

## ENDING MARRIAGE AS WE KNOW IT

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Marriage as we know it is a status unlike any other, conferring benefits and responsibilities unavailable to those in other close personal relationships. Consider the following example:

During the unrelenting investigation into President Clinton's relationship with Monica Lewinsky, prosecutor Kenneth Starr compelled a distraught Marcia Lewis, Lewinsky's mother, to testify before the grand jury about her daughter's confidences.<sup>1</sup> Lewinsky lived with her mother and had sought her advice in the context of their close mother-daughter bond.<sup>2</sup> However natural it was for Lewinsky to unburden herself to her mother, Starr had the power to force Lewis to betray her daughter's trust, and he shamelessly wielded that power.<sup>3</sup>

Had Lewinsky been married, and had she confided in her husband, her revelations would have been protected by the evidentiary privilege that shields from disclosure communications between a husband and wife.<sup>4</sup> Evidence law thus offers those who are married something it withholds from those who are not—a sphere of intimate communication protected from state intrusion, a relationship of trust so important to individual well-being and social cohesion that no one can compel the destruction of that trust, even to learn “the truth” about a crime.<sup>5</sup>

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1. See Lorraine Adams, *Confidences Became a Mother's Ordeal*, WASH. POST, Oct. 3, 1998, at A27; Peter Baker & Amy Goldstein, *Lewinsky's Mother Overcome By Emotion During Testimony*, WASH. POST, Feb. 12, 1998, at A1.

2. See Baker & Goldstein, *supra* note 1.

3. See Adams, *supra* note 1; Baker & Goldstein, *supra* note 1.

4. See generally 8 WIGMORE, EVIDENCE § 2232 (McNaughton rev. 1961).

5. For an intriguing analysis of the marital communication privilege, as well as the spousal privilege against giving adverse testimony, see MILTON C. REGAN, JR., *ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE* 89-135 (1999). Professor Regan is a strong proponent of the role

Marcia Lewis in despair brought public attention to forced betrayal of a child seeking comfort and advice from her mother. Editorials and columnists argued for the creation of a parent-child communication privilege.<sup>6</sup> I advocate here a more sweeping reform, incorporating recognition in every area of the law of the diversity of adult relationships characterized by emotional intimacy and economic interdependence. The law should no longer reward marriage above all other relationships.<sup>7</sup>

Part I of this Article reviews the most comprehensive analysis to date of the reasons to extend the reach of the law beyond marriage, a report entitled *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships* ("Beyond Conjuality"), released by the Law Commission of Canada in December, 2001.<sup>8</sup> The report presents a methodology that implements its analysis, by articulating the objectives of any law and determining what relationships should be included to meet those objectives. Part II considers those aspects of American law

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of law in strengthening loyalty, trust, connection, and commitment uniquely in marriage, and he analyzes spousal privilege in that light.

6. See Margaret Carlson, *Should a Mom Rat on Her Daughter?*, TIME, Feb. 23, 1998, at 25 ("Surely the parent-child bond is equal to that between husband and wife. . . . The Fifth Amendment right against self-incrimination ought to include the right not to incriminate a child."); Anna Quindlen, *Plenty of Privilege, But Not for Parents*, CHI. SUN-TIMES, Jan. 16, 2000, at 23 ("The lack of [parent-child] privilege is illogical, and defies both common sense and the public weal. In today's atmosphere of easy divorce, the ties of parenthood often trump those of matrimony.").

7. Elsewhere I have argued for the abolition of marriage as a legal category, joining other distinguished legal scholars. See generally Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U. J. GENDER SOC. POL'Y & L. 167 (2000) [hereinafter Polikoff, *Lesbians and Gay Men*]; Nancy D. Polikoff, *An End to All Marriage*, WASH. BLADE (July 25, 2003), available at <http://www.washingtonblade.com/2003/7-25/view/columns/endmarrige.cfm>; see also generally MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995) [hereinafter FINEMAN, *NEUTERED MOTHER*]; Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239 (2001); Ruthann Robson, *The State of Marriage*, 1 Y.B.N.Z. JURISPRUDENCE 1 (1997). Although I continue to believe that ending the legal category of marriage would be the preferable family law reform, this Article, which advocates eliminating the unique role of marriage in law, would end marriage as we know it and is a more realistic endeavor.

8. See LAW COMM'N OF CAN., *BEYOND CONJUALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS* (2001), available at [http://collection.nlc-bnc.ca/100/200/301/lcc-cdc/beyond\\_conjuality-e/pdf/37152-e.pdf](http://collection.nlc-bnc.ca/100/200/301/lcc-cdc/beyond_conjuality-e/pdf/37152-e.pdf) (last visited Jan. 19, 2004) [hereinafter *BEYOND CONJUALITY*]. An earlier report from the British Columbia Law Institute (BCLI) also addressed how the law should respond to a variety of family relationships. See BRITISH COLUMBIA LAW INSTITUTE: *REPORT ON RECOGNITION OF SPOUSAL AND FAMILY STATUS* [hereinafter *BCLI REPORT*], available at <http://www.bcli.org/>. The focus of this report was provincial, rather than federal, law. Therefore it addressed matters omitted from *BEYOND CONJUALITY*, such as consequences as between the two parties upon dissolution of the relationship. For further clarification of the family law matters within the jurisdiction of the Canadian federal and provincial governments, see Susan B. Boyd & Claire F.L. Young, "From Same-Sex to No Sex"?: *Trends Towards Recognition of (Same-Sex) Relationships in Canada*, 1 SEATTLE J. SOC. JUST. 757 (2003).

that already reflect the methodology of *Beyond Conjugal* as evidence that implementation of such a methodology is possible if advocates embrace this approach. Part III contemplates the role a relationship registration scheme could play in allocating rights and obligations and explains why such a system should not be a substitute for the rigorous methodology advanced in *Beyond Conjugal*. Part IV presents the limitations of, and indeed the dangers posed by, the movement toward gay and lesbian marriage in the United States. By constantly hammering at the injustice of excluding same-sex couples from the benefits and obligations of marriage, this movement, perhaps inadvertently, solidifies the differential treatment of the married and the unmarried. Rather than dethrone marriage from its favored status, a development that would honor all relationships, this movement seeks privileges for gay and lesbian relationships that mirror heterosexual marriage. This is not optimal family policy.

#### I. *BEYOND CONJUGALITY*: THE CANADIAN VISION

In 2001, the Law Commission of Canada released its report, *Beyond Conjugal*.<sup>9</sup> It calls for radical revisions in the law to honor and support all caring and interdependent personal adult relationships.<sup>10</sup> Although the report favors equality between same-sex and opposite-sex couples, including equal access to marriage, it denominates both types of relationships conjugal in nature.<sup>11</sup> The very title of the document, *Beyond Conjugal*, conveys the more profound conclusion that “governments

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9. See *BEYOND CONJUGALITY*, *supra* note 8, at i.

10. See *id.* at xxiv-xxv.

11. See *id.* at ix-x. Although the term “conjugal” is used commonly in Canadian case law and statutes to denote “marriage-like,” its definition is imprecise. See Brenda Cossman & Bruce Ryder, *What is Marriage-Like Like? The Irrelevance of Conjugal*, 18 CAN. J. FAM. L. 269 (2001). Although sexual relations are ordinarily a central, if not defining, aspect of a conjugal relationship, Canadian law relies on a flexible evaluation of seven factors, only one of which involves sex, for determining conjugal. See *id.* at 287-91. Scholars responding to the case law have noted that “judicial understanding of conjugal now comes close to an ‘I know it when I see it’ approach.” *Id.* at 299.

Unlike in Canada, American law does not commonly use the term “conjugal” to differentiate one set of relationships from others. Nonetheless, I use the term in this Article. I mean it to signify relationships that, even if not currently sexual, at one point contained a sexual component that deepened the tie between the two individuals. Martha Fineman’s groundbreaking work on the family critiques the centrality of sexual affiliation in law and society. See, e.g., *FINEMAN, NEUTERED MOTHER*, *supra* note 7. She uses the term “sexual family,” although at one point she uses it interchangeably with “conjugal family.” See *id.* at 143-44. Because I advocate that no legal significance attach specifically to conjugal relationships but not to others, I have no need to carefully define the meaning of the term.

need to pursue a more comprehensive and principled approach to the legal recognition and support of the full range of close personal relationships among adults.”<sup>12</sup>

The Canadian approach to family structures has differed significantly from ours over recent years. Two constitutional cases in the Supreme Court of Canada in the 1990s extended specific rights and responsibilities of marriage to both opposite-sex and same-sex couples.<sup>13</sup> The 2000 federal Modernization of Benefits and Obligations Act then virtually eliminated the legal difference between marital and nonmarital conjugal relationships.<sup>14</sup> If the Law Commission of Canada, in furtherance of its mandate to “consider measures that will make the legal system more efficient, economical, accessible and just,”<sup>15</sup> had merely concluded that the law should equalize the treatment of married and unmarried couples, it would have expressed little that was not already within the mainstream of Canadian thought.<sup>16</sup>

The United States is at no such point. No federal constitutional principle requires equal treatment of married and unmarried heterosexual couples, let alone gay and lesbian couples. Although there are a few significant victories in state legislatures<sup>17</sup> or in state courts, through statutory interpretation<sup>18</sup> or state constitutional interpretation,<sup>19</sup> federal legislation expresses the value that heterosexual married couples are always the preferred social unit.<sup>20</sup> From the Defense of Marriage Act<sup>21</sup> to

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12. BEYOND CONJUGALITY, *supra* note 8, at ix.

13. *See id.* at 14.

14. *See id.*

15. *Id.* at xxiv.

16. For a thorough review of both statutory and case law concerning nonmarital family relationships in Canada, see Nicholas Bala, *Controversy over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships*, 29 QUEENS L. J. \_\_\_\_ (forthcoming Fall 2003); *see also* Boyd & Young, *supra* note 8.

17. *See, e.g.*, CAL. FAM. CODE § 297 (West 2003) (creating a domestic partnership scheme open to same-sex couples and to opposite-sex couples in which one or both partners is eligible to receive Old Age Insurance Benefits under Social Security).

18. In *Braschi v. Stahl Assocs.*, the New York court held that the definition of family under the non-eviction provision of New York’s rent control laws should include the same-sex life partner of the deceased tenant whose relationship with the decedent fulfilled certain functional criteria. *See* 543 N.E.2d 49, 54-55 (N.Y. 1989).

