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MARRIAGE, TORT, AND PRIVATE ORDERING: RHETORIC AND REALITY IN LGBT RIGHTS

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I. INTRODUCTION

Phyllis Lyon and the late Del Martin lived through a dramatic arc of LGBT progress. Together for more than fifty years, they began as passionate activists whose lives together defied law and social norms.[1] While their own advocacy and that of countless others over a decades-long struggle resulted in decriminalization of sexual intimacy in same-sex relationships and even a measure of (often grudging) social acceptance, they long remained outsiders to the panoply of rights and protections the law reserved for opposite-sex couples, especially married ones. Matters improved for some with the advent of domestic partnership laws conferring some of the benefits typically associated with marriage,[2] but whether that final marker of social approbation will be achieved remains unclear.

Featured in a moving photograph widely circulated over the Internet in 2004, Lyon and Martin were among the temporarily joyful couples granted marriage licenses in San Francisco. As is well-known, the California Supreme Court ruled that San Francisco mayor Gavin Newsom had overstepped his authority in issuing such licenses to same-sex couples, and the unions were stricken from the record.[3] Two efforts by the California legislature to remedy the problem were vetoed by Governor Schwarzenegger,[4] but the California Supreme Court held that excluding same-sex cou-

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1. Lisa Leff, *Lesbian Del Martin Dies at 87*, MERCURY NEWS, Aug. 27, 2008, http://www.mercurynews.com/breakingnews/ci_10316518?nclick_check=1.

2. For a good summary of the evolution of California's domestic partnership laws, see National Center for Lesbian Rights, The Evolution of California's Domestic Partnership Law: A Timeline, http://www.nclrights.org/site/DocServer/timeline-ab205_042307.pdf?docID=1265.

3. Lockyer v. City and County of San Francisco, 95 P.3d 459, 494-95 (Cal. 2004).

4. Lynda Gledhill, *Schwarzenegger Vetoes Gay Marriage Bill as Promised*, SFGATE, Sept. 29, 2005, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/09/29/MNG4IEVVEG5.DTL; Jill Tucker, *Schwarzenegger Vetoes Same-Sex Marriage Bill Again*, SFGATE, Oct. 13, 2007, http://www.sfgate.com

ples from marriage violated the state's constitution[5] and thereby allowed the resilient couple to (re)marry on June 16, 2008—the first and only couple granted that right in San Francisco on the first day the court's order went into effect.[6]

Home to almost one in eight Americans,[7] California's progressive move could portend a seismic shift in the marriage equality struggle, but the signs are mixed. The vast majority of other states explicitly ban same-sex marriages, many through recently enacted amendments to their state constitutions.[8] Even in California, only Martin's recent passing might have been able to prevent the state from snatching away their long-sought recognition yet again; on November 4, 2008, the California voters attempted to amend the state's constitution to limit marriage to the union of a man and a woman, thereby overriding the court's ruling.[9] The legal struggle for equality is not nearly over, and the social meaning of gay marriages—and of gay lives more generally—promises to be bitterly contested for the foreseeable future. While much of the attention has focused on marriage, other legal and social issues continue to play out.

As one example of such a contested issue, consider whether Del Martin could have recovered in tort law for an injury suffered by Phyllis Lyon.

/cgi-bin/ article.cgi?f=/c/a/2007/10/13/BAT7SPC72.DTL.

5. *In re* Marriage Cases, 183 P.3d 384, 453 (Cal. 2008).

6. Janet Kornblum, *Gay Couples Tie the Knot in Calif.*, USA TODAY, June 17, 2008, http://www.usatoday.com/printedition/news/20080617/a_gaymarriage17.art.htm.

7. *See* THE WILLIAMS INSTITUTE, CENSUS SNAPSHOT, CALIFORNIA LESBIAN, GAY, AND BISEXUAL POPULATION (2008), *available at* http://www.law.ucla.edu/williamsinstitute/publications/CA%20Snapshot%202008.pdf.

8. As of May 2008, forty-one states have banned same-sex marriage by statute. As of that same date, twenty-seven states had defined marriage in their constitutions. That number potentially increased by three after November, 2008, as Arizona, California and Florida all passed constitutional amendments. *See* National Conference of State Legislatures, Same Sex Marriage, Civil Unions and Domestic Partnerships, http://www.ncsl.org/programs/cyf/samesex.htm#DOMA (last visited Apr. 5, 2009). As discussed in note 9, *infra*, the constitutionality of California's amendment was in doubt as of this writing.

9. Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1. Whether the ban will endure, and whether it will affect those who were married during the period between the court's ruling and November 4, are two questions that are open as of this writing. On November 5, several gay rights organizations and the ACLU, along with several private law firms, filed suit seeking relief against Proposition 8. The central argument in their brief is that the voters attempted to achieve a "revision" of the state constitution rather than an "amendment"; such revisions require prior legislative approval by a supermajority. *See* Lambda Legal, Proposition 8 Challenged, http://www.lambdalegal.org/publications/articles/proposition-8-challenged.html (last visited Nov. 7, 2008). The site also contains a link to the statement from California Attorney General Jerry Brown expressing his view that the marriages already performed are legal. Brown has also asked the Supreme Court to decide the constitutionality of the amendment. Jesse McKinley, *California Asks Court to Weigh Marriage Ban*, N.Y. TIMES, Nov. 18, 2008, at A13. On March 5, 2009, the California Supreme Court heard oral argument on whether Proposition 8 was a valid use of the state's initiative process. I live-blogged the argument. Three Acts on Prop 8: II, http://wordinedgewise.org/?p=40 (March 5, 2009). Under California law, a decision must be handed down within ninety days of argument.

Until recently, the answer would have been no because of the judicial insistence that the only relationships that count are those already cemented by law (like marriage) or by blood. A support agreement between the two, by contrast, might well have been enforced.

With occasional emphasis on developments in California, this Article examines the recent history of these sometimes parallel tracks of the legal recognition of gay and lesbian relationships: the move towards marriage; the redress of injuries to same-sex relationships through tort law; and judicial recognition of support agreements between same-sex partners. I argue that the socially enforced invisibility of gay lives and relationships had a lexical correlate: the phrase "gay marriage" was long regarded as absurd, if not oxymoronic. And inasmuch as marriage was also seen as the indispensable cornerstone of validity, same-sex couples also met with failure in tort cases in which their relationships swam directly into view. Over time, though, both visibility and the vocabulary needed to describe it have moved same-sex couples ever closer to formal, legal equality. Private arrangements, by contrast, have moved somewhat more quickly towards equal treatment.

Focusing on early efforts to persuade courts to recognize gay relationships—either as marriages, or as worthy of recognition in the torts context, or as proper subjects of support agreements—I begin by showing that courts were effectively tongue-tied: Marriages between same-sex couples could not be recognized because they were not, after all, marriages. Further, inasmuch as marriage was long seen as the only legitimate home for intimacy, efforts by both same-sex and opposite-sex couples to have their relationships recognized also met with failure in the torts context. This view of same-sex marriages exists yet today, most obviously in states that have banned same-sex marriages through legislation or constitutional amendment, more subtly in judicial decisions that restrict the fundamental right to marry to opposite-sex marriages.

While courts would not recognize same-sex marriages for any purposes, a body of law was at the same time developing that did accede to reality in some ways, often by protecting private economic arrangements. Thus, this Article proceeds chronologically, describing the quickening pace of change, of both rights and the language used to describe and enforce them—from private arrangements, to limited recognition as domestic partnerships or within the context of specific statutes, to the virtual equivalence of civil unions, to marriage. Not surprisingly, given the prominent role played by state law in these areas, many points along the continuum can be identified, from little recognition of same-sex relationships all the way

through to full marriage rights and recognition in tort law. Yet even the most retrograde of states has had to make some accommodation to the reality of openly gay lives. It is therefore likely that full and universal marriage equality is not far off, although resistance has been especially firm on this one issue.

II. THE 1970S AND 1980S: JUDICIAL (NON-)RECOGNITION OF SAME-SEX UNIONS

A. Early Marriage Equality Cases and their Societal Context

Perhaps emboldened by the nascent gay rights movement, a few groundbreaking couples did challenge the states' universal proscription of same-sex marriages. As has been chronicled many times, their efforts were dismally unsuccessful. In 1971, the Minnesota Supreme Court quickly and unanimously dismissed plaintiffs' constitutional and statutory arguments, relying on dictionary definitions of marriage and upholding the law as a rational classification supported by centuries of tradition.[10] One searches in vain for any discussion of the conclusion that the court simply asserted. In 1974, a Washington appellate court threw out a similar constitutional challenge to the state's exclusionary marriage law.[11] Although the decision is longer than the Minnesota court's holding, and ostensibly supported by more authority, in fact its basic argument consisted of little more than a quote from the Minnesota decision and a tautological statement that "marriage in this state, as elsewhere in the nation, has been deemed a private relationship of a man and a woman (husband and wife) which involves 'interests of basic importance in our society.'"[12] Simply put, at this time courts were unwilling to challenge the very definition of marriage as it been long understood, at least in the United States. In another case from this same era, the Kentucky Supreme Court summarized this uncritical position: "[M]arriage has always been considered as the union of a man and a woman. . . It appears to us that appellants are prevented from marrying . . . by their own incapability of entering into a marriage as that term is defined."[13]

These early decisions reveal courts that were simply without the background or language to soberly address the claims before them. Reading them alongside the more recent spate of cases faced with marriage equality

10. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).
11. Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974).
12. *Id.* at 1197 (quoting Boddie v. Connecticut, 401 U.S. 371, 376 (1971)).
13. Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973).

arguments, one is struck by the difference in tone, in analysis, and in respect. This latter set of cases, discussed more fully in Part IV.B., starts from the presumption that the claimants have advanced serious equality and liberty arguments that require careful consideration, even if the ultimate results are not always different from those reached in the earlier cases. But in the 1970s, openly gay lives were still rare, and claims to full participation in society were in their infancy. The 1969 Stonewall riots, often (but perhaps too easily) cited as the crucible from which the gay rights movement emerged, were still recent and raw. The nascent movement quickly became divided between radicals who questioned the legal structure, rules, and entitlements of marriage (among many other things) and more assimilationist liberals, who sought formal legal equality for their relationships. In a paradoxical way, radical ideology, while causing more discomfort to mainstream society, was less of a challenge to courts, whose power to effect change on such a scale is quite limited. Liberal claims to equality, even in marriage, were more alarming because they adapt the language and substance of rights and equality to new circumstances, thereby challenging judicial decision-makers to address the arguments directly. As shown above, judges avoided doing so in any comprehensive way. Given the likelihood that many of these judges had no acquaintanceship with openly gay people—much less with gay couples in intimate relationships—it is hardly surprising they were unable to come to grips with claims for a status they saw nowhere in evidence.

Such judicial blindness was even more pronounced in the area of harms to relational interests caused by personal injury or death. The torts of wrongful death and loss of consortium expressly require consideration of relationships, while one formulation of the requirements for a successful suit for negligent infliction of emotional harm also calls upon courts to assess the strength of relationships.[14] Yet two phenomena are striking in this area of the law, at least until very recently. First, courts called upon to assess the claims of unmarried cohabitants for the loss of, or injury to, their intimate companions often routinely and reflexively denied the claims—no matter the strength of the relationship before them. Second, and perhaps still more surprising, almost no same-sex couples even sought recovery for these injuries in the first place. Each of these statements needs expansion,

14. Currently, some states allow witnesses to serious injury caused to another to recover for their emotional distress even if these witnesses did not themselves fear harm, but only if the witnesses and the person physically injured stand in a close relationship. *See* DAN B. DOBBS, THE LAW OF TORTS § 309 (2000) (summarizing various views). Thus, the question arises as to what qualifies as a "close relationship." Until recently, intimate relationships not of the blood counted as "close" only if cemented by marriage. See notes 32–36 and accompanying text *infra* for a fuller discussion.

but I must begin by asking the reader's patience during a discussion of the claims of *opposite-sex* cohabitants. My reasons for doing so will become clear soon.

