior resembles that of opposite-sex couples. Christopher Carrington found, for example, that three-fourths of lesbian and gay couples divided household labor unequally, the partner with the lesser earning capacity performing more household chores. CHRISTOPHER CARRINGTON, NO PLACE LIKE HOME: RELATIONSHIPS AND FAMILY LIFE AMONG LESBIANS AND GAY MEN 67–108 (1999).

284. *See, e.g.*, Ginia Bellafante, *Two Fathers, With One Happy to Stay at Home*, N.Y. TIMES, Jan. 12, 2004, at A1. Bellafante states:

> That staying at home constitutes the just and noble course of parenthood was a sentiment echoed again and again in more than a dozen interviews with gay fathers. . . . Though many gay fathers may enter into domesticity with few conflicts or reservations, the pressures of starting a new life stripped of professional status can mirror those faced by nonworking mothers.

Id. See additionally the findings of Christopher Carrington, *supra* note 283.

285. Solomon et al., *supra* note 183, at 282–83.

286. My colleague Bill Rubenstein describes this as a "reverse Diaspora": Gay men and lesbians are born into heterosexual families and, as they grow up, they have to go forth and find their similars.

an institution that heterosexuals enter reflexively. The struggle of gays and lesbians to gain access to the institution has produced a thoughtful literature on the virtues and pitfalls of that institution, as well as on the nature and desiderata of coupled relationships.[287] As the immigrant's appreciation of his adopted land reawakens and renews the native-born citizen's appreciation of American freedom and democracy, so the claim of gay men and lesbians for access to marriage gives new value, significance, and meaning to an institution that heterosexuals may take for granted.

CONCLUSION

This Article describes the legislative campaign that culminated in the California Domestic Partner Rights and Responsibilities Act of 2003, which creates a shadow institution of marriage for same-sex couples.[288] As of 2005, registered domestic partners are treated as married persons in California for virtually all state law purposes.[289] The Article contrasts the entirely legislative origin of the Act with constitutionally impelled developments in other states, and evaluates the Act as both civil rights law and family law. The muted and largely acquiescent public reception of the Act contrasts sharply with the press coverage and public furor generated by similar nonlegislative initiatives. The pursuit of legislated domestic partnership rather than constitutionally compelled civil marriage may be understood to express a pragmatic preference for more certain, albeit less complete, civil rights for same-sex couples.[290]

In terms of civil rights for gays and lesbians, the Act is a stunning achievement. In terms of meeting the family law needs of same-sex couples, the Act is useful, but not sufficient. For reasons largely extrinsic to the character of their relationships, same-sex couples have not and cannot be expected to register as domestic partners at the rate at which opposite-sex couples marry.[291] Despite their enthusiasm for recognition of their civil rights, same-sex couples have responded weakly to the opportunity to

287. *See, e.g.*, SAME-SEX MARRIAGE: PRO AND CON (Andrew Sullivan ed., 1997); WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996); David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447 (1996); O'Brien, *supra* note 63; Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, Fall 1989, at 9. *See generally* ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY (1995).

288. *See supra* notes 8–41 and accompanying text.

289. *See supra* notes 38–45 and accompanying text.

290. *See supra* notes 40–60 and accompanying text.

291. *See supra* notes 184–190 and accompanying text.

formalize their relationships.[292] Thus, full attention to the legal needs of same-sex couples requires legal regulation of informal, or unregistered, relationships, as well as formal, or registered, relationships. With this issue in mind, the Article surveys the law of other countries and discovers that many, if not most, other countries have proceeded along two parallel tracks, formal recognition of gay relationships, initially as domestic partnerships and increasingly as marriage, and informal recognition of adult conjugal relationships, same-sex and opposite-sex.[293]

The Article does not argue the merits of formally recognizing same-sex relationships, although that question is still widely debated in the United States. From a comparative perspective, the issue has already been concluded in favor of recognition.[294] Even without the benefit of comparative perspective, recent events in the United States should enable us to see the writing on the wall, be it constitutional or legislative.[295] Instead, the Article concentrates on the potential of American family law to encompass informal as well as formal conjugal families, whether headed by same-sex or opposite-sex couples. The Article explores various strategies for moving the law toward inclusion. Those strategies are organized around three themes: functionality, equivalence, and the correspondence of rights and obligations.[296] Those themes challenge the procedural and contractual formality of American family law, which is expressed in the view that marriage requires conformity with legally prescribed procedures and that nonmarital cohabitation creates *inter se* legal obligations only to the extent that the parties affirmatively agree to assume them.[297]

The Article concludes with a reflection on the social consequences of legal regularization of same-sex relationships, where it identifies substantial gains for gay and lesbian youth, as well as for adult same-sex couples.[298] It also identifies potential benefits for opposite-sex couples and for the institution of marriage.[299]

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292. *See supra* notes 182–184 and accompanying text.
293. *See supra* notes 74–115 and accompanying text.
294. *See supra* notes 74–115 and accompanying text.
295. *See supra* notes 8–60 and accompanying text.
296. *See supra* Part VI.
297. *See supra* notes 134–140 and accompanying text.
298. *See supra* notes 270–280 and accompanying text.
299. *See supra* notes 281–287 and accompanying text.

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