19. In *Baker v. State*, the Vermont Supreme Court held that the Common Benefits Clause of its state constitution mandated that same-sex couples be given the same rights, benefits, and responsibilities under state law as married heterosexual couples. *See* 744 A.2d 864, 886-87 (Vt. 1999).

20. *See, e.g.*, Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (defining marriage as “only a legal union between one man and one woman as husband and wife” and defining spouse as “a person of the opposite sex who is a husband or a wife”).

welfare reform,<sup>22</sup> the United States government has taken numerous opportunities to exalt heterosexual marriage. Deviation from this model engenders scorn, stigma, and legally sanctioned discrimination. Government offers both carrots<sup>23</sup> and sticks<sup>24</sup> to stave off all initiatives that respect, value, and strengthen the diversity of families present in American society.

It is this very diversity within Canadian society that *Beyond Conjuality* celebrates. “Recognizing and supporting personal adult relationships that involve caring and interdependence is an important state objective,” it states.<sup>25</sup> After praising extension of the rights and obligations once associated only with marriage to unmarried heterosexual and same-sex couples, the report notes the limits of such reforms. “[T]his extension of rights and obligations has maintained the legal focus on conjugal relationships. A more principled and comprehensive approach is needed to consider not just the situation of spouses and common-law partners, but also the needs of persons in non-conjugal relationships, including caregiver relationships.”<sup>26</sup>

The Commission grounds its development of a new legal framework for addressing personal adult relationships in two fundamental values—equality and autonomy. The equality principle mandates both equality within relationships and relational equality, which requires governments to “respect and promote equality between different kinds of relationships.”<sup>27</sup> The principle of relational equality requires more than equal treatment of conjugal couples because

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21. *See id.* § 2 (legislating that a state is not required to give credit or effect to law of another state “respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other [s]tate”).

22. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 101, 110 Stat. 2105, 2110 (1996) (proclaiming marriage to be “the foundation of a successful society, . . . and an essential institution of a successful society which promotes the interests of children,” as findings in support of pro-marriage welfare reform); *see also* 42 U.S.C. § 601 (2003) (stating that the purposes of state grants under Temporary Assistance for Needy Families are prevention of out-of-wedlock pregnancies and formation and promotion of two-parent families).

23. State governments may offer additional cash benefits for welfare recipient families consisting of a married man and woman and dependent children of either or both of them. *See, e.g.*, W. VA. CODE § 9-9-6 (2003).

24. State school systems that teach anything other than abstinence-only sex education, which includes the principle that “a mutually faithful monogamous relationship in context of marriage is the expected standard of human sexual activity,” cannot receive federal funding for their sex education programs. 42 U.S.C. § 710 (2003).

25. *BEYOND CONJUALITY*, *supra* note 8, at 7.

26. *Id.*

27. *Id.* at 13.

“conjugality, like marriage itself, is not an accurate marker of the qualitative attributes of personal adult relationships that are relevant to particular legislative objectives.”<sup>28</sup>

The autonomy principle recognizes that “the freedom to choose whether and with whom to form close personal relationships is a fundamental value in free and democratic societies.”<sup>29</sup>

The report continues:

[G]overnments put in place the conditions in which people can freely choose their close personal relationships. The state must also avoid direct or indirect forms of coercive interference with adults’ freedom to choose whether or not to form, or remain in, close personal relationships. . . . [Governments] should not create financial or other kinds of pressure to discourage relationships without reference to their qualitative attributes. Autonomy is compromised if the state provides one relationship status with more benefits and legal support than others, or conversely, if the state imposes more penalties on one type of relationship than it does on others. . . . The state ought to support any and all relationships that have the capacity to further relevant social goals, and to remain neutral with respect to individuals’ choice of a particular form or status.<sup>30</sup>

From these principles, the Commission develops a methodology with which to analyze all laws and programs. It identifies four basic steps in evaluating any law.

QUESTION 1: Does the law pursue a legitimate policy objective? If not, the law ought to be repealed or fundamentally reconsidered.

QUESTION 2: If the law’s objectives are sound, do relationships matter? Are the relationships that are included important or relevant to the law’s objectives? If not, revise the law to consider the individual and to remove the unnecessary relational reference.

QUESTION 3: If relationships do matter, could the law allow individuals to choose which of their own close personal relationships they want to be subject to the law? If so, revise the law to permit self-definition of relevant relationships.

QUESTION 4: If relationships do matter, and public policy requires that the law delineate the relevant relationships to which it applies, can the law be revised to more accurately capture the relevant range of

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28. *Id.* at 15.

29. *Id.* at 17.

30. *Id.* at 18.

relationships? If so, revise the law to include the appropriate mix of functional definitions and formal kinds of relationship status.<sup>31</sup>

The Commission's report applies this methodology to much of Canadian law. The subjects covered include: who may be compensated for relationship harm upon negligently caused injury or death;<sup>32</sup> who is entitled to bereavement or caregiver leave;<sup>33</sup> who may be sponsored under immigration law;<sup>34</sup> who is disqualified from receiving unemployment benefits because his/her employer is a relative;<sup>35</sup> whose transactions may be nullified under bankruptcy law because they are between family members;<sup>36</sup> and numerous provisions of the Income Tax Act,<sup>37</sup> Old Age Security Act,<sup>38</sup> and Canada Pension Plan.<sup>39</sup>

As an example, consider the Commission's analysis of the evidentiary privilege with which this Article begins. The report notes that, under current law, if a spouse testifies, she may invoke the marital communications privilege and thereby refuse to reveal communications with her spouse during the marriage.<sup>40</sup> The privilege enables spouses to "treat their marriages as safe havens where they can unburden themselves through intimate conversation without fear of incriminating themselves."<sup>41</sup> The state may wish to find the truth, but "promoting candour and trust in marital relationships" prevails without exception.<sup>42</sup>

The Commission criticizes the current regime from two perspectives. First, it can lead to exclusion of evidence even when the state's interests in obtaining the truth outweigh the relational interests at stake.<sup>43</sup> Applying its methodology, the Commission elaborates upon the objective of the privilege, stating that:

Candour and trust are essential aspects of emotionally supportive personal relationships. Forcing witnesses to violate that trust jeopardizes what may be their most important sources of affection and

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31. *Id.* at 30.

32. *See id.* at 37-40.

33. *See id.* at 40-43.

34. *See id.* at 43-46.

35. *See id.* at 55-59.

36. *See id.* at 59-62.

37. *See id.* at 63.

38. *See id.* at 89-95.

39. *See id.* at 96-99.

40. *See id.* at 46.

41. *Id.* at 49.

42. *Id.*

43. *See id.* at 52.

emotional support, and sends a signal to others that the privacy of communications with loved ones will not be respected by the state.<sup>44</sup>

The Commission concludes that promoting candor and trust in close personal relationships is a legitimate policy objective, although this objective does not always outweigh the state's interest in obtaining the truth in criminal trials. Thus, the Commission concludes, the privilege should not be absolute.<sup>45</sup>

The Commission then opposes a policy under which, when relational interests outweigh the interest in discovering the truth, only marital relationships are protected. Since self-definition of relevant relationships is not appropriate here, the Commission advocates law revision to more accurately capture the relevant range of relationships.<sup>46</sup> It reviews suggestions that the connection between the witness and the accused be one of "family or similar ties," an "intimate relationship," or a "close personal relationship of primary importance in the individuals' lives."<sup>47</sup> It specifically approves extending the privilege to a best friend.<sup>48</sup> The Commission settles upon a variation on Australian law that allows a judge to weigh the nature and extent of the harm to the witness, and to the relationship between the witness and the defendant, against the

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44. *Id.*

45. *See id.* at 53.

46. *See id.* Professor Regan's book, which analyzes spousal privilege in depth, includes a defense of marriage as a demarcation line in law, and thus does not explore expansion of the relationships to which the privilege might apply. He answers the rhetorical question, "Why marriage?" by calling upon "its continuing power as a symbol of enduring rather than transitory attachment" and "the fact that marriage continues to hold a distinctive place in the cultural imagination." REGAN, *supra* note 5, at 7. He further invokes "the significance of marriage to many peoples' lives." *Id.* at 8. He identifies marriage as "a relationship that most believe should engage our being more fully than any other adult attachment." *Id.* at 205. Whatever the validity of these statements, they fail to acknowledge the myriad forces, including law itself, that produce and perpetuate our perceptions. *See infra* note 141. Perhaps more saliently, Professor Regan identifies and then answers the following crucial question:

How can we tame individual desire for the sake of communal stability when society regards individuals as "self-authenticating sources of valid claims?"

Marriage has long been seen in Western culture as a symbol of this enterprise . . . It has served as a way of channeling powerful and volatile drives for sexual gratification and individual fulfillment into an arrangement that furthers interests in procreation and social stability.

REGAN, *supra* note 5, at 10 (endnote omitted). I disagree with Professor Regan's emphasis on marriage because I find other family forms equally, if not better, able to further the interests of procreation and social stability.

47. BEYOND CONJUGALITY, *supra* note 8, at 53.

48. *See id.*

desirability of the court receiving the evidence.<sup>49</sup> Thus, the Commission's Recommendation 12 reads:

Parliament should replace the marital communications privilege with an amendment to the *Canada Evidence Act* that enables judges to prevent the divulgence of a confidential communication if the witness had a close personal relationship with the accused at the time the communication was made, and the need to protect and promote candour and trust in close personal relationships outweighs the desirability of admitting the testimony.<sup>50</sup>

Acknowledging that this "more sensitive and flexible balancing of interests" can produce complexity and uncertainty, the Commission notes that a form of this balancing test has been working satisfactorily in Australia for several years.<sup>51</sup>

With the framework provided in *Beyond Conjuality*, Marcia Lewis would very likely have been able to guard her daughter's confidences. They had a close personal relationship; they lived together; there appeared to be a natural bond of trust between them. Both found Lewis's compelled testimony devastating. Weighing against this the slight value of the evidence Marcia Lewis could provide, given other evidence available in the Starr investigation, a judge would most likely have excluded the testimony. That would have been the right result for the right reasons.

## II. AMERICAN LAW AND THE *BEYOND CONJUALITY* METHODOLOGY

The methodology of the Canadian report is not entirely foreign to American law. When relationships matter to achieving a law's objectives,<sup>52</sup> *Beyond Conjuality* first determines if individuals can

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49. *See id.* at 53-55. Perhaps because this rule has no counterpart in American law, Professor Regan does not consider it in his extensive analysis of spousal privilege. *See* REGAN, *supra* note 5.