B. *Early Tort and Support Claims by Unmarried Cohabitants for Relational Injury*

The denial of recovery to those not in marital relationships is most defensible in the case of wrongful death. For historical reasons not pertinent here, wrongful death claims are entirely statutory. Most statutes strictly limit the class of those entitled to recover for the negligently caused death of another; typically, spouses and immediate family members are included, while others are not.[15] Thus, surviving intimates who were never married to their now-deceased partners have seldom bothered to even file claims under these laws. Those that did were routinely unsuccessful.[16] The claims were brought by opposite-sex couples, but there is little reason to think that the results would have been much different in the case of same-sex couples, because in neither case does the plaintiff meet the statutory definition of "spouse."

Matters are more complex in the cases of loss of consortium and negligent infliction of emotional distress, because neither claim confronts a statutory prohibition against recovery. Consortium claims, once available only to a husband for the loss of his wife's services because of her injury at defendant's hands, have since evolved into a more encompassing balm for the loss of society and sexual relations (with "services" taking on an ever-smaller role).[17] Inasmuch as only husbands were "entitled" to services, limiting recovery to those in sanctioned marriages was justified by the reality of the marital relationship and its unique ability to command certain duties of the spouses *inter se*.[18] But the elements of recovery today are meant to reflect the reality of the relationship as lived, and the injury to both its tangible and less quantifiable merits. One might therefore expect

15. *See* John G. Culhane, *A "Clanging Silence": Same-Sex Couples and Tort Law*, 89 KY. L. J. 911, 955–56 nn.209–12 (2001) (citing representative list of then-current statutes and those entitled to recovery in various categories of family relationships).

16. *See id.* at 957–60 (discussing three California cases that denied wrongful death claims brought by surviving partners in cohabiting relationships).

17. Ezernack v. Progressive Sec. Ins. Co., 899 So. 2d 870, 871 (La. Ct. App. 2005).

18. It hardly needs stating that, to a modern sensibility, the institution of marriage as it existed for centuries is not one that almost anyone would claim allegiance to today. Among its dismal hallmarks were the legal disappearance of the wife, the concomitant supremacy of the husband, and the virtual impossibility of exit even for what most would agree today would be good grounds for dissolution. Accessible summaries of these points are found in HARRY D. KRAUSE ET AL., FAMILY LAW 97–101, 551–57 (5th ed. 2003).

courts to undertake a more searching examination of all intimate relationships for harms suffered.[19]

Yet in case after case, courts in California and elsewhere dismissed such claims, thereby foreclosing any effort by the consortium plaintiff to demonstrate that, in fact, the loss suffered might be just as acute as any incurred by a married plaintiff. Judicial support of this strict rule combined concern about the practical difficulties of assessing the strength of a non-marital relationship with language about the state's interest in fostering marriage—as though allowing tort recovery in such cases would undermine that interest. The language of the California Supreme Court in *Elden v. Sheldon*[20] (a case to which we shall have occasion to return) is both typical and instructive:

> Marriage is accorded [a special] degree of dignity in recognition that "[t]he joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime."[21]
>
> . . .
>
> [T]he policy favoring marriage is "rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society."[22] Formally married couples are granted significant rights and bear important responsibilities toward one another which are not shared by those who cohabit without marriage. . . . Plaintiff does not suggest a convincing reason why cohabiting unmarried couples, who do not bear such legal obligations toward one another, should be permitted to recover for injuries to their partners to the same extent as those who undertake these responsibilities.[23]

By this account, the special treatment of marriage is—and must be—so pervasive that not even claims that are formally independent of it can be recognized if they tend to weaken marriage even hypothetically.

That loss of consortium claims were so tied to the legal relationship of

19. There is also an argument for considering harms to non-intimate relationships, such as those between adult siblings who live together, long-time (non-intimate) friends, and so on. Indeed, the possibility of such relationships being considered has been pressed into the service of the "slippery slope" argument against extending loss of consortium claims beyond the clear boundaries of legally sanctioned marriage. *See, e.g.*, Borer v. Am. Airlines, 563 P.2d 858, 861–62 (Cal. 1977):

> Patricia Borer, for example, foreseeably has not only a husband . . . and the children who sue here, but also parents[,] . . . brothers, sisters, cousins, inlaws, friends, colleagues, and other acquaintances who will be deprived of her companionship. No one suggests that all such persons possess a right of action for loss of Patricia's consortium; all agree that somewhere a line must be drawn.

Id.

20. 758 P.2d 582 (Cal. 1988).

21. *Id.* at 586 (quoting Nieto v. City of Los Angeles, 188 Cal. Rptr. 31 (Cal. Ct. App. 1982)).

22. *Id.* at 587 (quoting Laws v. Griep, 332 N.W.2d 339, 341 (Iowa 1983)).

23. *Id.*

marriage (and not the reality of the relationship, or the injury) might owe something to the history of the tort. But no such history accounts for courts' similar treatment of claims based on the negligent infliction of emotional distress. Under the rules for recovery in some states, including California, one may recover for purely emotional distress caused by witnessing an injury to a loved one as long as the plaintiff stands in a sufficiently close relationship with the primary victim.[24] Since the courts only recently devised the requirements for this tort, one might expect a flexible and evolving approach to defining "close relationship." But while the California intermediate appellate courts did occasionally show such flexibility,[25] *Elden v. Sheldon* again wrote the plaintiffs' relationship out of the law. Indeed, the statement from the case that was quoted above is taken from the court's discussion of the emotional distress claim (although it expressly adopted the same rationale in its consideration of the consortium claim.)

A moment's reflection should indicate the absurdity of the court's marriage-promoting rationale in the case of emotional distress claims: Unlike consortium claims, which at least retain a foothold in the realm of service (to which only spouses had the right), the tort of emotional distress is to compensate for the mental harm caused by the injury to someone with whom one is emotionally close. Although matters of administrative convenience might justify a bright-line rule, it is hard to see how a marriage-promotion argument does. The tort is not connected, except by the court's say-so, to "the rights and obligations of marriage," nor would allowing recovery to anyone who could show actual emotional injury undermine the institution. Even today, most courts continue to screen out such claims for both loss of consortium and emotional distress, although some have looked to the reality of relationships in allowing such cases to survive dismissal.[26]

Perhaps administrative convenience is indeed the driving force behind judicial refusal to recognize the claims of unmarried intimates. To the extent that reluctance to encourage non-marital relationships is in play, though, these decisions are harder to explain. California again provides an instructive example of judicial confusion: Although the *Elden v. Sheldon*

24. *See* Thing v. LaChusa, 771 P.2d 814 (Cal. 1989).

25. *See* Ledger v. Tippitt, 210 Cal. Rptr. 814 (Cal. Ct. App. 1985) (upholding dismissal of loss of consortium claim but reversing dismissal of negligent infliction of emotional distress claim); Butcher v. Superior Court, 188 Cal. Rptr. 503 (Cal. Ct. App. 1983) (loss of consortium). *But see* Drew v. Drake, 168 Cal. Rptr. 65 (Cal. Ct. App. 1980) (upholding dismissal of emotional distress claim).

26. Several states now have statutes that, by approximating marriage, allow same-sex couples to sue if they are in a state-sanctioned relationship, but cohabitants mostly remain outside of tort law's protections for injuries to relational interests. *See infra* Part IV.C. For a discussion of the few cases allowing claims to proceed, see John G. Culhane, *Even More Wrongful Death: Statutes Divorced from Reality*, 32 FORDHAM URB. L.J. 171, 190–94 (2005).

court waxed rhapsodic about the value and privilege of marriage—and the danger in sending any signal that might compromise its status—that same California Supreme Court had, more than a decade earlier, issued the progressive and influential decision in *Marvin v. Marvin*,[27] which permitted an unmarried cohabitant to claim support on a variety of different bases: express contract; implied contract; quantum meruit; or other equitable remedies, including constructive trusts.[28] This decision, expressly rejected by other courts precisely because of the negative effect it was deemed likely to have on marriage,[29] was mentioned only in an unrelated note in the *Elden* court majority, but formed a central pillar of the dissent's case that societal realities and the requirements of fairness dictated a more flexible approach.

One central difference between the support cases and the tort claims discussed above is that the former involve only agreements between the parties, while the latter necessarily bring in third parties, as do claims by unmarried cohabitants for government benefits. Inasmuch as private parties, even those in "meretricious relationships," enjoy the freedom to enter into contracts with each other, refusing to recognize such contractual agreements (express or implied) where the subject is support rather than something else (such as the sale of a good) requires first overriding the default, contract-friendly rule and then drawing a possibly difficult line between permissible and impermissible subjects of agreement.

Thus, in the realm of private ordering, courts are able to import terms and doctrine from contract law, thereby diminishing the focus on the underlying relationship that causes disquiet. Indeed, the *Marvin* court took pains to assure us that consideration for the agreement could not be based on the sexual relationship itself, thereby directing focus to the kind of economic support that even non-intimate cohabitants might rely on.[30]

By contrast, even in its modern guise the tort of consortium is and continues to be bound up in the family relationship, and, at least until quite recently, families were carefully defined to exclude those without connection of law or blood. In the legal context, of course, that connection is

27. 18 Cal. 3d 660 (Cal. 1976).

28. *Id.* at 665.

29. *See, e.g.*, Hewitt v. Hewitt, 394 N.E.2d 1204, (Ill. 1979). The court asks:

> Will the fact that legal rights closely resembling those arising from conventional marriages can be acquired by those who deliberately choose to enter into what have heretofore been commonly reffered to as 'illicit' or 'meretricious' relationships encourage formation of such relationships and weaken marriage as the foundation of our family-based society?

Id. at 1207. A typical middle ground approach is evidenced in Connell v. Francisco, 898 P.2d 831 (Wash. 1995) (holding that only property that would have been community property in a "real" marriage is subject to equitable distribution).

30. *Marvin*, 18 Cal. 3d at 674.

"marriage" and none other. Emotional distress claims were ensnared by this same outmoded view.

C. *Tort Claims by Same-Sex Couples for Relational Injury*

With opposite-sex couples walled off from recovery in tort, one might expect that same-sex couples would have done even worse. In fact, they did but the direct evidence for this claim is hard to come by for a simple reason: Very few cases were even brought. While the tort claims of opposite-sex unmarried cohabitants were disfavored, those of same-sex couples were largely invisible.

Elsewhere, I have detailed the likely reasons for the lack of appellate law addressing the claims by members of same-sex couples for loss of consortium and negligent infliction of emotional distress;[31] I summarize these reasons here. First, at least until quite recently, and even to an extent today, many same-sex couples might omit to disclose or "edit" their relationship in discussing their case with an attorney. Second, the attorney might choose not to mention the possibility of such derivative claims to the client(s) (an action that might raise ethical concerns, depending on the law of the relevant state), or might at least dissuade the couple from pursuing the consortium or emotional distress claims. Such dissuasion might make practical sense, because the primary, personal injury claim is the most valuable, and, given a combination of the dearth of legal precedent and a potentially hostile judge or jury, many fully informed couples might choose not to compromise the more financially important claim for a less valuable and more uncertain one. Although there are differences between the two claims—consortium necessarily compensates for injury to the relationship itself, while emotional distress uses the relationship somewhat less directly—these seem minor compared to the daunting similarities discussed above.