50. *BEYOND CONJUALITY*, *supra* note 8, at 55.

51. *Id.* at 54.

52. Relationships do not always matter to achieving a law's objectives. Personal income taxation is one area in which the Law Commission of Canada reaches this conclusion. After extensive analysis, the Report concludes that the individual, rather than the conjugal couple or any other definition of family unit, should remain the basis for calculation of income tax liability. *See id.* at 65-71. Although the individual has been the basis for calculating tax liability in Canada since the inception of personal income taxation in 1917, for the most part American law has recognized a husband and a wife as a single taxable unit since 1948. *See* Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 144 (1998). Some scholars note the inequality faced by gay men and lesbians and advocate extending the marital taxable unit to same-sex couples. *See*,

decide for themselves which relationships will be subject to the law. Only if this is not possible or practical does the law then attempt to accurately capture the full range of relationships that should be included.<sup>53</sup> Portions of American law reflect each of these steps.

A. Beyond Conjuality's *Question Three: Self-Definition*

Anyone who has filled out a form in a doctor's office or a personnel office has answered a question asking whom to notify in case of emergency. The form may ask the individual what relationship she has with the person she names, but it does not require that the individual name someone with a specified relationship, such as spouse, partner, parent or child. The individual chooses for herself whom she wants notified. She may choose based on close family relationship, but she may also choose the person most easily reachable by phone, the person located closest to the doctor's office or the workplace, or the person she considers best able to respond calmly under pressure.

This principle of self-designation exists as well in law. For example, it is the norm in wills, where donative freedom is the overarching principle.<sup>54</sup> Although surviving spouses are often entitled to some share of a decedent's estate even if a will provides to the contrary, others cannot make such claims. Parents can disinherit their children, for example, even when they are minors or physically or mentally disabled.<sup>55</sup>

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e.g., Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY 97, 98 (1991). Professor Knauer, however, notes:

To the extent same-sex couples want the tax code to recognize their relationships, they are at odds with the emerging consensus that the individual and not the married couple should be the appropriate unit of taxation. Thus, lesbian and gay scholars seem to be asking for inclusion in the very regime that other progressive scholars are trying to dismantle.

Knauer, *supra* at 157 (footnote omitted). Mirroring Question 2 of the BEYOND CONJUGALITY methodology, Knauer continues:

Tax parity for same-sex couples under the existing marital provisions . . . is only a viable proposal if one accepts that marital status is a relevant and appropriate factor in determining tax liability. If marital status is not deemed a relevant factor, then one alternative would be to dismantle the marital provisions completely. Once the benchmark of the married couple is no longer privileged, . . . [s]ame-sex couples and married couples would be on equal footing because the law would recognize neither.

*Id.* at 211. BEYOND CONJUGALITY has indeed deemed relationships not relevant to determining personal income tax liability.

53. See BEYOND CONJUGALITY, *supra* note 8, at 33-36.

54. Scholars have criticized court decisions that trample upon this principle by too easily invalidating wills devising property to those who are not the decedent's traditionally defined family members. See generally Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199 (2001).

55. See *id.* at 220-21.

An individual can leave her estate to anyone she wishes, no matter how distasteful, emotionally jarring, or financially disastrous to those left behind.<sup>56</sup>

An individual can also designate a surrogate to make healthcare decisions. This can be any person the individual wishes, and need not be a relative, even if the individual is married or has living parents or adult children.<sup>57</sup> Question Three of the *Beyond Conjugal* methodology asks whether a law could allow individuals to choose which of their own close personal relationships they want to be subject to the law.<sup>58</sup> When designating a substitute healthcare decisionmaker, the law can—and does—allow individuals to make such choices. Thus, an individual with a spouse can bypass that marital relationship to select a different individual.

The federal statute passed several months after September 11, 2001, entitled the Mychal Judge Police and Fire Chaplains Public Safety Officers' Benefits Act of 2002, also reflects this principle.<sup>59</sup> Under a 1968 law, the federal government was providing a one-time \$250,000 death benefit to the surviving spouse or child of a public safety officer killed in the line of duty.<sup>60</sup> When a much loved New York City fire chaplain, Mychal Judge, died on September 11th with no spouse or child,<sup>61</sup> the law was amended to make the benefit payable, in the absence of a spouse or child,<sup>62</sup> to the person named as beneficiary on the officer's life insurance policy.<sup>63</sup> Media coverage noted that this statute facilitates

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56. *See id.* at 209.

57. *See, e.g.*, N.M. STAT. ANN. § 24-7A-5(B) (Michie 2002) (“An adult or emancipated minor, while having capacity, may designate any individual to act as surrogate by personally informing the supervising health-care provider.”).

58. *See* BEYOND CONJUGALITY, *supra* note 8, at 30.

59. *See* 42 U.S.C.S. § 3796 (Law. Co-op. 2003); *see also* Pub. L. No. 107-196 (noting that the short title for this act is “Mychal Judge Police and Fire Chaplains Public Safety Officers' Benefit Act of 2002”).

60. *See* 18 U.S.C. §§ 1201(a), 1204 (1968) (current version at 42 U.S.C.S. §§ 3796(a)-(b) (2003)).

61. Mychal Judge was an openly gay Catholic priest. *See* Chuck Colbert, Notre Dame Gay Alumni, Phil Donahue Honor Fr. Mychal Judge, NAT'L CATHOLIC REP., Oct. 18, 2002, *available at* [http://www.natcath.org/NCR\\_Online/archives/101802/101802j.htm](http://www.natcath.org/NCR_Online/archives/101802/101802j.htm) (last visited Jan. 19, 2004); *see also generally* MICHAEL FORD, FATHER MYCHAL JUDGE: AN AUTHENTIC AMERICAN HERO (2002).

62. *See* 42 U.S.C.S. § 3796b(3) (Law. Co-op. 2003) (defining child as:

[A]ny natural, illegitimate, adopted, or posthumous child or stepchild of a deceased public safety officer who, at the time of the public safety officer's death, is—(i) 18 years of age or under; (ii) over 18 years of age and a student as defined in section 8101 of title 5, United States Code; or (iii) over 18 years of age and incapable of self-support because of physical or mental disability).

63. *See* 42 U.S.C.S. § 3796.

receipt of government benefits by a same-sex surviving partner, the only federal law to do so.<sup>64</sup>

Recognition of a same-sex couple under this federal statute is a byproduct of the principles animating the law. Congress recognized that not all public safety officers have a wife or children; it wished to honor equally all those killed in the line of duty; therefore, it determined to make the death benefit available to all. Congress could have chosen to make the payment to the decedent's estate, thus passing through the laws of intestacy if the decedent lacked a will.<sup>65</sup> It also could have chosen to make the payment directly to the legal next of kin or to those who would have inherited from the decedent had he died intestate, thus bypassing anyone named in a will in favor of conventionally defined family members. Instead, it implemented the principle of self-definition by accepting the choice of the decedent concerning who should receive compensation upon his death, as expressed by the choice of life-insurance beneficiary.<sup>66</sup>

Self-definition could be made easier.<sup>67</sup> It could also be extended to many more areas of law, as the Canadian report recommends.<sup>68</sup> It is a concept familiar to American law, where it sometimes trumps the primacy of marriage.<sup>69</sup> Allowing greater self-definition of what relationships matter for specific purposes is a critical step towards ending marriage as we know it.

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64. See, e.g., Lou Chibbaro Jr., *Congress Passes DP Bill for Firefighters, Police Officers: White House Mum on Whether Bush will Sign Measure Named After Gay Priest*, WASH. BLADE, June 21, 2002.

65. Current intestacy laws have been criticized for their failure to adequately reflect family life today. See generally Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQUALITY 1 (2000); Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917 (1989). For one reform proposal, see E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255, 258 (2002).

66. See 42 U.S.C.S. § 3796.

67. For example, every application for a motor vehicle license could require the applicant to designate a surrogate healthcare decisionmaker, in the absence of any later writing to the contrary. This would be only slightly more onerous than requiring applicants to indicate if they wish to be organ donors.

68. See, e.g., *infra* notes 154-60 and accompanying text (discussing self-definition in the context of care taking leave).

69. See *supra* notes 50-57 and accompanying text, for a discussion of examples of self-definition in American law, including surrogate decisionmaking.

*B. Beyond Conjuality's Question Four: Capturing the Relevant Range of Relationships*

Question Four of the Canadian report's methodology is triggered when self-definition is inappropriate and a law must capture the range of relationships that are relevant to achieving that law's objectives.<sup>70</sup> Without necessarily articulating the question as the Canadian methodology does, American law implements this methodology in state statutes designed to protect victims of domestic violence. These statutes create a civil action enabling a petitioner to obtain an order of protection and related remedies.<sup>71</sup> Each state law identifies limited categories of individuals entitled to apply for such orders.<sup>72</sup> Early statutes covered intimate partners only when they were married to each other and still living together.<sup>73</sup> When such laws were enacted, before violence against

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70. Question Four is also necessary to establish default rules for when an individual allowed to self-define the relevant relationship fails to do so. For example, when an individual does not name a substitute healthcare decisionmaker, a statute facilitating decisionmaking by another must assign that status to someone. While statutes typically designate a spouse, parent, or adult child, recent amendments to District of Columbia law present a better model. First priority, in the absence of a court-appointed guardian, is given to a spouse or domestic partner, defined as "an adult person living with, but not married to, another adult person in a committed, intimate relationship." D.C. CODE ANN. § 21-2202 (2003). In addition, the term encompasses anyone who has registered as domestic partners, a status available to anyone living together in "a familial relationship . . . characterized by mutual caring" D.C. CODE ANN. § 32-701 (2003). In the absence of such a person, authority goes in order of priority to an adult child, a parent, an adult sibling, and then a close friend. *See* D.C. CODE ANN. § 21-2210. "Close friend" is defined as "any adult who has exhibited significant care and concern for the patient, and has maintained regular contact with the patient so as to be familiar with his or her activities, health, and religious and moral beliefs." D.C. CODE ANN. § 21-2202(1A). Recognizing that the designated order of priority might not be appropriate in all cases, the statute makes it a rebuttable presumption, rather than absolute. The presumption is rebutted if "a person of lower priority is found to have better knowledge of the wishes of the patient, or, if the wishes of the patient are unknown and cannot be ascertained, is better able to demonstrate a good-faith belief as to the interests of the patient." D.C. CODE ANN. § 21-2210(f).