Indeed, research of cases from the 1970s and 1980s disclosed no claims for loss of same-sex consortium, and only one for negligently inflicted emotional distress. With opposite-sex couples encountering courts unable to separate relational injury from marriage, same-sex couples unsurprisingly lagged still further behind. The one appellate case involving emotional distress makes the point dramatically.

In *Coon v. Joseph*,[32] plaintiff Gary Coon and his "intimate male friend" (to use the court's term), known to us only as "Ervin," were attempting to board a municipal bus in San Francisco when the bus driver,

31. Culhane, *supra* note 15, at 974–79.

32. 192 Cal. App. 3d 1269 (Cal. Ct. App. 1987).

defendant Michael Joseph, allegedly "verbally abused Ervin and struck his face. When [Coon] observed the assault on his friend, he suffered great . . . emotional distress."[33] Coon sought relief under several causes of action, including intentional and negligent infliction of emotional distress.

In affirming the lower court's dismissal of the entire complaint, the court found that, for purposes of the negligent infliction of emotional distress claim, the plaintiff could not—as a matter of law—establish the "close relation" required. In so deciding, the court avoided addressing the actual, as opposed to legal, strength of the relationship. Coon alleged that he and Ervin had an "intimate, stable and 'emotionally significant' relationship as 'exclusive life partners,'" and that the two had been living together for a year.[34] Given the sketchiness of the court's description, it is difficult to assess whether Coon and Ervin had the sort of long-term, committed relationship that might serve as a "substitute" for marriage by a sympathetic court. The court's approach, though, made a fuller description unnecessary.

A benign reading of the decision is that the court was simply more comfortable with a bright-line rule.[35]Several statements made by the court, however, suggest that the true discomfort—or at least the greater extent of it—was with a same-sex couple, not with the broader category of unmarried couples. First, the court referred to Coon's life partner as his "male friend," and, as noted above, did not deign to provide his full name.[36] This "de-sexing" of the couple was further evidenced by the court's citation to a statement in Prosser and Keeton's Torts hornbook that was of little application in this case:

> It would be an entirely unreasonable burden on all human activity if the defendant . . . were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as all his friends.[37]

Whatever the exact nature of the relationship between Coon and Ervin, it bore no resemblance to any of the remote parties to whom Prosser rightly feared extending recovery. But the court's reliance on this passage is of a piece with its overall treatment of the couple, and its willingness to elevate the often transient parent- foster child relationship over that of a

33. *Id.* at 1272.

34. *Id.*

35. Indeed, the court cited a number of cases interpreting the close relationship requirement narrowly, as requiring either husband-wife, parent-child, or grandchild-grandparent. *Id.* at 1275. The two, or maybe three, cases to the contrary were regarded as "exceptions," and either ignored, explained away, or disapproved. *Id.*

36. *Id.* at 1272.

37. W. KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS § 54, at 366 (5th ed. 1984).

committed couple: "We view the relationship of mother and foster child . . . as a parent-child relationship."[38]

The court's negation of the intimate life of the couple is obvious enough from its holding and from the analysis above, but additional language from the decision supports my point that the idea of same-sex marriage was simply unfathomable to courts at this time. The court distinguished the couple before it from an opposite-sex couple in *Ledger v. Tippitt*, where a California appellate court had permitted an emotional distress claim by an unmarried cohabitant to go forward.[39] Rather than simply disapproving the holding in that case—which other appellate courts had done, and which the California Supreme Court was about to do—the *Coon* court emphasized those facts from *Ledger* that it found sympathetic, most significantly including the couple's having "establish[ed] a home with their natural child."[40] It then stated that, unlike the Ledger case, the case before it did not involve a "de facto" marriage, "[n]or could such allegation be made because appellant and Ervin are both males and the Legislature has made a determination that a legal marriage is between a man and a woman."[41]

This language is quite revealing as to the state of non-recognition in which same-sex couples encountered the law. So vertiginous was the idea of a same-sex marriage, apparently, that it disabled the court from seeing that, once it recognizes any "de facto" marriage, it cannot then use the legislative definition of marriage, without more, to exclude same-sex couples. Moreover, the court was blind to the unfairness of a legal system that would first deny marriage rights to same-sex couples, and then use that denial to erase gay men and lesbians from other areas of legal protection. Indeed, a court less at sea might have been able to recognize that same-sex couples, deprived of the option to marry, were *more* sympathetic candidates for relaxing the bright-line, marriage-only rule.[42]

D. Support Agreements Between Same-Sex Partners

As noted above, *Marvin v. Marvin* established, at least for California, the enforceability of express and implied private support contracts, so long as such contracts were not based on impermissible consideration (i.e., as

38. *Coon*, 192 Cal. App. 3d at 1275 n.1.

39. 164 Cal. App. 3d 625 (Cal. Ct. App. 1985).

40. *Coon*, 192 Cal. App. 3d at 1276–77.

41. *Id.* at 1278.

42. The statement in the text should not be taken to indicate a position favoring the bright-line rule; such a reflexive rule is unfair to committed opposite-sex couples, as well.

long as support was not seen as payment for sex). In the case of same-sex couples, by contrast, courts struggled to reconcile seemingly incompatible notions: the increasing presence of same-sex couples and the reality of their needs upon separation, on the one hand, with continued judicial discomfort with arrangements and "lifestyles" they were often wholly unfamiliar with.

A brief discussion of a pair of California appellate cases stand in instructive contrast, and makes the point.

In *Jones v. Daly*, the parties had agreed that plaintiff would render his services to Daly as "a lover, companion, homemaker, traveling companion, housekeeper and cook."[43] The court found that the agreement was based in large part ("indeed the predominant consideration") on sexual services, and was therefore invalid."[44] In *Whorton v. Dillingham*,[45] on the other hand, a different California appellate court did permit severance of the illegal consideration from the bulk of other tasks the plaintiff claimed he agreed to perform in exchange for financial support, which included "chauffeur, bodyguard, social and business secretary, partner and counselor in real estate investments."[46] "Additionally, Whorton was to be Dillingham's constant companion, confidant, traveling and social companion, and lover."[47] While the list of "occupations" in *Whorton* is considerably more comprehensive than that in *Jones*, the *Whorton* court found such services as "chauffeur" to be those for which people typically get paid, and therefore compensable.[48] The Jones court, on the other hand, refused to so regard the plaintiff's efforts as "housekeeper" or "cook."[49]

As has been discussed throughout this section of the Article, courts during the 1970s and 1980s were quite uncomfortable with same-sex relationships, and *Jones* shows that such discomfort could even upend otherwise valid agreements between same-sex partners. The problem seems to have been the term lover: "[T]he words 'cohabitating' and 'lover' do not have the innocuous meanings which plaintiff ascribes to them. These terms can pertain only to plaintiff's rendition of sexual services to Daly."[50] Since the plaintiff in Jones did not permit the court to avert its attention from intimacy, he was punished by having that intimacy extended outward to engulf, and so to extinguish, otherwise compensable claims.

43. 122 Cal. App. 3d 500, 505 (Cal. Ct. App. 1981).
44. *Id.* at 508.
45. 202 Cal. App. 3d 447 (Cal. Ct. App. 1988).
46. *Id.* at 450.
47. *Id.*
48. *Id.* at 454.
49. *Jones*, 122 Cal. App. 3d at 509.
50. *Id.* at 508.

Would a different term have yielded a more sympathetic approach? Husband and wife would have worked, apparently; in *Marvin v. Marvin*, the court effectively held that the words "husband and wife" did not mean that sexual relations were part of the "package" of services.[51] Perhaps the more business-like "partner" would have worked, inasmuch as the court seemed fixated on the word "lover" and its obvious connection to sexual intimacy. The irony, of course, is that the parties' word choices were constrained by the legal system's unwillingness to recognize their relationship in the first place.

But perhaps the juxtaposition of these cases heralded a change towards greater recognition for same-sex relationships. For in addition to the rather occupational-sounding tasks listed in *Whorton,* the agreement there also included the word "lover"—albeit at the end of the string, rather than at the beginning. Given the speed with which the lives of same-sex couples were emerging into view during this period, the seven-year lapse between *Jones* (1981) and *Whorton* (1988) may explain as much as any other purported justification for the difference in result.

III. THE 1990S: SLOW PROGRESS, QUICK BACKLASH

By the 1990s, gay and lesbian people were streaming out of the closet.[52] This accelerating emergence spilled into the legal arena in two of the areas under discussion: marriage equality and private support agreements. And while common law torts remained quiet, an increasing boldness and financial need did begin to result in wrongful death suits—which began to have at least some modicum of success, despite the high statutory hurdle.

A. The Marriage Equality Debate Enters the National Conversation

As with the early marriage cases,[53] the first to gain notoriety in the 1990's was filed by a couple acting on its own initiative—not strategically hand-picked by legal advocacy groups to present the strongest possible factual and legal arguments. Indeed, such advocacy groups feared such suits because of their potential to create unwelcome precedent. That said, the plaintiffs could hardly have picked a better state than Hawaii in which

51. 18 Cal. 3d 660, 669–74 (Cal. 1976).

52. *See* R. BRADLEY SEARS & M.V. LEE BADGETT, THE WILLIAMS INSTITUTE, SAME-SEX COUPLES AND SAME-SEX COUPLES RAISING CHILDREN IN THE UNITED STATES: DATA FROM CENSUS 2000 (2004), http://www.law.ucla.edu/williamsinstitute/publications/CaliforniaCouplesReport.pdf.

53. Such unsuccessful cases continued to be filed throughout the 1980s and until and beyond the time that the case discussed in the text succeeded. For a listing of such cases, see WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 803 n.f (1997) (listing cases).

to challenge their exclusion from the institution of marriage: the state was heavily Democratic, and was known for a multicultural tradition that might have seemed receptive to this sort of equality argument. Moreover, the court itself had a reputation as progressive. This reputation continued with *Baehr v. Lewin*,[54] the case that showed, in result, the gains that the GLBT community had by 1993 made; rhetorically, the decision reveals a court beginning to reflect a transition in the broader society.

In *Baehr*, the Hawaii Supreme Court took the then-astonishing position[55] that the state needed a compelling reason to deny a same-sex couple a marriage license, and remanded the case to the lower court to determine whether that standard could be met. Yet the court so held not because same-sex couples were said to have a fundamental right to marry, but because denying the license in such cases presumptively amounted to impermissible sex discrimination in violation of the equal rights amendment to the Hawaii state constitution. Although this holding is potentially radical from a gender-equality point of view,[56] it steps away from "the gay issue"; indeed, the court made that point explicitly in stating that a same-sex couple need not even be homosexual.[57] In so doing, the court was able to anchor its holding in a principle for which there was widespread agreement—gender equality—while achieving a more controversial civil rights result.

From a short-term perspective, the Hawaii Supreme Court's decision was worse than a failure; it was a debacle. Once the trial court found, in 1996, that the high hurdle imposed by the equal rights amendment had not been cleared,[58] a cascade of reactions more than undid the result. The Hawaii legislature proposed an amendment to the state's constitution that would allow the legislature to define marriage and the union of a man and a woman that was then overwhelmingly approved by voters, thereby mooting the courts' holdings.[59] More significantly, the United States Congress

54. 852 P.2d 44 (Haw. 1993).

55. "As of 1993, not a single judge or state attorney general had expressed an opinion that same-sex marriage is required by any principle of law." ESKRIDGE, JR. & HUNTER, *supra* note 53, at 803.

56. This notion of exclusion of same-sex couples from marriage as gender discrimination was substantially fleshed out by Justice Johnson in her opinion in Baker v. State, 744 A.2d 864 (Vt. 1999), in which she concurred in the holding that denying same-sex couples the benefit of marriage violated the state's equality guarantee but dissented from the holding that the situation could be remedied by offering a marriage "equivalent," such as the civil union that was ultimately adopted. For a detailed analysis of this concurring opinion, see John G. Culhane, *A Tale of Two Concurrences: Same-Sex Marriage and Products Liability*, 7 WM. & MARY J. WOMEN & L. 447, 458–71 (2001).

57. *Baehr*, 852 P.2d at 51.

58. Lynn D. Wardle, *Same-Sex Marriage: The Ruling in* Baehr v. Miike, NAT'L LAW. ASS'N REV., Winter 1996, http://www.nla.org/winter96/pg5.html.

59. *Hawaii Gives Legislature Power to Ban Same-Sex Marriage*, CNN, Nov. 3, 1998, http://www.cnn.com/ALLPOLITICS/stories/1998/11/04/same.sex.ballot/.

passed (and President Clinton signed) the so-called Defense of Marriage Act (DOMA),[60] a 1996 statute that did two things: (1) expressly permitted states to refuse recognition of same-sex marriages performed and valid in other states; and (2) defined marriage as the union of a man and a woman for federal purposes. In addition, many states quickly acted to pass their own versions of DOMA, statutorily defining marriage so as to exclude same-sex couples.[61]

The sober analysis of the Hawaii Supreme Court was of a piece with a 1996 decision by the United States Supreme Court. In *Romer v. Evans*,[62] a solid majority of the Court held that a Colorado state constitutional amendment that prohibited local government from enacting gay-friendly legislation, and that disallowed discrimination claims based on sexual orientation, was in defiance of the constitutional promise of equal protection under the laws. As we have seen, however, these progressive moves by the courts were at odds with much of the popular will; after all, it was the voters of Colorado who had approved the sweeping anti-gay amendment. The plebiscite had been drafted by the virulently anti-gay Colorado for Family Values, whose campaign in favor of passage had employed a typical litany of extreme, and false, statements: Gay men were AIDS-infected and died young; "homosexuals" tried to recruit children— "maybe even your own"; and basic civil rights protections, when extended to gays, were "special rights."[63]

Baehr and *Romer*, on the one hand, and DOMA and the Colorado amendment, taken together, suggest a rift between courts and the public's view—a rift that persists to this day. As the debate over DOMA demonstrated, even at the national level politicians shared—or were willing to accede to—constituents' views on the meaning and reach of marriage and its rights. Yet the rhetoric employed during the DOMA debate indicates a transition to a more tolerant and respectful view of the GLBT community; the focus of many of the comments was on the tradition of marriage, and on its perceived definitional (and therefore immutable) imperatives, rather than on negative stereotypes about gays. Remarks of this type dominated the discourse, but voices both more progressive and more reactionary were also heard—not surprising during a time of transition when many Americans were coming to know gay and lesbian people and the reality of their

60. 28 U.S.C. § 1738C (2006).

61. *See* Nancy J. Knauer, *Same-Sex Marriage and Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 421, 433 (2008).

62. 517 U.S. 620, 631–32 (1996).

63. WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS 280 (2008) (citing source materials).

lives, while others wished to deny this changed reality. A few examples from the debate over DOMA will serve to illustrate these points.

As noted, the forces of relative moderation held sway, reflecting the emerging view that gays—and their behavior—should be tolerated but that such toleration should not translate into tampering with the mainstream's perceived prerogatives—especially marriage. Typical of this line of defense was the comment by Representative Seastrand that "[t]raditional marriage . . . is a house built on a rock. As shifting sands of public opinion and prevailing winds of compromise damage other institutions, marriage endures, and so must its historically legal definition."[64] In a somewhat similar vein, Florida's Representative Canady expressed the view that "[f]amilies are not merely constructs of outdated convention, and traditional marriage laws were not based on animosity toward homosexuals."[65] Cementing the point that toleration holds the majority in a superior position, Rep. Canady added: "Our law should not treat homosexual relationships as the moral equivalent of the heterosexual relationships on which the family is based."[66]

Similarly, in the Senate even conservative Texas Senator Phil Gramm emphasized the historical and traditional role of marriage, declining to be drawn into denigration of gay and lesbian people: "Human beings have always given traditional marriage a special sanction. Not that there cannot be contracts among individuals, but there is something unique about the traditional family in terms of what it does for our society and the foundation it provides . . . "[67]

These anodyne support statements for traditional marriage were hemmed in on both sides by more virulent anti-gay rhetoric and more progressive voices. Some, such as North Carolina Senator Lauch Faircloth, offered unsupported pronouncements that "[s]ame-sex unions do not make strong families."[68] In a similar vein, Sen. Robert Byrd of West Virginia blithely stated that, "out of same-sex relationships . . . emotional bonding

64. 142 CONG. REC. H7484 (daily ed. July 12, 1996) (statement of Rep. Seastrand).

65. 142 CONG. REC. H7441 (daily ed. July 11, 1996) (statement of Rep. Canaway).

66. *Id.*

67. 142 CONG. REC. S10106 (daily ed. Sept. 10, 1996) (statement of Sen. Gramm).

68. *Id.* at S10117 (statement of Sen. Faircloth). Senator Faircloth also made a separate, and logically incoherent, point. To the extent that same-sex couples complained that exclusion from marriage was burdensome because of the denial of benefits that the status confers, their claim had no merit because benefits are not a good reason to marry. *Id.* Well, if benefits are not supposed to provide at least some incentive to marry, why are they offered to anyone in the first place? And to the extent that benefits are intended not as incentive but to encourage and support the flourishing of existing marriages, we are brought back, full-circle, to the independent question of who should be allowed to marry (and why).

oftentimes does not take place . . . "[69] Others, such as Rep. Lamar Smith of Texas, reflected a more openly hostile view, declaring that "same sex 'marriages' demean the fundamental institution of marriage. They legitimize unnatural and immoral behavior."[70] (Note the single quotes around the word "marriage," a well-known signal that the statement's author regards same-sex marriages as oxymoronic.) Never to be outdone in the tone and strength of his old-school homophobia, Sen. Jesse Helms of North Carolina offered the eye-rolling reference to "Adam and Eve—not Adam and Steve," and hoped that Congress would reject homosexuals' effort at "legitimizing their behavior."[71] Further, some DOMA supporters, without factual support, invoked the interests of children as supporting the exclusion of same-sex couples from marriage.[72]

Despite these comments, and the rather lopsided votes in both chambers of Congress,[73] a number of statements indicate an increasing awareness of the legitimacy of at least some of the points made in support of marriage equality. Some such statements came from supporters of the measure who were attempting to balance the religious understanding of marriage with the secular reality of benefits conferred. Senator Bill Bradley, for instance, augured the "virtual marriage" status of the civil union in stating that:

> [M]arriage with all its religious connotations is different from a secular desire to get housing or a good job. So . . . in trying to balance the religious and historical idea of marriage with the need for extending rights, I say that rights should extend up to but not include recognition of same-sex marriages.[74]

Others went further, seeing same-sex marriages as consistent with the emphasis on commitment supposedly fueling the DOMA. As Representative Meehan of Massachusetts stated:

> Our society encourages and values a commitment to long-term monogamous relationships—and we honor those commitments by creating the legal institution of marriage. If we then deny the right of marriage to a

69. *Id.* at S10109 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd).

70. 142 CONG. REC. H7494 (daily ed. July 12, 1996) (statement of Rep. Smith).

71. 142 CONG. REC. S10068 (daily ed. Sept. 9, 1996) (statement of Sen. Helms).

72. For example, referring to legislative findings that marriage "promotes the interests of children," Senator Kempthorne of Idaho stated that "we want to protect that institution." 142 Cong. Rec. S10116 (statement of Sen. Kempthorne). By the time Congress debated the Federal Marriage Amendment, discussed in Part IV.B., *infra*, the "interests of children" argument was ascendant.

73. The Senate supported DOMA by a vote of 85–14, while the result in the House was 342–67. *See* U.S. Senate, Legislation and Records Home, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=2&vote=00280 (last visited Apr. 10, 2009) (Senate results); Final Vote Results For Role Call 316, http://clerk.house.gov/evs/1996/roll316.xml (last visited Apr. 10, 2009) (House results).

74. 142 CONG. REC. S10125 (daily ed. Sept. 10, 1996) (statement of Sen. Bradley).

> segment of our population, we devalue their commitment without compelling reasons . . . We can't have it both ways. Protecting everyone's right to make a legal commitment to another is a defense of marriage.[75]

Massachusetts Representative Barney Frank made a similar point: "This notion that a loving relationship between two persons of the same sex threatens relationships between two people of the opposite sex, that is what denigrates heterosexual marriage."[76]

Perhaps most progressive was Representative Sheila Jackson-Lee of Texas, who noted that the DOMA was anchored in assumptions about marriage and family that were "based on an antiquated notion . . . .Today, there is no single definition of family that applies to all individuals."[77] After providing a list of various kinds of families, Jackson-Lee concluded by bringing in "individuals of the same sex living together and sharing their lives as a couple . . . " She then called DOMA "unnecessary," and stated that it "patently disregards the 14th Amendment [right to] equal protection under the law."[78]

B. Equality in Tort and Private Ordering Move (Sluggishly) Forward

These fascinating exchanges were to some extent mirrored in state-by-state debates over DOMA, with legislators in most places reflecting the conflicts of their constituents. Meanwhile, of course, actual same-sex couples had legal problems and obstacles in need of solution, with or without the umbrella protection that full marriage equality would have provided. Increasingly, attorneys worked with same-sex couples to create enforceable support contracts,[79] and courts began to express willingness to honor these contracts even where the relationship itself enjoyed no state sanction.

A telling example of a court's need and willingness to address the support problems that plague many couples, straight and gay alike, is the 1992 decision by the Georgia Supreme Court in *Crooke v. Gilden*.[80] There, a couple—apparently without first names and without gender—were at odds over an agreement they had entered into for sharing of expenses and assets, as well as for the improvement of certain real estate. From an independent source, one learns that the litigants were in fact a lesbian couple,[81]

75. 142 CONG. REC. H7486 (daily ed. July 12, 1996) (statement of Rep. Meehan).

76. 142 CONG. REC. H7447 (daily ed. July 11, 1996) (statement of Rep. Frank).

77. *Id.* at H7448 (statement of Rep. Jackson-Lee).

78. *Id.*

79. *See, e.g.*, Posik v. Layton, 695 So.2d 759 (Fla. 1997) (describing and enforcing a complex agreement between two women that was drawn up by an attorney).

80. 414 S.E.2d 645 (Ga. 1992).