71. For an overview of state statutes, see generally Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993).

72. *See id.* at 814-42.

73. For example, Maryland had limited eligibility to file to "spouses, parents, children, or blood relatives who live together at the time of the abuse." *See Barbee v. Barbee*, 537 A.2d 224, 224 (Md. 1988) (quoting MD. CODE ANN., FAM. LAW § 4-501(e) (1984)). In *Barbee*, a woman brought an action against her husband for striking her with his fists and threatening her at work; the fact that the spouses did not reside together at the time of the abuse indicated that the law was not applicable. *See* 537 A.2d at 224. A New York statute covering assaults between "spouses," parents and children, and members of the same household, was held inapplicable to a divorced couple who no longer lived together. *See People v. Williams*, 248 N.E.2d 8, 12-13 (N.Y. 1969).

women was recognized as a significant social problem,<sup>74</sup> their purpose was to “reach and treat the roots of family discord” and save marriages.<sup>75</sup> In the 1970s, feminists demanded that the state respond more forcefully to violence against women and, among other things, lobbied to make these statutes more effective at stopping violence.<sup>76</sup>

These efforts resulted in civil protection order statutes in all states by the early 1990s, many enacted or significantly amended in the mid-1980s and later.<sup>77</sup> Once the goal was stopping violence, not saving marriages or treating household problems, eligibility for relief under the statutes was expanded to reflect more of the relationships in which women were likely to encounter violent domination. Advocates argued that family members covered by statutes should be defined to reflect “all concepts of family as they exist in the reality of our diverse family relationships” and all intimate and dating relationships.<sup>78</sup> By 1993, forty-six jurisdictions covered unmarried partners living together, and thirty-six covered same-sex intimate partners.<sup>79</sup> Forty-seven jurisdictions covered family members, expansively defined.<sup>80</sup> The laws of forty-three jurisdictions applied to a couple with a child in common.<sup>81</sup>

In the context of intimate violence, the United States Congress agrees that marriage should not be the dividing line between those who are protected under federal law and those who are not. Thus, the crime of interstate domestic violence, created by the 1994 Violence Against Women Act (“VAWA”), punishes interstate travel, and the facilitation of interstate travel, involving commission of a crime of violence against a “spouse or intimate partner.”<sup>82</sup> Those terms include spouses, former

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74. In the late 1960s a movement of feminist activists and lawyers began to bring the problem of woman abuse to public attention. At the time, there was no legal recognition of a harm of violence against women by intimates—today known as domestic violence. It simply didn’t exist in the legal vocabulary.

[V]irtually no public discussion of wife beating took place from the beginning of the twentieth century until the mid-1970s.

ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 3, 20 (2000).

75. *Williams*, 248 N.E.2d at 9-10, 13.

76. *See Klein & Orloff, supra* note 71, at 810.

77. *See id.*

78. *Id.* at 820; *see id.* at 818, 829.

79. *See id.* at 829, 832. A recent report lists six states with statutes explicitly excluding same-sex couples from the categories of eligible individuals. LESBIAN, GAY, BISEXUAL AND TRANSGENDER DOMESTIC VIOLENCE IN 2001: A REPORT OF THE NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS, available at <http://www.avp.org/> (last visited Jan. 19, 2004).

80. *See Klein & Orloff, supra* note 71, at 816-17.

81. *See id.* at 824-25.

82. 18 U.S.C.S. § 2261 (Law. Co-op. 2003).

spouses, persons who share a child in common, persons who cohabit or have cohabited as a spouse, and “any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides.”<sup>83</sup>

The VAWA provision requiring that every state accord full faith and credit to any protection order issued by another state protects an even broader group of persons than those covered by the federal criminal provisions.<sup>84</sup> A “protection order” is defined as “any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, *another person*.”<sup>85</sup> An earlier draft of VAWA limited a “protection order” under the Act to orders against a spouse or intimate partner.<sup>86</sup> The version as enacted means that an order from a state with an expansive definition of who may obtain such orders must be honored by states whose own laws are more restrictive.<sup>87</sup>

The first critical step in applying Question Four of *Beyond Conjugalities*'s methodology is identifying a law's objectives. Recognizing certain relationships under the law flows from that determination. When protection order statutes were designed to save marriages, there was logic in limiting their reach to cohabiting married couples.<sup>88</sup> The contemporary goal of stopping violence is frustrated, not furthered, by such a cramped definition.

Consider one other example from *Beyond Conjugalities* of capturing the range of relationships that advance a law's objectives. With respect to recovery in tort for negligently caused relational loss, the report applauds

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83. 18 U.S.C.S. § 2266(7)(B). One Circuit Court has approved application of this statute to the murder of a woman by the man with whom she had lived. *See United States v. Barnette*, 211 F.3d 803, 814, 815 (4th Cir. 2000). After reviewing the intimate details of the couple's relationship, the Court held that the evidence “ma[de] it clear that the intimate relationship between Barnette and Miss Williams, although not husband and wife, was ‘like’ that of husband and wife.” *Id.* at 815.

84. *See* 18 U.S.C.S. § 2265(a) (Law. Co-op. 2003).

85. 18 U.S.C.S. § 2266(5) (Law. Co-op. 2003) (emphasis added).

86. The Violence Against Women Act of 1991, S. REP. NO. 102-197, at 20 (1991).

87. Thus, for example, a state must give full faith and credit to a protective order issued in the context of a same-sex relationship, even if its own state law clearly excludes gay men and lesbians from obtaining such orders.

88. A recent version of this type of reasoning is found in *Puerto Rico v. Martinez*, in which the Supreme Court of Puerto Rico refused to apply its domestic violence statute to a same-sex couple. According to a newspaper article describing the opinion, the court identified the purpose of the statute as “‘strengthen[ing] the institution of the family,’ defined as one of a ‘sentimental and legal union between a man and a woman.’” Ivan Roman, *Gay-Rights Issues Bring Protestors to Street*, ORLANDO SENTINEL, Apr. 20, 2003, at A10.

the civil law approach in Quebec which allows such recovery without limiting those who may recover to a narrow list.<sup>89</sup> Recovery depends upon the facts of the particular relationship and the quality of the injury complained of.<sup>90</sup> The report supports the principle that “no barriers based on relationship status should be put in the way of individuals’ ability to prove a relational loss in court. . . . The entitlement to compensation is based on proving relational loss, rather than on the status of a relationship.”<sup>91</sup>

In the United States, New Mexico has come closest to implementing this principle through its case law. Noting that it is common for extended family to live together, the New Mexico Supreme Court allowed a grandmother living with her granddaughter to sue for loss of consortium after a pharmacy error resulted in the child’s death.<sup>92</sup> Subsequently, the same court allowed a long-term, cohabiting heterosexual partner to file such an action.<sup>93</sup> Echoing *Beyond Conjugality’s* methodology, the court reasoned as follows:

We must consider the purpose behind the cause of action for loss of consortium. A person brings this claim to recover for damage to a relational interest, not a legal interest. To use the legal status as a proxy for a significant enough relational interest is not the most precise way to determine to whom a duty is owed. Furthermore, the use of legal status necessarily excludes many persons whose loss of a significant relational interest may be just as devastating as the loss of a legal spouse.<sup>94</sup>

The process of identifying a law’s objectives will force those who are ideologically committed to the primacy of heterosexual marriage to articulate that view and defend it against other possible objectives. Consider the disaster relief available from private agencies after September 11, 2001.<sup>95</sup> Reverend Louis Sheldon argued that aid should be awarded “on the basis and priority of one man and one woman in a marital relationship.”<sup>96</sup> The Red Cross, however, articulated its goal as meeting the “disaster-related needs of all persons, regardless of race,

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89. See *BEYOND CONJUGALITY*, *supra* note 8, at 38.

90. *See id.*

91. *Id.* at 39.

92. *See* *Fernandez v. Walgreen Hastings Co.*, 968 P.2d 774, 784 (N.M. 1998).

93. *See* *Lozoya v. Sanchez*, 66 P.3d 948, 961 (N.M. 2003).

94. *Id.* at 955.

95. For a comprehensive review of governmental and private responses to the surviving same-sex partners of those killed on September 11, 2001, see Nancy J. Knauer, *The September 11 Attacks and Surviving Same-Sex Partners: Defining Family Through Tragedy*, 75 *TEMP. L. REV.* 31 (2002).

96. *Id.* at 90 (footnote omitted) (internal quotation marks omitted).

ethnicity, gender, religion or sexual preference or orientation.”<sup>97</sup> An organization run by Sheldon would have aided only surviving spouses, but the Red Cross, in order to meet its objectives, assisted “those who were unmarried, living together, or in committed relationships, persons not living together who nonetheless relied on a victim’s support, and roommates of victims, all regardless of gender or sexual orientation.”<sup>98</sup>

This step in the *Beyond Conjuality* methodology is both rational and revolutionary. It is rational because it seeks to tailor the definitions of the relationships that matter to a law’s specific objectives. It is revolutionary because it dislodges marriage from its singularly privileged place in law and recognizes the equal value of other relationships that fulfill critical social functions.

### III. THE ROLE OF REGISTRATION SCHEMES

A relationship registration scheme can coexist with the *Beyond Conjuality* methodology but cannot replace it. Registration is an efficient method of designating who matters for whatever purpose the registration regime specifies. After more than twenty years of both public and private registration schemes, there is no uniformly accepted definition of who may register and no universally defined set of ensuing consequences.<sup>99</sup> Rather, each jurisdiction that creates a status available through registration, commonly called registered or domestic partnership,<sup>100</sup> must make two principal policy determinations: 1) who is eligible to register and 2) what entitlements and obligations flow from registration.

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97. *Id.* at 91 (footnote omitted) (internal quotation marks omitted).

98. *Id.* (footnote omitted) (internal quotation marks omitted).

99. See generally Julianna S. Gonen, *Same-Sex Unions & Domestic Partnerships*, 2 GEO. J. GENDER & L. 329 (2001) (reviewing the various aspects of domestic partnership programs, both state and municipal, that exist within the United States); Megan E. Callan, Comment, *The More, the Not Marry-er: In Search of a Policy Behind Eligibility for California Domestic Partnership*, 40 SAN DIEGO L. REV. 427 (2003) (comparing the eligibility requirements and consequences of California’s Domestic Partnership Program with those of various other state and municipal domestic partnership programs).