81. Nancy Ehrenreich, *The Progressive Potential in Privatization*, 73 DENV. U. L. REV. 1235,

but the court took pains to avoid disclosing anything about the parties or their relationship. As to the defendant's claim that the contract was unenforceable because supported by "illegal consideration," the court found that such consideration was "incidental" to the promised performances under the contract, and permitted the remedy of partitioning the real property. As the dissent pointed out, the majority's conclusion was not mandated by the facts (which should have been entitled to deference). Crooke had testified at trial that she would not have entered into the contract if not for the promise of the illegal activity, and apparently such testimony was unrebutted. Although such testimony was obviously self-serving, the trial judge found it credible; a finding, again, that would ordinarily not be second-guessed by an appellate court. But the decision shows that, even in a state that still had an anti-sodomy law,[82] same-sex couples were beginning to gain recognition.

This practical, problem-solving approach had an analogue in tort law as well. Recall that wrongful death statutes are inhospitable to same-sex couples, as these laws expressly qualify only named classes of beneficiaries for recovery. In the 1990s, the categories always included spouses, but they never included unmarried cohabitants, whether of the same sex or of the opposite sex.[83]

Given that the wrongful death statutes are intended, in part, to compensate those who relied on and could have been expected to continue receiving financial support from the decedent, it becomes obvious that the narrow categories of eligible plaintiffs sometimes leaves a vital statutory purpose unfilled. For example, a stay-at-home domestic partner would not be able to recover a dime from the negligent actor whose actions resulted in

1249 (1996).

82. In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the U.S. Supreme Court infamously upheld Georgia's anti-sodomy law. The decision was later overruled, of course, by *Lawrence v. Texas*, 539 U.S. 558 (2003), and before that the Georgia Supreme Court had declared, in 1998, that this same law was unconstitutional under Georgia's *state* constitutional guarantee of privacy. Powell v. State, 510 S.E.2d 18 (Ga. 1998). Still, in 1992, when *Crooke v. Gilden* was decided, even consensual sex between two women was illegal.

83. In at least one state, though, such unmarried partners might qualify were they named as beneficiaries in the decedent's will. MICH. COMP. LAWS ANN. § 600.2922(1)-(3)(c) (West 2008) ("[P]ersons who may be entitled to damanges under this section shall be limited to . . . [t]hose persons who are devisees under the will of the deceased, except those whose relationship with the decedent violated Michigan law. . ."). No cases have decided whether the language of the sentence's last clause would disqualify the surviving member of a same-sex couple in light of Michigan's constitutional amendment prohibiting same-sex marriages. The Michigan Constitution provides, in Article I, § 25: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." MICH. CONST. art. I, § 25. A recent Michigan State Supreme Court case, discussed in Part IV.C., suggests an extremely broad interpretation of this amendment. *See* Nat'l. Pride at Work, Inc. v. Governor of Mich., 748 N.W.2d 524 (Mich. 2008).

the decedent partner's death, while the children and often even the parents of this adult "child" would be able to recover if able to show compensable loss.

Because of the devastating financial loss that the statute would otherwise leave unremedied, it is perhaps not surprising that a few of these survivors brought suit in apparent defiance of the laws' clear language. In a handful of appellate cases from the 1980s, those in opposite-sex relationships had been unsuccessful.[84] At least in these cases, courts could rely on the often-stated (but ultimately unpersuasive) argument that those who deliberately forego the formality of legal marriage cannot complain when they are unable to gain benefits associated with it. Of course, this argument has no traction in the case of same-sex couples, who, in the 1990s, were universally unable to marry. And at least two judges showed apparently sympathy for the inextricable difficulty facing surviving members of such couples. Their analyses and sympathies again show the emerging recognition of the reality of gay relationships.

In *Solomon v. District of Columbia*,[85] the trial judge denied the District of Columbia's motion for summary judgment in a wrongful death case brought by a woman whose lesbian partner had allegedly been killed through the District's negligence. The District's motion was based on a straightforward reading of the statute, which limited recovery to "spouse" and "next of kin."[86] The court, though, exploited the lack of an explicit statutory definition of "next of kin" to find that the survivor qualified as such, even though she could not be considered a spouse. While the result was not strictly contradicted by a disqualifying definition of "next of kin," the court's result required disregarding the overall structure of the law of intestacy. That law provides a comprehensive, and seemingly complete list of those who qualify as next of kin; not surprisingly, surviving members of intimate, but unmarried, couples are not included in that catalogue.[87]

Judge Dorsey achieved this questionable reading of the statute because of her recognition of the reality of their lives, and the consequences of denying recovery. On the former point, the court had this to say:

The relationship between Ms. Solomon and Ms. Lane [the decedent]

84. *See, e.g.*, Matuz v. Gerardin Corp., 254 Cal. Rptr. 725 (Cal. Ct. App. 1989); Nieto v. City of Los Angeles, 188 Cal. Rptr. 31 (Cal. Ct. App. 1982); Roe v. Ludtke Trucking, Inc., 732 P.2d 1021 (Wash. Ct. App. 1987).

85. Solomon v. District of Columbia, 21 FAM. L. REP. (BNA) 1305, 1316 (D.C. Apr. 26, 1995).

86. *Id.* The decision is reported only in the BNA Family Law Reporter and represents the reporter's synopsis of the case, not the exact language used by the judge. Quoted material is taken from 1995 LESBIAN/GAY L. NOTES 83 (1995).

87. *See* D.C. CODE ANN. §§ 19-301-316 (2001); *see also* Lewis v. Lewis, 708 A.2d 249, 251–52 (D.C. 1998).

> contained all the attributes of a married couple but for the fact that it is a same sex union that cannot be recognized with a marriage license... [T]his close relationship, coupled with the fact that they were both legally recognized parents of the same two children leads the Court to conclude that Ms. Solomon is the next of kin of Ms. Lane.[88]

As to reality, Judge Dorsey clearly understood the artificiality of separating the parenting role from the spousal one, especially since failure to recognize the couple as such would have created an anomalous result: "It is clear that the [couple's] two children are eligible to receive remedy pursuant to the Wrongful Death Act... Since Ms. Solomon also relied on her for support and maintenance, logic dictates that she is also entitled to remedies..."[89]

In a dissenting opinion in *Raum v. Restaurant Associates*, Judge Rosenberger showed similar sympathy for a surviving dependent in a same-sex wrongful death case. First, he read the statute as ambiguous. Then, he invoked other decisional law from New York that had reflected a functional view of law over a literal one, and then used that approach to broadly read a statute "whose purpose is to promote the public welfare, so that homosexual couples will not be disadvantaged by their inability to give their relationship a legal status."[90] He also noted that, in contrast to other cases in which the court had declined to call same-sex partners "spouses,"[91] "the wrongful-death statute makes no alternative provision for homosexual dependents, which... raises equal protection problems unless surviving 'spouse' is interpreted more broadly."[92]

Dividing this article by decades suggests a tidiness of progress that has been to an extent belied by the discussion within each section; these expositions reveal the complexity and ambiguity of political, social, and judicial rules and rhetoric surrounding the integration of gay lives and relationships into mainstream culture. Marriage is a cornerstone of such integration, so it

88. *Solomon v. Dist. of Columbia*, 1995 LESBIAN/GAY L. NOTES 83.

89. *Id.*

90. Raum v. Restaurant Assocs., Inc., 675 N.Y.S.2d 343, 345 (N.Y. App. Div. 1998) (Rosenberger, J.P., dissenting).

91. These cases include efforts by surviving same-sex partners to be considered spouses under the law of intestate succession, Matter of Cooper, 592 N.Y.S.2d 797 (N.Y. App. Div. 1993), as well as a case in which the Crime Victims Board decided that same-sex partners were not surviving spouses to be compensated under the relevant law. Secord v. Fischetti, 653 N.Y.S.2d 551 (N.Y. App. Div. 1997). Although in the first set of cases, same-sex and opposite-sex couples are not identically situated, at least the same-sex partners can provide for each other by will, thereby avoiding the intestacy problem. As to Secord, Judge Rosenberger noted that surviving same-sex partners were able to recover under a different section of the statute, which paid damages to "any other person dependent for his principal support upon a victim of a crime." *Raum*, 675 N.Y.S.2d at 346 (Rosenberger, J.P., dissenting). The lack of alternative protection provided by the wrongful death statute seems to have been the linchpin of Judge Rosenberger's argument.

92. *Raum*, 675 N.Y.S.2d at 346 (Rosenberger, J.P., dissenting).

was to be expected that battles over marriage equality would be the most seriously waged. As the next section demonstrated, this struggle is hardly over.

IV. THE "AUGHTS:" STAGGERING TOWARDS EQUALITY?

On December 20, 1999, the Vermont Supreme Court welcomed the new millennium through its decision in *Baker v. State of Vermont*.[93] Although it could not have been known at the time, the carefully constructed compromise at the core of the court's holding has come to represent the place where a majority of Americans find themselves today on the issue of gay relationships: in favor of formal equality—most often represented by the newly minted "civil union" status that arose from *Baker*—but against outright *marriage* equality. In this final section, I describe the evolving perception of gays and lesbians through the familiar triad of marriage, tort, and private ordering, and conclude that the ever-increasing social acceptance of gay people, lives and families will eventually lead to legal equality in all realms. But marriage will likely be difficult for at least a generation to come.

A. Marriage Equality: Preliminaries

In *Baker,* the court held that denying the benefits of marriage to same-sex couples violated the state's constitutional promise of "common benefits" (read: equal rights) for all "Vermonters." The court, however, declined to require the state to extend the right of marriage to these couples, instead leaving the state free to devise a parallel institution for same-sex couples that would grant all of the rights of marriage without bestowing the status of marriage. Elsewhere, I have argued that the court should have taken the final step and ordered full marriage equality,[94] but events have shown that the decision, while legally impeachable, was politically astute.[95] Yet the decision is also notable for the court's soaring peroration, which recognized and welcomed gay and lesbian relationships into the human family: "The extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and

93. 744 A.2d 864 (Vt. 1999).

94. "[T]he majority should have discharged its responsibility to provide the . . . remedy sought. Instead, what remains is the shell of legal discrimination against same-sex couples, who have to settle for something not-quite-marriage." John G. Culhane, *A Tale of Two Concurrences: Same-Sex Marriage and Products Liability*, 7 WM. & MARY J. WOMEN & L. 447, 471 (2001).

95. As the local Vermont journalist David Moats has chronicled in his excellent book, CIVIL WARS (2004), it was difficult enough to enact the civil union law.

security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity."[96]

In so stating, the court moved in step with the reality of increasing presence and acceptance of gays and lesbians in the United States. Data and anecdote alike bear witness to this phenomenon, which is likely in accordance with the intuition of most readers of this article. As to data: In the years between 2000 and 2005, the number of same-sex couple households increased by about 30% (from 600,000 to 777,000)[97] obviously this number includes only self-identifying gays and lesbians in relationships stable enough to call themselves "households." Further, gay and lesbian parents are increasingly raising children.[98]

Translating this statistical profile to recognition of the reality of gay lives is not difficult, and can be found in all sorts of places. For example, U.S. Supreme Court Justice Sandra Day O'Connor voted with a majority of justices in the 1987 case of *Bowers v. Hardwick*, a decision holding that states could constitutionally prohibit intimate, private conduct between members of the same-sex. By 2003, however, she voted with a majority in *Lawrence v. Texas* in its decision that overruled *Bowers*, writing a concurrence stating that principles of equality forbade the states from this kind of disparate and disparaging treatment. While it is true that the concurrence allowed Justice O'Connor to avoid directly contradicting her earlier position, the evolution in her view seems obvious. At least one observer has attributed this change to the new perception Justice O'Connor gained from having openly gay law clerks, at least one of whom was raising a child.[99]

Of greater practical significance, the majority opinion in *Lawrence* evinces this emerging recognition that gay lives are real and to be valued and respected. Justice Anthony Kennedy's language went far beyond what was needful to the task of overruling *Bowers*, as bad a piece of Supreme

96. *Baker*, 744 A.2d at 889.