100. “Domestic partnership” is the term most commonly used in the United States. See generally 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 (1992); Nancy J. Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less than Perfect Institutional Choice*, 7 TEMP. POL. & CIV. RTS. L. REV. 337 (1998). “Registered partnership” is more common in European countries. See LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN, AND INTERNATIONAL LAW (Robert Wintemute & Mads Andenaes eds., 2001).

The Law Commission of Canada recommends a registration system open to both conjugal and non-conjugal relationships.<sup>101</sup> The Commission does not specify that registration must confer specific rights and responsibilities; rather it suggests that registration might offer various models for voluntary assumption of mutual responsibilities.<sup>102</sup> The Commission's analysis also refers to an earlier report on relationship recognition from the British Columbia Law Institute, which also recommended a relationship registration model.<sup>103</sup> This Part briefly explores possible registration schemes from the perspectives of both eligibility criteria and ensuing entitlements and obligations.

### A. Eligibility Criteria

Almost all domestic partnership models extend eligibility for registration to one of the following three categories of relationships: 1) same-sex couples only;<sup>104</sup> 2) same-sex and opposite-sex couples;<sup>105</sup>

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101. See BEYOND CONJUGALITY, *supra* note 8, at 117.

102. See *id.* at 120-21.

103. See *id.* at 120 (citing BCLI REPORT, *supra* note 8).

104. In the United States, Vermont's civil union status falls into this category. VT. STAT. ANN. tit. 15, § 1202 (2003). It is also the model in Denmark, Norway, Sweden, and Iceland, among others. See, e.g., Danish Registered Partnership Act, Act No. 372 of June 1, 1989, § 1 (Den.) [hereinafter Danish Registered Partnership Act] (last amended by Danish Act Amending the Danish Registered Partnership Act, Act No. 360 of June 2, 1999). An English translation of the original text of the law is available at <http://www.qrd.org/qrd/world/europe/denmark/registered.partnership.act.with.amendments>. The full text of the Danish Registered Partnership Act as amended is available in English translation at <http://www.civildir.dk/regler/regipartnership.htm>; Bill on Registered Partnerships (Norway 1995), available at <http://www.france.qrd.org/texts/partnership/no/norway-en.html> (last visited Jan. 19, 2004); Lag om registrerat partnerskap [Law on registered partnerships], ch. 3, § 2 (Swed. 1994) [hereinafter Swedish Registered Partnership Act], reprinted in 1994 Svensk författningssamling [SFS] 1117, available at <http://rixdagen.se/htbin/thw/?%7BBASE%7D=%7B%7D&%7BTHWIDS%7D=9.24%7D10736048641070&%7BHTML%7D=%7B%7D&%7BTRIPSHOW%7D=format=THW&%7BTHWURLSAVE%7D=24%7D10736048641070>; 564th Bill On the Recognized Partnership (1996) (Iceland), available at <http://www.france.qrd.org/texts/partnership/is/iceland-bill.html> (last visited Jan. 19, 2004). The Women and Equality Unit of the British Government has recently proposed a same-sex couples only Civil Partnership regime for England and Wales. See CIVIL PARTNERSHIP: A FRAMEWORK FOR THE LEGAL RECOGNITION OF SAME-SEX COUPLES 9 (2003), available at <http://www.womenandequalityunit.gov.uk> (last visited Jan. 19, 2004).

105. The Netherlands adopts this approach. See Kees Waaldijk, *Major Legal Consequences of Civil Marriage, Registered Partnership [sic], and Informal Cohabitation for Different-Sex and Same-Sex Partners in: The Netherlands, Scotland, England and Wales*, available at <http://athena.leidenuniv.nl/rechten/meijers/index.php3?m=&c=85&garb=0.9965597598708904&session=> (last visited Jan. 12, 2004) (providing textual and graphical displays of the legal consequences of registered partnership and civil marriage laws in Netherlands, including that both same-sex and opposite-sex couples are eligible for both). Other examples of domestic partnership laws that provide benefits to both same-sex and opposite-sex couples include France and some Spanish provinces. See Title XII: Of Civil Covenants, Of Solidarity and Of Concubinage, C.C. chap. I, art. 515-1 (1999) (France), available at [http://www.legifrance.gouv.fr/html/codes\\_traduits/code\\_civil\\_textA.htm](http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm) (last

and 3) same-sex couples and individuals related to each other to a degree that would prevent them from marrying.<sup>106</sup> Each of these categories is flawed. A small number of jurisdictions extend eligibility to a wider group of relationships and should be considered models for future registration schemes.<sup>107</sup>

The three dominant categories express distinct underlying visions. Allowing only same-sex couples to register validates marriage as the proper norm. Thus, opposite-sex couples, who are permitted to marry, *must* marry to obtain relationship-based rights and responsibilities.<sup>108</sup> This category does not support alternative family structures; rather it acknowledges the value of gay and lesbian couples and expresses the inequity of denying such couples access to some, or even most, of the incidents accorded spouses. Eligibility criteria customarily eliminate two individuals of the same sex who would be prohibited from marrying were they of opposite sex, thus evidencing marriage as the analogous relationship. Two sisters, or a grandmother and a granddaughter, no matter how emotionally and economically intertwined, cannot register. Conjugal relationships, whether opposite-sex or same-sex, are therefore supported above equally committed relationships between relatives.

The category that includes same-sex couples and relatives unable to marry similarly validates marriage as the proper norm because it

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visited Jan. 19, 2004); Articles of the Unmarried Couples Law (1999) (Aragon, Spanish Province) (noting that while the government recognizes both same-sex and opposite-sex couples in its unmarried couples law, it provides different benefits to same-sex and opposite-sex cohabiters).

106. Hawaii's reciprocal beneficiary is an example of this category. *See* HAW. REV. STAT. § 572C-4 (2003). Vermont adopted a hybrid of this category and the first category by extending civil union status to same-sex couples and the status of reciprocal beneficiary, enabling two people to make healthcare and burial decisions for each other but providing no other benefits, only to relatives prohibited from marrying (if of opposite sex) or entering civil unions (if of same sex). *See* VT. STAT. ANN. tit. 15, § 1202 (2003) (civil unions); VT. STAT. ANN. tit. 15, § 1303 (2003).

107. *See infra* notes 111-20 and accompanying text.

108. California expresses a slight modification of this vision. It allows opposite-sex couples to register as domestic partners if one is over the age of sixty-two. *See* CAL. FAM. CODE § 297 (West 2003). Although such couples are permitted to marry, for many marriage will reduce the monetary benefits one or both receives under Social Security laws. *See* Domestic Partnership Act, Cal. Legis. Serv. Chap. 588 (A.B. 26) S. Fl. At 11 (1999), available at [http://info.sen.ca.gov/cgi-bin/postquery?bill\\_number=ab\\_26&sess=9900&house=B&site=sen](http://info.sen.ca.gov/cgi-bin/postquery?bill_number=ab_26&sess=9900&house=B&site=sen) (last visited Jan. 19, 2004) (setting forth analysis regarding the inclusion of senior citizens within the eligibility requirements for domestic partnership registration). Thus, they have a strong financial incentive not to marry, and their refusal to do so is not a repudiation of the institution of marriage but rather a practical solution to their economic circumstances. *See id.* Recognizing this context in which older couples choose not to marry, California has elected to treat their decision as the functional equivalent of being unable to marry. *See id.*

excludes opposite-sex couples.<sup>109</sup> This category does, however, recognize the importance of certain familial, non-conjugal, relationships and allows those in such relationships certain benefits.

Extending eligibility to both same-sex and opposite-sex couples validates the choice of heterosexuals to remain unmarried and thus has the potential to chip away at the privileged legal status of marriage. Such regimes, however, are geared toward conjugal relationships, even though engaging in sexual relations is not specified as an eligibility criterion.<sup>110</sup> Intent to recognize only conjugal relationships is evidenced by exclusion from registration of all those who would be unable to marry under state incest laws.

In contrast to these three dominant models, the District of Columbia expresses a broad vision of what relationships matter. Its eligibility criteria extend to two individuals in “a familial relationship . . . characterized by mutual caring and the sharing of a mutual residence.”<sup>111</sup> Same-sex couples, opposite-sex couples, and those in non-conjugal relationships are thus all qualified to register.

Madison, Wisconsin also defines eligibility for registration broadly. Domestic partners must be in a “relationship of mutual support, caring, and commitment and intend to remain in such a relationship in the immediate future. . . . Mutual support means that the domestic partners contribute mutually to the maintenance and support of the domestic partnership throughout its existence.”<sup>112</sup> They must live together as “a single, nonprofit housekeeping unit, whose relationship is of permanent and distinct domestic character,” and their relationship must not be “merely temporary, social, political, commercial, or economic in nature.”<sup>113</sup>

The criteria of shared residence in both the District of Columbia and Madison laws, and indeed in most domestic partnership laws, is problematic, given that married couples are not required to live together.

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109. Eligibility for registration under Hawaii’s Reciprocal Beneficiary statute is limited to “parties [that must] be legally prohibited from marrying one another under chapter 572,” the State’s marriage statute. HAW. REV. STAT. § 572C-4(4) (2003).

110. The law of marriage, on the other hand, assumes heterosexual intercourse as a fundamental requirement. For an analysis of how law expresses this requirement, see generally Sally F. Goldfarb, *Family Law, Marriage, and Heterosexuality: Questioning the Assumptions*, 7 TEMP. POL. & CIV. RTS. L. REV. 285 (1998). Professor Goldfarb advocates removing this requirement from marriage, thus facilitating marriage by both same-sex couples and by two people not in a sexual relationship. *See id.* at 300-01. Although I prefer implementation of the BC methodology, Professor Goldfarb’s approach would also end marriage as we know it.

111. D.C. CODE ANN. § 32-701 (2003).

112. Madison, Wis., Equal Opportunities Ordinance at § 3.23(2)(o)(1), (z).

113. *Id.* at § 3.32(o)(6)-(7).