97. *See* Ryan Lee, *ATL Ranks Third Among Cities With Highest Percentage of Gay Residents*, WILLIAMS INSTITUTE, Nov. 17, 2006, http://www.law.ucla.edu/williamsinstitute/press/ATLRanks Third.html (using data from 2000 and 2005 census reports).

98. *See* SEARS & BADGETT, *supra* note 52 (analyzing census data from 2000 and stating that as of that date there were 90,000 same-sex couples in California and that about 70,000 children were being raised in households headed by same-sex partners).

99. ESKRIDGE, JR., *supra* note 63, at 325 (stating that: "More than her colleagues, she had had her eyes opened by former law clerks who had come out as homosexual; at least one was raising a child."). This point is elaborated on in another book, where the author describes how Justice O'Connor extended her practice of giving tee-shirts to the newborns of her former law clerks to include a gay former clerk who had just adopted a baby: "O'Connor poked her head into her current clerks' office, explained the situation, and said, 'I should send one of the shirts, right? We think this is a good idea, don't we?' The clerks nodded, and the shirt went in the mail." JEFFREY TOOBIN, THE NINE 187 (2007).

Court logic and craft as one can find. For Justice Kennedy, gay people, like all other citizens were "entitled to respect for their private lives."[100] Further, "[t]he State cannot demean their existence or control their destiny by making their private sexual conduct a crime."[101]

For all of its affirming language and sympathetic tone, though, *Lawrence* also reiterates—via needless dictum—that the case is not about marriage. Again, Justice Kennedy: "The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[102] Justice O'Connor's concurrence was far more explicit on the marriage issue, and, typically for her, mirrored the prevailing view that rights relating to private sexual intimacies were less problematic than of marriage: "Unlike the moral disapproval of same-sex relations . . . other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."[103]

Justice O'Connor's evolving position on issues relating to gay rights can be seen in many arenas today, ranging from judicial decisions on same-sex marriage, to legislation and popular initiatives on the issue, to tort and private law. The remainder of this Article briefly discusses these three areas.

B. Marriage Equality:Courts Break Through, Legislatures Lock Down

With *Baker* as immediate background, several state appellate courts have confronted the marriage equality issue during the present decade. Many articles have been written analyzing and dissecting these opinions, and I shall mostly refrain from doing so here. Instead, the cases are discussed in furtherance of this Article's project of chronicling the halting but clear substantive and rhetorical progress of the GLBT movement towards real, and deeply understood, equality.

The cases and judicial views may fairly be grouped into four categories: cases and judges that support full marriage equality; one case that follows the *Baker* "virtual equality" approach; cases and judges that deny marriage equality but are clearly sympathetic to the unfairness and difficulty that their decisions and the underlying legal system impose on gay couples; and cases and judges that matter-of-factly (and occasionally nas-

100. *Lawrence*, 539 U.S. at 578.

101. *Id.*

102. *Id.* Elsewhere, Justice Kennedy states that the statutes in question "seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose. . ." *Id.* at 558.

103. *Id.* at 585 (O'Connor, J., concurring).

tily) reject the equality claim. This spectrum, of course, reflects the bandwidth of public opinion on the issue, but focusing on the language used by courts serves to articulate the underlying sentiment that often wants for clear expression. It will best suit my purposes to work from the least sympathetic views to the most.

It is striking that even the decisions and judicial pronouncements that give no comfort to gay couples generally refrain from the kind of borderline hostile rhetoric that sometimes marked judges' views not so long ago. "Generally" is the operative word, because at least one opinion does demonstrate a thinly masked hostility. In his concurring opinion in *Andersen v. King County*,[104] Justice James M. Johnson made little effort to disguise his lack of sympathy for the plaintiffs' position. Joined by Justice Sanders, he was sure to expressly disagree with the plurality opinion's view that the case was "difficult."[105] The concurring opinion also sympathetically and uncritically cited studies purporting to show that children did best in stable two-parent families, barely acknowledging that these studies did not involve a side-by-side comparison of opposite-sex and same-sex couples.[106] Most tellingly, the opinion adopts the grammatical tactic favored by the most vocal opponents of marriage equality: placing ironic quotation marks around the word "marriage", thus: same-sex "marriage."[107]

More typically, decisions and opinions rejecting marriage equality claims avoid this kind of provocative approach. In *Standhardt v. Superior Court*,[108] an Arizona appellate court followed a standard, "matter of fact" approach—not hostile, but not sympathetic to the real-world effect of denying marriage equality on the gay community. One measure of the court's approach comes at the beginning: The *Standhardt* court did not provide any description of the relationship of the couple challenging Arizona's anti-marriage equality law. As we shall see, more sympathetic courts routinely adopt the petitioning parties' descriptions of their lives and highlight them in their opinions. As for legal analysis, *Standhardt* mostly evinces a clinical detachment from reality: defining the "fundamental right" to marry as limited to opposite-sex marriage; declining to recognize sexual orientation as a suspect class for purposes of equal protection analysis; and then using the highly deferential rational basis test to conclude that the legislature might

104. 138 P.3d 963 (Wash. 2006).

105. *Id.* at 991 (Johnson, J., concurring in judgment only).

106. *Id.* at 1002.

107. *Id.* at 993. For a good example of a commentator employing this tactic, see Robert P. George, *What's Sex Got to Do with It?: Marriage, Morality, and Rationality*, 49 AM. J. JURIS. 63, 81, nn.62–63 (2004).

108. 77 P.3d 451 (Ariz. Ct. App. 2003).

have believed that restricting marriage rights to the only couples capable of unassisted biological reproduction was justified. Because same-sex couples cannot do so, the court went on, "the State could also reasonably decide that sanctioning same-sex marriage would do little to advance the State's interest in ensuring responsible procreation within committed, long-term relationships."[109]

Critics of this argument abound (I am one of them),[110] but my purpose here is not to substantively criticize arguments, but to explore their relationship to a court's underlying view about gay couples. Of course, courts can disguise or suppress these views behind a veil of "neutral" legal analysis, but critical legal scholars long ago lifted that veil to expose the assumptions underlying decisional law. The *Standhardt* court was particularly adept at maintaining this illusion of obeisance to constitutional commands; it recognized that that the exclusion of same-sex couples from the institution of marriage "may result in some inequity for children raised by same-sex couples,"[111] but purported to be unable to do anything about the injustice it had just identified: After all, this is rational basis analysis! This clinical understatement reflects a level of detachment from the reality of life for children (and for their parents, inequity to whom is not even acknowledged).

While *Standhardt* identified the problem but did not empathize, the plurality opinion in *Andersen v. King County* went a step further. Significantly, the *Andersen* plurality did not discuss the lives of the nineteen couples who had challenged the law. Yet, after a long decision that largely tracks the standard constitutional justifications for excluding same-sex couples from marriage, the court did more than acknowledge that its denial of marriage equality might "result in some inequity," it spelled out the problem rather sympathetically:

> [M]any day-to-day decisions that are routine for married couples are more complex, more agonizing, and more costly for same-sex couples, unlike married couples who automatically have the advantages and rights provided to them in . . . laws and policies such as those surrounding medical conditions . . . probate . . . and health insurance.[112]

Then, the court went a step further, inviting the legislature to remedy the inequity it had just identified: "[G]iven the clear hardship faced by same-sex couples evidenced in this lawsuit, the legislature may want to reexam-

109. *Id.* at 463.

110. John G. Culhane, *Beyond Rights and Morality: The Overlooked Public Health Argument for Same-Sex Marriage*, 17 L. & SEXUALITY REV. 7, 19 (2008).

111. *Standhardt*, 77 P.3d at 463.

112. *Andersen*, 138 P.3d at 990.

ine the impact of the marriage laws on all citizens of this state."[113] In so stating, the court might also have been telegraphing its view on the argument that, even if same-sex couples are not entitled to "marriage," they might have a case for the rights and obligations incident to marriage; but the court went on to note that the parties had expressly requested that the court not consider this alternative approach.[114]

That approach, which might be called the "virtual equality" line of decisional and legislative law, reflects a view that generally recognizes the inequity of denying same-sex couples the *benefits* of marriage, but attempts to strike the political (and sometimes judicial) compromise enabled by *Baker*.

Perhaps the *Andersen* court was also inviting future plaintiffs to seek the benefits of marriage without the label. If so, it veered close to the approach pioneered in *Baker* and most recently followed by the New Jersey Supreme Court in *Lewis v. Harris*.[115] The *Lewis* court came as close as possible to mandating the issuance of marriage licenses to same-sex couples: four of seven justices left open the "civil union" option (which the legislature subsequently grasped for), while the three dissenters would have required full marriage equality, including the title.[116] Thus, all seven judges supported at least formal equality. Moreover, the majority decision is overtly empathetic to the seven couples before them, devoting an entire subsection of the opinion to a description of their lives, and summarizing the discussion with this stark statement: "The seeming ordinariness of plaintiffs' lives is belied by the social indignities and economic difficulties that they daily face due to the inferior legal standing of their relationship compared to that of married couples."[117] That the court nonetheless stopped short of mandating full marriage equality seemed to stem from its optimism that events in New Jersey were moving inexorably in the plaintiffs' direction—"we must steer clear of the swift and treacherous currents of social policy"[118]—and that further discussion should be through the "democratic process. Although courts can ensure equal treatment, they cannot guarantee social acceptance, which must come through the evolving

113. *Id.* Shortly before this article went to press, the Washington legislature took the court's suggestion, enacting a comprehensive domestic partnership statute. *See* Chris Grygiel, *Lawmakers Pass Expanded Domestic Partner Rights*, SEATTLEPI.COM, Apr. 16, 2009, http://www.seattlepi.com/local/405189_domestic16.html.

114. *Id.*

115. Lewis v. Harris, 908 A.2d 196 (N.J. 2006).

116. *Id.* at 220–21.

117. *Id.* at 202.

118. *Id.* at 222.

ethos of a maturing society."[119]

Issuing a moving dissent on her final day on the bench, Chief Judge Deborah Poritz understood even more fully the complexity of the equality problem, and made that understanding evident in an unusual way: by quoting at length from the affidavits submitted by one of the couples attesting to the real, human cost of their exclusion from the intangible benefits conferred by their inability to speak the word "marriage" in describing their lives. Because Justice Poritz took the unusual step of incorporating these attestations into her opinion, it is worth quoting one of them at length:

> I've seen that there is a significant respect that comes with the declaration "[w]e're married." Society endows the institution of marriage with not only a host of rights and responsibilities, but with a significant respect for the relationship of the married couple. When you say that you are married, others know immediately that you have taken steps to create something special . . . The word "married" gives you automatic membership in a vast club of people whose values are clarified by their choice of marriage. With a marriage, everyone can instantly relate to you and your relationship. They don't have to wonder what kind of relationship it is or how to refer to it or how much to respect it.[120]

The final step, of course, is marriage equality. Beginning with the groundbreaking decision by the Massachusetts Supreme Court in *Goodridge v. Department of Public Health,* as of this writing four state supreme courts (California, Connecticut, and Iowa as well as Massachusetts) have mandated the issuance of marriage licenses for same-sex couples, thereby implicitly (in the case of Massachusetts) or explicitly (in the other states) rejecting the argument that other, recently created institutions (the civil union or the domestic partnership) are the equal of marriage.[121]

119. *Id.* at 223.

120. *Id.* at 226 (Poritz, C.J., dissenting).

121. In Massachusetts, the challenge to the prohibition against same-sex marriage was brought against a backdrop of no state recognition of anything like marriage for gay couples. Therefore, when the court held that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution[,]" Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003), there ensued some discussion among commentators and the state legislature as to whether the court might countenance creation of a parallel institution that conferred the "protections, benefits and obligations" of marriage, without the label. The Massachusetts Senate therefore submitted to the Justices of the Supreme Judicial Court a bill that established civil unions while prohibiting same-sex couples from marrying, and requested an opinion from the justices as to whether such a bill, if ultimately enacted, would satisfy the court's directive. Opinion of the Justices to the Senate, 802 N.E.2d 565, 566 (Mass. 2004). The court's rejection of this effort could not have been clearer, and presages the treatment of the issue by the California and Connecticut Supreme Courts:

> Because the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status. . . . If . . . the proponents of the bill believe that no message is conveyed by eschewing the word 'marriage' and replacing it with 'civil union' . . . we doubt that the attempt to circumvent the court's decision in Goodridge would be so purposeful.

Two features of these decisions bear discussion for present purposes. First, anyone furnished with the facts as stated by courts considering the marriage equality issue would stand an excellent chance of predicting the legal outcome. Those courts that have rejected the claims have generally avoided discussion of the lives of the couples before them, while courts (and judges in dissent) favoring marriage equality have described these lives with the richness of empathy. Compare, for example, Chief Justice Judith Kaye's summarizing discussion of the plaintiffs' lives in her dissenting opinion in *Hernandez v. Robles*,[122] with the absence of any such mention in the majority opinion denying marriage equality (or even civil unions). In her words: "Plaintiffs . . . include a doctor, a police officer, a public school teacher, a nurse, an artist and a State legislator. Ranging in age from under 30 to 68, plaintiffs reflect a diversity of races, religions, and ethnicities."[123] Chief Judge Kaye then went on to cite the couples' geographical diversity, long-term commitments, parenting obligations, and community involvement, and concluded: "In short, plaintiffs represent a cross-section of New Yorkers who want only to live full lives, raise their children, better their communities and be good neighbors."[124] These descriptions foregrounded the empathetic statement that followed, in which Chief Judge Kaye gathered herself and all New Yorkers into a warm community, but one that unfairly excluded gay couples:

> For most of us, leading a full life includes establishing a family. Indeed, most New Yorkers can look back on, or forward to, their wedding as among the most significant events of their lives. They, like plaintiffs, grew up hoping to find that one person with whom they would share their future, eager to express their mutual lifetime pledge through civil marriage. [But] plaintiffs are denied [these] rights and responsibilities. This State has a proud tradition of affording equal rights to all New Yorkers. Sadly, the Court today retreats from that proud tradition.[125]

Similarly, in the four state supreme court decisions requiring marriage equality—in Massachusetts, California, and Connecticut—the courts begin with an often detailed account of the couples' lives, making clear before the legal analysis is even underway that the marriage laws adversely affect people whose lives look very much like the lives of opposite-sex couples. In contrast, courts finding no unconstitutional deprivation in the denial of marriage rights to same-sex couples offer only the bare facts needed to situate the legal issue. Prototypical of this approach is *Andersen v. King*

Id. at 569–70.

122. 855 N.E.2d 1, 22 (N.Y. 2006) (Kaye, C.J., dissenting).

123. *Id.*

124. *Id.*

125. *Id.*

County,[126] which offered the cold but legally sufficient statement that "sixteen individuals, eight couples, sought marriage licenses . . . Their requests were denied because each sought to marry someone of the same sex."[127] This sterile approach likely makes easier the conclusion that no constitutional rights are infringed by denying marriage equality, and, in an important way, hearkens back to the days of the closet—except that in this case only one side agrees to the "bargain." The second notable feature of the marriage equality decisions is, as the name "marriage equality" implies, the strong and emerging focus on real, as opposed to formal, equality. This focus relates to the courts' discussions of the couples' lives and the very real deprivations that second-class status (which civil unions are recognized to confer) works on people. The remarks that follow focus on the California Supreme Court's decision in *In re Marriage Cases*, but let us first situate the case among the three marriage equality cases.

Goodridge differs fundamentally from *In re Marriage Cases* and *Kerrigan*, in that the Massachusetts court mandated marriage equality in a state that did not already have a "virtual equivalent" (namely the civil union).[128] The court's analysis consciously fused "fundamental rights" and "equality" jurisprudence, utilizing standard analytical and doctrinal tools to reach a progressive result. Further, the court side-stepped the issue of whether the case required strict scrutiny, holding that the legislature lacked even a rational basis for denying marriage licenses to same-sex couples.

In California and Connecticut, by contrast, the legislatures had already established the domestic partnership and the civil union, respectively, which granted all of the rights and obligations of marriage but pointedly not the label.[129] Thus, these courts were left with the (in a sense) narrow question whether the couples before them were suffering a cognizable injury when the benefits that the state could officially confer were equal between same-sex and opposite-sex couples. Only a court that truly understands that the resulting regime nonetheless imposes a real cost on the couples subject to this "pure" discrimination can furnish the relief of true equality.

Both courts did so in a startling way: The California Supreme Court

126. 138 P.3d at 963.

127. *Id.* at 970.

128. This was also true of Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009). Because *Varnum* was handed down just as this article was going to press, its results are summarized but not analyzed herein.

129. While the term civil union has been adopted only in states that wish to confer all of the benefits of marriage without the label, "domestic partnership" is ambiguous. In California and Oregon, it does what the civil union does; in other states and localities, it confers only some subset of marriage's benefits. For a good discussion of the point, see *In re* Marriage Cases 183 P.3d 384, 398 n.2 (Cal. 2008).

became the first high court in any state to declare that sexual orientation is a suspect classification, thereby triggering strict scrutiny and practically ordaining the conclusion that the challenged law fails.[130] The very recent decisions by the Connecticut (and also the Iowa) Supreme Courts take the perhaps even more unusual position that sexual orientation is a "quasi-suspect" classification, thereby calling for intermediate scrutiny.[131] Sexual orientation was not included in a provision of the Connecticut state constitution that listed impermissible categories for discrimination,[132] but the court expressly denied that it was using the lower standard for that reason. Nonetheless, it is not unreasonable to assume that the provision made the judges more comfortable with using a slightly lower standard; especially since that standard easily led to the same result. Although both decisions are of signal importance, the California decision is perhaps the better vehicle for analysis here, given the court's complex and thoughtful fusion of the jurisprudence—and reality—of fundamental rights and equality.

In re Marriage Cases, although lengthy, is worthwhile reading for proponents and opponents of marriage equality,[133] but also has the kind of aspirational tone likely to sway many undecided citizens. Pushing off from the starting premise that gays and lesbians are entitled to the same dignity and respect as everyone else, the court swept aside the argument that the fundamental right to marry was defined by or limited to opposite-sex couples. Like everyone else, gay couples—whose lives had already been described by the court—have an interest in marrying a person of their choice, *not* an abstract interest in the right to marriage as historically defined. The court then launched an exhaustive discussion of the rights, obligations, and responsibilities of marriage. This discussion included a catalogue of the remaining differences between marriage and California's very expansive domestic partnership status,[134] but the court relegated these distinctions to a footnote, and in any case did not appear to attach great emphasis to these relatively minor inequalities. Instead, Chief Judge George's majority opinion is an alembic through which the long-smoldering hopes of gay and

130. *Id.* at 441–42.

131. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 432–33 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 888–93 (Iowa 2009).

132. *Id.* at 422.

133. As stated earlier, the effect of the court's decision is unclear as of this writing because of the passage of Proposition 8, which purports to amend the state's constitution to strip same-sex couples of marriage equality. *See* McKinley & Goodstein, *supra* note 9. Nonetheless, the decision is analyzed here because: (1) it is likely to retain effect for those couples who did marry during the several months of 2008 between the decision and the passage of Proposition 8; (2) there is some chance that the initiative will be struck down as improperly passed; and (3) the decision is sound and ground-breaking on its own merits, regardless of subsequent actions that may or may not nullify its impact.

134. *In re Marriage Cases*, 183 P.3d at 416 n.24.

lesbian couples are given rhetorical strength and vital legal approbation:

> Even when the state affords substantive legal rights and benefits to a couple's family relationship that are comparable to the rights and benefits afforded to other couples, the state's assignment of a different name to the couple's relationship poses a risk that the different name itself will have the effect of denying such couple's relationship the equal respect and dignity to which the couple is constitutionally entitled. Plaintiffs contend that . . . the current California statutes properly must be understood as having just such a constitutionally suspect effect.
>
> We agree with plaintiffs' contention . . . [A]ffording same-sex couples access only to the separate institution of domestic partnership, and denying such couples access to the established institution of marriage, properly must be viewed as impinging upon the right of those couples to have their family relationship accorded respect and dignity equal to that accorded the family relationship of opposite-sex couples.[135]

Thus, the judiciary has begun to clear a path towards marriage equality, and has done so with decisions that welcome gay couples into the legal and social community, effectively welding law to rhetoric.

As noted in the earlier discussion of the DOMA, however, matters in state and federal legislatures have been quite different. For a start, only one state legislature (California) has voted for same-sex marriages—and even this effort did not survive a veto by the governor.[136] A few other states have enacted "virtual marriage" laws—either civil unions or the full-rights version of domestic partnership,[137] while far more states have moved towards statutory or constitutional prohibition against same-sex marriages.[138] Given the diversity of views represented throughout the nation and the

135. *Id.* at 444–45.

136. *See supra* notes 5, 129, 134 and accompanying text. The legislation likely would not have survived judicial scrutiny in any case; in *In re Marriage Cases*, the court discussed § 308.5 of the Family Code, adopted by the California voters by initiative in 2000. That statute limits marriage to the union of one man and one woman. Because it was passed through the initiative process, the court stated that the legislature could not overturn it without first submitting it to the voters. *In re Marriage Cases*, 183 P.3d at 410–13.

137. As of this writing, New Jersey, New Hampshire and Vermont have civil union laws, while Oregon has a domestic partnership scheme that confers substantially the same rights as marriage. See *In re Marriage Cases*, 183 P.3d at 398 n.2, for a then-current account of the different laws affording same-sex couples state-wide relationship recognition. Since the court's decision, however, Connecticut now permits same-sex marriages (as required by Kerrigan v. Comm'r of Public Health, 957 A.2d 407 (Conn. 2008)), and the status of California's marriage law is in doubt; if Proposition 8 is ultimately upheld, the state will revert to its domestic partnership law, which attempts to grant all of marriage's benefits to same-sex couples. *But see In re Marriage Cases*, 183 P.3d at 416 n.24 (setting forth a number of remaining differences between the two statuses).