District of Columbia regulations clarify that a partner does not abandon the mutual residence, resulting in partnership termination, if that partner acquires an additional residence.<sup>114</sup> *Beyond Conjugal* and the British Columbia Law Institute (“BCLI”) report both recommend that there be no such requirement for registration.<sup>115</sup>

No registration system currently allows more than two people to register as each other’s domestic partners. *Beyond Conjugal* mentions, but does not develop, the desirability of extending registration beyond couples.<sup>116</sup> The BCLI report notes that a “significant minority” of its board opposed restricting domestic partnership to two people.<sup>117</sup> The report states the issue might be reconsidered after a period of experience with domestic partnerships. Similarly, eligibility criteria universally specify that a person may have only one domestic partner.<sup>118</sup>

This limitation may be necessary for some purposes, such as healthcare decisionmaking, where one person must have the delegated authority. Conservation of scarce resources may in some instances also require the designation of only one domestic partner. For other purposes, however, limiting registration to family units of two adults unnecessarily perpetuates a normative vision of family structure that, while no doubt accurate in the majority of instances, omits some committed, familial relationships deserving of recognition.<sup>119</sup>

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114. See D.C. MUN. REGS. tit. 29, §§ 8002.1, 8002.2 (1992).

115. See *BEYOND CONJUGALITY*, *supra* note 8, at 120; *BCLI REPORT*, *supra* note 8, at 12.

116. See *BEYOND CONJUGALITY*, *supra* note 8, at 119. In a footnote, the report states:

[I]n principle, the Law Commission sees no reason to limit registration to two people. Registration should capture situations involving three siblings or four housemates, so long as the relationships are characterized by economic or emotional interdependence of some duration. The values and principles of autonomy and state neutrality require that people be free to choose the form and nature of their close personal adult relationships. This issue, however, requires further consideration of factors, such as potential for abuse and exploitation, conflicting interests and claims, and potential costs to third parties.

*Id.* at 133 n.16.

117. *BCLI REPORT*, *supra* note 8, at 12. Expansion beyond two people “would serve the needs, for example, of a family unit consisting of brothers and sisters, each wishing to ensure that various entitlements, such as employment benefits, would be equally available to all.” *Id.*

118. A person who is married cannot have a domestic partner. Typically, marriage by one partner automatically terminates the domestic partnership. See, e.g., HAW. REV. STAT. § 572C-4 (2003) (stating that “[n]either of the parties [can] be married nor a party to another reciprocal beneficiary relationship”); VT. STAT. ANN. tit. 15, § 1202 (2003) (noting that in order to meet the eligibility criteria for entering a civil union, parties may “[n]ot be a party to another civil union or a marriage”).

119. In addition to family units consisting of three siblings or other relatives, three or more individuals may be in a polyamorous relationship and may wish to assume obligations towards one another and obtain legal recognition of their family for some purposes. See *generally* Maura I.

### B. Entitlements and Obligations

The incidents of domestic partner registration vary substantially, from individual, isolated rights, such as hospital visitation, to widespread benefits and obligations close to those accorded spouses. Canadian law professor Nicole LaViolette divides the rights and duties arising under existing registration schemes into two categories, which she calls “Marriage Minus” and “Blank Slate Plus.”<sup>120</sup> “Marriage Minus” models are socially and functionally like marriage and fall just short of conferring all the entitlements and obligations of marriage.<sup>121</sup> “Blank Slate Plus” schemes grant particular rights and obligations to those who otherwise have none, without conferring a quasi-marital status.<sup>122</sup>

An alternative method of categorizing registration schemes would look at the means provided for terminating the relationship. Some permit termination only under the jurisdiction’s divorce laws.<sup>123</sup> Others permit termination, unilaterally, by the filing of a statement to that effect.<sup>124</sup> This differentiation expresses whether drafters expect dissolution of the partnership to engender the property division and ongoing financial support issues that accompany divorce. Comparing these categories with those articulated by Professor LaViolette, the “Marriage Minus” schemes almost always require divorce with its financial consequences. The “Blank Slate Plus” model always permits more simple termination.

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Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. U. L. REV. 439, 444-65 (2003) (describing the forms of “multi-partner relating” that constitute polyamory); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79 (2001) (defining, and arguing for recognition of, sexual and non-sexual polyamorous affiliations); WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 288-92 (1999) (describing both polygamy and “polyparenting,” the practice of a biological mother, non-biological mother, and biological father raising a child together).

120. Nicole LaViolette, *Waiting in a New Line at City Hall: Registered Partnerships as an Option for Relationship Recognition Reform in Canada*, CANADIAN J. FAM. L. 116, 119 (2002).

121. *See id.* at 122. The Registered Partnership laws of Denmark, Sweden, Norway, Iceland, the Netherlands, and Quebec Province, as well as Vermont’s Civil Union status, fall within this model. *See id.* at 122-23.

122. *See id.* at 122. “Rather than subtracting from the marriage ceiling, these registered partnerships add a bundle of rights and obligations onto what was previously a blank slate.” *Id.* Examples of such regimes include the PACS in France, the “reciprocal beneficiaries” designations in Hawaii and Vermont, provisions in several regions of Spain, and numerous domestic partnership registration mechanism established at the municipal level and by private employers in the United States. *See id.* at 127-29.

123. *See, e.g.*, VT. STAT. ANN. tit. 15, § 1202 (2003); Danish Registered Partnership Act, *supra* note 104; Bill on Registered Partnerships, *supra* note 104; Swedish Registered Partnership Act, *supra* note 104; 564th Bill On the Recognized Partnership, *supra* note 104.

124. *See* Gonen, *supra* note 99, at 341-44 (explaining the various features of municipal domestic partnership laws, including that termination is most commonly provided in the case of the death of one partner or by a statement filed with the clerk).

There is an interrelationship between eligibility criteria and the extent of entitlements and obligations incurred through registration. Government creates a “Marriage Minus” model when it accepts marriage as the proper reference point and when its objective is to confer a marriage-like status on gay and lesbian couples, therefore most such models are open only to gay and lesbian couples.<sup>125</sup> “Blank Slate Plus” models vary dramatically in the level of benefits and obligations they confer, and they vary equally in their eligibility criteria.

The Law Commission of Canada considers replacing civil marriage with relationship registration open to all. Religious marriage could continue unimpeded by the state. The Commission notes many advantages of this approach.<sup>126</sup> Nonetheless, the Commission falls short of endorsing such a proposal, noting that it would face popular opposition because many regard marriage as a “legal mechanism . . . fundamental to their commitment.”<sup>127</sup> The Commission recommends establishment of registration schemes along with expansion of marriage to include same-sex couples.<sup>128</sup>

At the moment, no jurisdiction offers multiple relationship registration options and allows individuals to choose for themselves among them. The concept behind establishing registration options, however, is similar to the choice given couples marrying in Louisiana whether to marry under the state’s covenant marriage laws or under the standard marriage laws that were previously the only regime available.<sup>129</sup> Those who choose covenant marriage must complete premarital counseling and face stiffer grounds for divorce if their relationship deteriorates.<sup>130</sup> By providing these two options, the state recognizes the value of allowing couples some choice in establishing the terms of their relationship.

Registration options might be tailored as follows: Relationships characterized as primarily emotional, rather than economic, in nature,

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125. See LaViolette, *supra* note 120, at 132. Netherlands is the exception.

126. See BEYOND CONJUGALITY, *supra* note 8, at 123.

127. *Id.* at 124.

128. See *id.* at 130.

129. See LA. REV. STAT. ANN. § 9:272 (West 2003) (explaining that couples can opt into a covenant marriage by declaring their intent to do so on their marriage license and by filing an official intent to contract as provided by the law).

130. See LA. CIV. CODE. ANN. art. 102, 103 (West 2003) (stating the different standards for obtaining a divorce under Louisiana’s regular marriage statute and Louisiana’s covenant marriage statute); LA. REV. STAT. ANN. § 9:272 (West 2003) (noting the counseling requirements and the more difficult termination process under a covenant marriage as opposed to a typical marriage under Louisiana’s state law).

might be registered to establish the individual entitled to make healthcare and burial decisions, take family and medical leave, and have testimonial privileges.<sup>131</sup> Relationships that also include the care of one person by the other, through caregiving or financial support, might be registered to establish entitlement to government and private benefits, recovery for wrongful death, and treatment as a single economic unit for income tax purposes.<sup>132</sup> Economically interdependent partners who expect their relationship to extend indefinitely might in addition to the above choose an option that would trigger adjustment of financial circumstances between the two should their relationship dissolve.<sup>133</sup>

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131. David Chambers has proposed a status along these lines, entitled "designated friends." David L. Chambers, *Unmarried Partners and the Legacy of Marvin v. Marvin: For the Best of Friends and For Lovers of All Sorts, A Status Other Than Marriage*, 76 NOTRE DAME L. REV. 1347, 1348 (2001). The status would be available to any two unmarried persons. Designated friends would have no financial obligations towards each other, or towards third parties on behalf of each other, and the government would not be required to provide benefits such as Social Security as a result of the designated friend status. *See id.* at 1353. The two persons, would, however, make financial and medical decisions for each other in the event of incapacity, have the right to family leave to care for each other, have some status under intestacy laws, have the same testimonial privilege as spouses if they had been registered for two years, and be subject to government anti-nepotism rules. *See id.* William Eskridge articulates the idea of a "menu" of options, including: living together, with nothing formal unless the couple makes a contract; domestic partnership, a public statement without strong commitments; and marriage. William N. Eskridge, Jr. & Sheila Rose Foster, *Discussion of Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 329, 334 (1998). His "menu" does not, however, include a choice of registration options.

132. Professor Eskridge criticizes typical domestic partnership laws that confer few benefits. His principle criticism, however, is not the paucity of benefits but the fact that such laws require no assumption of obligations. *See* ESKRIDGE, *supra* note 123, at 289. He contends that seeking benefits without insisting on concomitant obligations "[misses] the main functional point of marriage." *Id.* I approach registration from a different perspective. The point of relationship registration is to recognize the function that the relationship actually serves. When partners are economically and emotionally interdependent, they fulfill a function that is good for their own flourishing and for society as a whole. They need not be in a marriage, or even a conjugal relationship, to serve this function. Conferral of benefits under such circumstances appropriately reflects the obligations that the partners have voluntarily undertaken.

133. Failure to register would not automatically bar property division and ongoing support at the termination of a relationship. In some instances, ascription of a status entitling access to relevant marital dissolution principles is appropriate. Chapter 6 of the AMERICAN LAW INSTITUTE PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS reflects this approach by defining the circumstances under which an unmarried opposite-sex or same-sex couple will be subject to the property and compensatory spousal payments principles. *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION chap. 6 (2002). BEYOND CONJUGALITY disfavors ascription because it risks assigning ongoing obligations to those who have explicitly eschewed them. If the government provides appropriate mechanisms for individuals to define for themselves the terms of their relationships, ascription would be necessary only to prevent exploitation. *See* BEYOND CONJUGALITY, *supra* note 8, at 116.

The report of the British Columbia Law Institute similarly disfavors ascription. It argues that:

Under a principle of voluntariness, the law should not impose rights and obligations on people who live together unless either (a) they (expressly or tacitly) accept those

Even multiple registration options, each open to all, should be but a part of a legal regime governing close personal relationships. To complement, rather than supplant, the careful evaluation of laws contained in *Beyond Conjuality*, the availability of registration must not change the Law Commission's basic premises. When relationships matter to achieving a law's objectives, individuals, when appropriate, should be able to define for themselves what relationships matter. When self-definition is unworkable, the availability of registration should not obviate the necessity of including within every law the range of relationships relevant to achieving that law's objectives.

Marcia Lewis should not have been required to testify against her daughter.<sup>134</sup> A New Mexico grandmother was properly permitted to recover for loss of consortium upon her granddaughter's negligently caused death.<sup>135</sup> Numerous relationships are properly subjected to civil protection order provisions of domestic violence statutes.<sup>136</sup> These results are correct because the included relationships accurately reflect the proper objectives of the relevant law. Such an analysis must be done for every law even if registration is also available.

#### IV. SAME-SEX MARRIAGE IN THE UNITED STATES: A DIVERSION FROM A MORE JUST REFORM OF THE LAW OF FAMILIES

The way in which lesbian and gay advocates argue for same-sex marriage threatens to push American law in the wrong direction by widening the divide between the status of marriage and the status of other relationships. Advocates make their case by emphasizing the many disadvantages gay and lesbian couples suffer and attributing those hardships to the inability to marry.<sup>137</sup> Of course unmarried heterosexual

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obligations, or (b) another policy, such as the principle of [protecting the vulnerable], is applicable and, in the circumstances, should be accorded greater weight than the principle of voluntariness.

BCLI REPORT, *supra* note 8, at 6.

134. *See supra* notes 1-4 and accompanying text.

135. *See supra* note 92 and accompanying text.

136. *See supra* notes 70-87 and accompanying text.

137. For example, the lead plaintiffs in the Massachusetts same-sex marriage case state that "we still can't transfer assets to our spouse, benefit from each other's social security should one of us die, and we worry about emergencies when we travel, even with all the proper documentation." <http://www.glad.org/marriage/Julie&Hillary.shtml> (last visited Jan. 12, 2004) (internal quotation marks omitted). Two plaintiff couples express the need for tax and other protections as they contemplate retirement and estate planning, *see* <http://www.glad.org/marriage/Robert&David.shtml> (last visited Jan. 12, 2004) and <http://www.glad.org/marriage/Gloria&Linda.shtml> (last visited Jan. 12, 2004); three express concern about ability to secure appropriate medical care in an emergency,

couples share the disadvantages of same-sex couples, but their ability to marry, in the eyes of same-sex marriage advocates, turns complaints about these disadvantages into a matter of “choice” rather than inequality.

The Law Commission of Canada exposes the fallacy of applying choice-based rhetoric to the decision to marry. When the state “provides one relationship status with more benefits and legal support than others, or . . . imposes more penalties on one type of relationship than it does on others” it applies coercion and negates the possibility of people freely choosing their close personal relationships.<sup>138</sup> When gay and lesbian marriage advocates argue that they seek the *choice* to marry, rather than marriage, they ignore the “special rights” that marriage affords. The plaintiff couples in the Massachusetts gay marriage case understandably seek numerous benefits that would improve their family life in both economic and emotional ways.<sup>139</sup> Our legal system currently provides those benefits only to those who are married.<sup>140</sup> If the benefits were available to a wider range of relationships, then marriage might actually be a choice for those couples.<sup>141</sup>

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see <http://www.glad.org/marriage/Robert&David.shtml> (last visited Jan. 12, 2004), <http://www.glad.org/marriage/Gloria&Linda.shtml> (last visited Jan. 12, 2004), and <http://www.glad.org/marriage/Michael&Ed.shtml> (last visited Jan. 12, 2004). One couple is stretched financially by the need to purchase additional health insurance for the partner who is a full-time student since the employed partner's insurance cannot cover an unmarried couple. See <http://www.glad.org/marriage/Richard&Gary.shtml> (last visited Jan. 12, 2004).

138. BEYOND CONJUGALITY, *supra* note 8, at 18.

139. See *Goodridge v. Dep't Pub. Health*, 798 N.E.2d 941, 948, 949 & n.6 (Mass. 2003).

140. See *supra* notes 20-24 and accompanying text.

141. I develop a critique of choice-based rhetoric more fully elsewhere. See *generally* Polikoff, *Lesbians and Gay Men*, *supra* note 7. For an extensive analysis of what the author calls “compulsory matrimony,” see Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709, 777-800 (2002). Robson notes:

Lesbians and gay men are included in the statement that “most of us have been brought up with expectations that we will marry,” yet our personal “choice,” no less than the choice of heterosexuals, is overdetermined by external social forces. Thus, the desire or choice to marry should be as open to question as the desire or choice to be heterosexual.

Social, political and legal forces combine to produce a system of compulsory matrimony. Thus far, this system has excluded same-sex couples. Nevertheless, any quest for lesbian and gay marriage occurs within this coercive construct.

*Id.* at 799-800 (footnotes omitted).

In her thorough analysis of the values that should underlie gay and lesbian family policy, Valerie Lehr points out that “each time people ‘choose’ to marry, they strengthen the institution, at least in part, because they have less of an incentive to oppose the benefits they receive as married people.” VALERIE LEHR, *QUEER FAMILY VALUES: DEBUNKING THE MYTH OF THE NUCLEAR FAMILY* 36 (1999). I would add my hunch that if lesbians and gay men achieve the right to marry, advocacy organizations will have less incentive to support extending the benefits that married couples receive to a wider range of personal relationships.

When advocates for same-sex marriage invoke the very two-tiered structure that privileges marriage as a reason why lesbians and gay men must have access to the favored tier, they accept that two-tiered structure as a natural and unquestioned phenomenon.<sup>142</sup> Worse still, advocates often extol marriage as a badge of maturity, commitment, and citizenship.<sup>143</sup> Such arguments place gay and lesbian advocacy on the

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142. I do not mean to suggest that *all* advocates for same-sex marriage support the privileged status of marriage. Some would be happy to reduce or eliminate the disparity between the legal treatment of marriage and that afforded other significant relationships. But it is not rhetorically possible to say at the same time 1) that it harms real people, in tangible and intangible ways, to deny gay and lesbian couples the benefits and privileged status conferred by marriage and that therefore gay and lesbian couples should be allowed to marry; and 2) that the state should no longer confer benefits privileged status on married couples that it denies to other equally valuable relationships. For an analysis of the significance of the rhetoric used in advocating same-sex marriage, see generally Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535 (1993).

143. This rhetoric appears in many contexts. Most recently, advocates have argued to the Supreme Judicial Court of Massachusetts that creation of a civil union status would not satisfy the court's mandate in *Goodridge*. Plaintiff's lawyers in their briefs argued that marriage is unique in its ability to express love and commitment and confer security for children. Brief of Interested Party/Amicus Curiae Gay and Lesbian Advocates and Defenders at 23-27, In the Matter of a Request for an Advisory Opinion from the President of the Senate (No. 09163). They quote with approval historian Nancy Cott for the principle that "[m]arriage has an attribute of legitimacy that has been earned through many years of validation and institutionalization." *Id.* at 26 (citation omitted). An *amicus* brief filed on behalf of numerous gay and lesbian organizations states as follows:

The word "marriage" is both a tangible and intangible protection because the term "marriage" evokes a common vocabulary understood across cultures and generations. People understand that a couple who is married shares a loving, committed, and hopefully enduring relationship. That simply is not the case with "civil union," or any other attempted marriage-facsimile that a state might create. . . .

. . .

. . . No other term besides "marriage" conveys the true character of a couple's relationship to the outside world. No other term carries with it the same weighty historical connotation of commitment, through thick and thin, that can impact not only the perception of the outside world, but also the experience of a couple within a committed relationship. No other term provides the same opportunity for the strongest possible public expression of a couple's commitment to one another and their family.

No other term says to a couple's children: "our relationship, and our family, is built on the most solemn promise of mutual dedication and self-sacrifice." No other term provides parents who want to impart to their children a profound respect for the institution of marriage the same opportunity to be role models. . . .

Moreover, no other term fully ties same-sex couples into the fabric of our community of families—a community in which we are surrounded by images on television, on the radio, and in the movies of "married" couples and their families . . . .

[Creation of a separate civil union status] would deny individuals in same-sex relationships access to the undeniably significant social content attendant to "marriage,"

wrong side of an intense culture war.<sup>144</sup> To be sure, opponents of same-sex marriage populate that side of the culture war as well.<sup>145</sup> But what all on that side share is a conviction that the good of marriage is so profound and basic to a well functioning society that law and policy can single out marriage for “special rights” unavailable to other emotionally and economically interdependent units.<sup>146</sup> On the other side of the culture war are those, like myself, who value equally all family forms and who therefore want just social policies that facilitate maximum economic well-being and emotional flourishing for all, not only for those who marry.<sup>147</sup>

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including the ability to make the profound and broadly understood public commitment of marriage, . . . and to participate fully and as an equal in a community that recognizes, respects, and in many cases, privileges the status of marriage.

Brief of Amici Curiae Human Rights Campaign, National Gay and Lesbian Task Force et al. at 25-29, *Goodridge v. Dep’t Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (No. SJC-09163).

144. A thorough critique of advocacy in favor of gay marriage is found in MICHAEL WARNER, *THE TROUBLE WITH NORMAL* 81-147 (1999).

145. A major player in the culture war is the Institute for American Values, which describes itself as “a private, nonpartisan organization devoted to contributing intellectually to the renewal of marriage and family life as the sources of competence, character, and citizenship.” INSTITUTE FOR AMERICAN VALUES, INSTITUTE AT A GLANCE, at [http://www.americanvalues.org/html/institute\\_at\\_a\\_glance.html](http://www.americanvalues.org/html/institute_at_a_glance.html) (last visited Feb. 3, 2004).

146. Among those favoring both a privileged status for marriage and access to marriage by lesbians and gay men are Milton Regan, see *FAMILY LAW AND THE PURSUIT OF INTIMACY* 119-28 (1993), and Elizabeth Scott, see *Marriage, Cohabitation, and Collective Responsibility for Dependency*, \_\_\_ U. CHI. LEGAL F. \_\_\_ (forthcoming) (paper delivered at University of Chicago Legal Forum, Oct. 2003) (on file with author). Among gay and lesbian advocates, this view is expressed by Jonathan Rauch in *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* (2004). Warner writes:

[S]tate recognition of nonstandard households is being rolled back in the United States and is increasingly targeted by a neoconservative program of restricting divorce, punishing adultery, stigmatizing illegitimacy, and raising tax incentives for marriage. The campaign for marriage may be more in synchrony with that program than its advocates intend.

WARNER, *supra* note 148, at 125.

147. Professor Jane Schacter writes:

I fear that strategies [valorizing and romanticizing marriage] will undermine the real pluralism of affiliate structures that I think we should seek. . . . I fear that these strategies draw same-sex marriage advocates—unintentionally, to be sure—into the lamentable larger dynamics that sustain contemporary single-mother bashing. . . . To posit marriage as marking a unique form of commitment seems inescapably to devalue other family arrangements.

Jane S. Schacter, *Taking the InterSEXional Imperative Seriously: Sexual Orientation and Marriage Reform*, 75 DENV. U. L. REV. 1255, 1262-63 (1998) (footnotes omitted); see also Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 585-602 (1997) (citing the importance that non-white cultures place on extended rather than nuclear families as a means of social organization and child rearing as one facet of a multidimensional analysis that criticizes lesbian and gay advocates who prioritize achieving same-sex marriage over other issues); Vivian Hamilton, *Mistaking Marriage for Social*

Demanding equality among equally valuable relationships, instead of marriage as the remedy for the disadvantages facing gay and lesbian couples, would produce both different legal strategies and different rhetoric. In *Baker v. State*,<sup>148</sup> advocates for same-sex couples had the state constitution's Common Benefits Clause on which to base their legal demands. The clause provides that "government is, or ought to be, 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, set of persons, who are a part only of that community."<sup>149</sup> As the Vermont Supreme Court articulated, "the Common Benefits Clause expressed a vision of government that afforded every Vermonter its benefit and protection and provided no Vermonter particular advantage."<sup>150</sup> Advocates could have used this clause to challenge the privileged status of marriage in Vermont; they could have argued that the special rights accorded married couples in Vermont unconstitutionally advantaged one type of family over others; they could have asked the court to require that the state articulate the objectives of all of the laws singling out marriage for distinct treatment and that the state include within the sphere of each law all relationships equally able to fulfill the state's objective. Instead, they argued only for allowing same-sex couples access to marriage.

Vermont's response to the mandate of *Baker v. State* was the creation of civil unions, a status for same-sex couples that confers all of the rights and obligations of marriage under state law.<sup>151</sup> It is not available to opposite-sex couples. Thus, Vermont has compounded the inequality of its laws. This denial of equality may mirror the exclusion of same-sex couples from marriage, but two wrongs don't make a right. This is not some trivial complaint; it is formal inequality with serious

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*Policy*, \_\_\_ VA. J. SOC. POLICY & L. \_\_\_ (forthcoming 2004). For an articulation of the value of family forms in the context of opposition to promoting marriage for those receiving TANF, see Gwendolyn Mink, Martha Fineman & Anna Marie Smith, *No Promotion of Marriage in TANF!*, at <http://falcon.arts.cornell.edu/ams3/npmposition.html> (last visited Feb. 3, 2004). The organization most visibly advocating support for all family forms is the Council on Contemporary Families. See generally <http://www.contemporaryfamilies.org>.

148. 744 A.2d 864 (Vt. 1999).

149. *Id.* at 867.

150. *Id.* at 875.

151. See H. 847, 2000 Gen. Assem. (Vt. 2000) (stating the purpose of Vermont's Civil Union legislation was "to respond to the constitutional violation found by the Vermont Supreme Court in [*Baker v. State*], and to provide eligible same-sex couples the opportunity to 'obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples'").

implications.<sup>152</sup> Recognizing, but affording a paltry number of benefits to, relationships between relatives, Vermont also created “reciprocal beneficiary” status, conferring the right to make health related and burial decisions.<sup>153</sup> Adding another layer of inequality to the Vermont scheme, no two persons eligible to marry or enter a civil union can register as reciprocal beneficiaries.

Rhetoric emphasizing equality of equally valuable relationships would never invoke the two tiered structure that privileges marriage as a reason why same-sex couples should have access to the privileged tier. An example from a paper available on the web site of Lambda Legal, a nationally prominent lesbian and gay rights legal organization, exemplifies the available rhetorical, legal, and political options. The paper is entitled, *Denying Access to Marriage Harms Families*.<sup>154</sup>

Ronnie in New York City developed a grave illness and needed her partner of over twenty years, Elaine, to assist her in getting to medical appointments[.] Ronnie would suffer black-outs walking in the street. Elaine requested family medical leave from her employer to cover the periodic appointments, but the employer said no because Ronnie was not a “spouse.”<sup>155</sup>

But Ronnie doesn’t need a spouse; she needs care. A spouse or its nonmarital equivalent could provide that care—if she has such a partner—but so could Ronnie’s niece, her sister, her closest friend, or a group of her closest friends. And such people *must* provide the needed care if Ronnie doesn’t have a partner. The AIDS crisis, attention to which remains a part of Lambda Legal’s mission, should have

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152. For an impassioned and articulate review of the harm this inequality causes for heterosexual women, see Mary Ann Case, *What Stake Do Heterosexual Women Have in the Same-Sex Marriage/Domestic Partnership/Civil Union Debates* (paper delivered at the North American Regional Conference of the International Society of Family Law) (June 2003)

(The bifurcated regime Vermont created sends a message of subordination to both gays and lesbians on the one hand and heterosexual women on the other, while reaffirming patriarchy. . . . By restricting . . . male-female couples to marriage, it forces women who wish to unite themselves to men under state law to do so in an institution whose legal history is one of subordinating wives both practically and symbolically.)

Ruthann Robson asserts that “the civil union exclusion of heterosexual couples should offend our notions of formal equality in the same manner that the marital exclusion of lesbian and gay couples offends us.” Ruthann Robson, *supra* note 145, at 754.

153. VT. STAT. ANN. tit. 15, § 1301 (2003).

154. See Lambda Legal, *Denying Access to Marriage Harms Families*, at <http://web.archive.org/web/20021230202805/http://lambdalegal.org/cgi-bin/iowa/documents/record?record=873> (last visited Feb. 12, 2004).

155. *Id.*

illuminated the fallacy of expecting any one individual to care for someone with extensive medical needs.

The solution to Ronnie's crisis, to the extent the law can facilitate one, is a Family and Medical Leave Act—a caregiving leave act—that allows anyone with whom she has a close personal relationship to take her to her medical appointments without fear of being fired. Any law that permits such caregiving leave but limits who may take such leave to spouses or a narrow group of family members<sup>156</sup> defeats the important purpose of such a law—facilitating caregiving by those who are willing to provide such care to those with whom they have close personal relationships.

Lambda Legal posits the solution to Ronnie's crisis as legalizing same-sex marriage. But what if her spouse, Elaine, dies? Or what if Elaine can't afford to take the unpaid leave provided by the law? As a lesbian, Ronnie may have fewer options for care by her parents, who are eligible to take leave under current federal law; they may have rejected her precisely because of her lesbianism, or she may have moved away from her family of origin to a region of the country more socially and politically supportive of lesbians and gay men. Ronnie's chosen family of friends<sup>157</sup> may well include individuals able to transport her to her medical appointments, as long as they do not have to lose their jobs to do it.

Lambda Legal titles its paper, *Denying Access to Marriage Harms Families*.<sup>158</sup> But it would better serve the needs of all lesbians and gay men if it joined with other advocacy groups in a campaign for a more just law.<sup>159</sup> Such a law would serve the purpose of facilitating caretaking

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156. The federal Family Medical Leave Act mandates that an employer provide unpaid leave when an employee's son or daughter is either born or placed into the home for adoption or foster care; when an employee's spouse, son, daughter, or parent is suffering from a serious health condition; and when the employee himself or herself is suffering from a serious health condition. 29 U.S.C.S. §§ 2611-2612 (Law. Co-op. 2003).

157. This phenomenon is developed extensively in KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* (1991).

158. See Lambda Legal, *supra* note 157.

159. There are models of Family and Medical Leave Act provisions that would solve Ronnie's problem while supporting other close personal relationships as well. For example, the District of Columbia Family and Medical Leave Act defines "family member" to include those related by "blood, legal custody, or marriage"; a child living with the employee for whom the employee "permanently assumes and discharges parental responsibility;" and a person who lives with the employee, or has lived with the employee within the past year, with whom the employee has a "committed relationship." D.C. CODE ANN. § 32-501(4) (2003). While not capturing as many relevant relationships as the recommendation of the Law Commission of Canada, this definition covers many more relationships than does the federal Family and Medical Leave Act.

while also addressing legitimate concerns of employers about both possible abuse of the law and workplace efficiency. When the Law Commission of Canada considered the issue, it came up with the following recommendation:

Parliament should amend the *Canada Labour Code* to provide employees with the right to take caregiving leave and to permit employees to designate the relationships most meaningful to them for the purposes of caregiving leave. To control the risk of abuse, the legislation could place a cap on the number of days that an employee could take for caregiving leave, or it could permit employees to provide a list to employers of those persons with whom they have relationships that may give rise to the need to provide care.<sup>160</sup>

### CONCLUSION

Rather than invoke the advantages of marriage as grounds for access by same-sex couples, advocates for lesbians and gay men could work to create a more just network of laws, regulations, and programs that value a wide range of close personal adult relationships. For some purposes, relationship registration options would provide an effective mechanism to allocate rights and responsibilities. Like marriage, however, relationship registration is not the answer because it is an inaccurate proxy for identifying what relationships matter for specific purposes.

In its *Beyond Conjuality* report, the Law Commission of Canada has developed a useful methodology with which to reconsider all law and social policy. It accords individuals maximum freedom to identify the relationships that matter to them. When a law must delineate the relationships to which it applies, the law should capture all those relationships that are relevant to achieving the objectives of the law.

Some areas of American law already reflect the thinking that underlies *Beyond Conjuality*, such as civil protection order statutes that apply to the wide range of personal relationships in which domestic violence occurs. Lasting commitment, care, love, and emotional and economic support also occur in a wide range of relationships. When the law can recognize and reflect this fact, we will have ended marriage as we know it.

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160. BEYOND CONJUALITY, *supra* note 8, at 43.