138. The number of states doing so is a moving target, as they continue to fortify the ramparts by enshrining the anti-equality laws into their constitutions, expand the prohibition to include "marriage equivalents" (using various terms, some of which have already led to difficult questions of interpretation), or, in some cases, move in the other direction by recognizing marriage or "similar" rights. Among the websites attempting to keep up-to-date on these developments, a usually reliable one is Human Rights Campaign, http://www.hrc.org/issues/marriage.as (last visited Nov. 14, 2008).

political spectrum, perhaps the most accurate gauge of public sentiment as expressed through elected officials can be found in the discussions about the proposed Federal Marriage Amendment (FMA), which reads as follows:

> Marriage in the United States shall consist solely of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.[139]

This amendment, which stands little chance of passing, would seemingly allow civil unions or any other marriage equivalent, but only if passed by state legislatures, not if thought required by federal or constitutional law. It would clearly ban same-sex marriages. Yet a sample of statements made in 2006 by Senators and Representatives indicates, albeit with exceptions, that the presence of gay and lesbian people is now taken as a given, and has been to an extent "normalized." Thus, an optimist reading into the anti-gay-marriage statements might see the development of a view that could one day evolve into a vote for equality.

In his eloquent remarks in opposition to the FMA, Vermont Senator Patrick Leahy quoted favorably from President George W. Bush's statement "real lives will be affected by our debates and decisions, and . . . every human being has dignity and value . . . "[140] Admittedly, these remarks were taken out of context; Mr. Bush was talking about the equally sensitive and polarizing issue of immigration law reform. But the recent debates over the FMA reveal, by and large, an increased respect for gay couples, and a newly defensive posture on the part of those supporting amending the process. Indeed, demonizing comments by elected officials (at least at the federal level) are by now so rare that one is struck when they do surface, as here by Senator Inhofe of Oklahoma: "The homosexual marriage lobby . . . [has] the goal of . . . breaking down all State-regulated marriage requirements to just one: consent. In doing so, they are paving the way for legal protection of such repugnant practices as: homosexual marriage, unrestricted sexual conduct between adults and children, group marriage, incest, and bestiality."[141]

Tellingly, none of the other representatives or senators who argued in favor of the FMA echoed Sen. Inhofe's approach, likely for fear of being associated with such retrograde views. Instead, the remarks in support of the FMA tended to cluster around a few loosely related ideas: marriage is

139. S.J. Res. 1, 109th Cong. (2005).
140. 152 CONG. REC. S5407 (daily ed. June 5, 2006) (statement of Sen. Leahy).
141. 152 CONG. REC. S5450 (daily ed. June 6, 2006) (statement of Sen. Inhofe).

under attack (not only or even from gay couples), and its definition is therefore in need of affirmation; children would be adversely affected by allowing same-sex couples to marry; "rogue" judges are thwarting the will of the people, as expressed through state law, to define marriage as they wish; and states should have the freedom to grant some or (perhaps) even most or all of the rights of marriage through such institutions as the civil union or domestic partnership, but only if so decreed by the legislature—not by courts. In making their arguments, the pro-FMA forces relied on a combination of tautological assertions about the meaning of marriage and a results-driven interpretation of social science data. What they notably did *not* rely on was negative comments about gay families—some of whom, after all, would be visible constituents in even the "reddest" of states. A brief sampling of a few of these comments, which often mix some of the assertions set forth above, will suffice to illustrate the point.

The comments of Senator Vitter from Louisiana are typical. He criticizes the "rush" by "activist courts" to "radically redefine" marriage,[142] and then states the social science view that the best results for children are gained in a "loving, nurturing, two-parent family . . . "[143] He then makes the move that often follows, noting that this two-parent family consists of "a mother and a father."[144] Similarly, Senator Orrin Hatch of Utah sounded the theme of "a few elite judges" improperly deciding social policy, but then added that "respectful" treatment must be afforded "homosexual citizens" who "are endowed with the rights that Thomas Jefferson elaborated in the Declaration of Independence." But apparently marriage equality is not a right; it is "social policy" that is properly decided by "the people," "not judges."[145]

Perhaps most articulate in defending traditional marriage was Senator Sam Brownback of Kansas.[146] After calling for civility, Sen. Brownback referred extensively to data from European countries that have, over the

142. *Id.* at S5456 (statement of Sen. Vitter).

143. *Id.*

144. *Id.* While there is (contested) social science research supporting the view that children do best in stable, married households, the studies purportedly so demonstrating compared single families, and in some cases families with cohabiting opposite-sex parents, to two-parent, married households. Same-sex parents raising children have not been part of these studies. In fact, the emerging research suggests that children do just as well in households headed by same-sex parents as by opposite-sex parents. *See , e.g.*, William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, FUTURE OF CHILDREN, Fall 2005, at 97, 102–04, *available at* http://www.princeton.edu/ futureofchildren/publications/docs/15_02_FullJournal.pdf.; Charlotte J. Patterson, *Family Relationships of Lesbians and Gay Men*, 62 J. MARRIAGE & FAM. 1053, 1058–60. Such studies are typically ignored or disparaged as insufficiently well-grounded by those opposing marriage equality.

145. 152 CONG. REC. S5457–58 (daily ed. June 6, 2006) (statement of Sen. Hatch).

146. 152 CONG. REC. S5419–24 (daily ed. June 5, 2006) (statement of Sen. Brownback).

past two decades, moved towards recognition of same-sex partnerships.[147] In at least some of these countries, he noted, out-of-wedlock births have increased.[148] In his view, this evidence suggests that granting marriage rights to same-sex couples could destabilize the institution by redefining it.[149] The evidence to which Sen. Brownback refers does not in fact support the causal connection he believes it does,[150] but what is interesting in the context of the present discussion is that those most seriously backing the FMA recognize that it is no longer sufficient simply to dismiss the claim for marriage equality, and, by extension, the lives of same-sex couples, through demonization and circular reasoning about a presumed immutable definition of marriage. Evidence of the effect of marriage equality (however weak, in my view) was needed, and respect was required: "I am just saying that we have basic social data on this vast social experiment . . . I respect my colleagues who have a different position. There are good people on all sides of this issue. But the data is what it is."[151]

Indeed, the FMA supporters, despite their significant numbers and the strength of their convictions, have often seemed on the defensive, fending off charges of bigotry and discrimination. For example, in the 2004 House debate, Representative Hayworth of Arizona supported the amendment but protested that he was not discriminating against gay people: "Marriage is not about excluding a group of people. Marriage is about what is best for our children and our society."[152] Expanding on this comment, he added: "Marriage is not about exclusion. It is about inclusion and an inclusive foundation for children and society . . . Marriage encourages the men and women who together create life to unite in a bond for the protection of children. That is not discrimination."[153]

It is unsurprising that in the House of Representatives, even more so than in the generally more genteel Senate, members were mostly careful to avoid openly offending the GLBT community; the House, after all has two openly gay members who were present and who participated in the debates. The point is made clear in the comments of the extremely conservative Rep. Tom Delay of Texas to Rep. Barney Frank of Massachusetts: "I have

147. *Id.* at S5419 (statement of Sen. Brownback).

148. *Id.* at S5420 (statement of Sen. Brownback).

149. *Id.*

150. Extensive treatment of this debate is well beyond my purposes here. Much of the data on which Sen. Brownback relied is discussed and its interpretation refuted in WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR WORSE? (2006).

151. 152 CONG. REC. S5420 (daily ed. June 5, 2006) (statement of Sen. Brownback).

152. 150 CONG. REC. H7900–01 (daily ed. Sept. 30, 2004) (statement of Sen. Hayworth).

153. *Id.*

utmost respect for the gentleman from Massachusetts. I respect his feelings. No one is attacking his feelings or his relationships. There are many loving relationships between adults."[154] Predictably, Delay then went on to discuss the importance of "traditional" marriage between "one man and one woman" raising their children. But Delay's respectful tone towards Rep. Frank suggests that GLBT Americans are part of the national discourse, no longer able to be dismissed with the kind of nasty epithet employed by Delay's predecessor as House Majority Leader, Dick Armey: In 1995, Armey had referred to Rep. Frank as "Barney Fag."[155]

Similarly, it would be hard to speak disrespectfully in response to the measured comments of Tammy Baldwin, an openly lesbian Representative from Wisconsin. Rep. Baldwin noted that the Constitution had never been amended to deny rights. She went on:

> This debate is not simply . . . theoretical . . . It has a real impact on millions of Amreicans. I believe that the institution of marriage enhances our social fabric in many positive ways. I think we all agree that loving, supportive marriages provide strong environments for raising children.[156]

After noting that children in two-parent families did better on average than kids only able to rely on one parent, she continued:

> Marriage's role in protecting children is about providing sustenance. It is about teaching. It is about sharing cultures and beliefs. It is about transmitting a family's values. It is about providing love and emotional support. These are all important components of marriage, and none of them are exclusive to a couple consisting of a man and a woman.[157]

In short, at least at the national level speaking ill of the gay community has, at last, mostly fallen out of favor. At least, homophobic statements and views have largely been moved into a closet down the hall from the one formerly occupied by gay persons themselves.[158] Such is the natural outgrowth of increased gay visibility and—to a greater or lesser extent—acceptance.

154. *Id.* at H7908 (statement of Sen. Delay).

155. Frank Rich, *Journal; Closet Clout*, N.Y. TIMES, Feb. 2, 1995, at A23, *available at* http://query.nytimes.com/gst/fullpage.html?res=990CE6DF113AF931A35751C0A963958260.

156. 150 CONG. REC. H7901 (daily ed. Sept. 30, 2004) (statement of Rep. Baldwin).

157. *Id.*

158. Occasionally, someone records what happens in such closets. Consider the recent case of an Oklahoma state legislator who claimed that homosexuality posed a greater threat to the Republic than terrorism. Associated Press, *Oklahoma Rep. Sally Kern on YouTube Clip: Homosexuality Bigger Threat Than Terrorism*, FOX NEWS, Mar. 16, 2008, http://www.foxnews.com/story/0,2933,338271,00.html. Would she have spoken thus had she expected her comments would have been recorded and then repeated? Likely not.

C. *Final Thoughts on Developments in Tort and Private Ordering*

As noted throughout this Article, the developments in relationship recognition tend to move in similar, sometimes stronger, ways when the consideration moves from the volatile marriage issue, with its attendant cultural, religious and social associations. In tort law, courts have increasingly come to grips with the upheavals created by increasing recognition of same-sex relationships. Of greatest significance, of course, are statutes that incidentally grant tort rights to members of same-sex couples who register under the state's laws granting relationship recognition to domestic partnerships, civil unions, or, of course, marriage itself.[159] But even absent such statutes, the emerging recognition of gay lives—and deaths—has begun to make inroads, too. A few recent wrongful death cases well illustrate the point, but also show the need for full, clear equality.

Long before *In Re Marriage Cases*, California law had been moving steadily in favor of same-sex partnerships. In 2001, the wrongful death statute was amended to add domestic partners to the list of eligible beneficiaries. As is sometimes the case, this amendment was passed in response to political pressure created by an incident that gathered a great deal of attention.

Earlier that year, Diane Whipple had been mauled to death by a dog; the underlying circumstances of pet owner misconduct were so serious that the dog's owners faced criminal charges.[160] Under the wrongful death law

159. Civil union laws and "full dress" domestic partnership laws purport to equal marriage, so they naturally confer the right to sue in tort on the same basis as would be available to married couples. *See, e.g.*, VT. STAT. ANN. tit. 15, § 1201(2) (2007) (declaring that parties to a civil union "may receive the benefits and protections and be subject to the responsibilities of spouses"); VT. STAT. ANN. tit. 15, § 1204(a) (2007) (civil union confers "all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage."). On April 7, 2009, the Vermont legislature overrode the Governor's veto of a marriage equality bill, thereby enacting the legislation. Same-sex couples are now allowed to marry in Vermont as of September 1, 2009. *Gay Marriage Legal in Vermont*, 365 GAY, April 7, 2009, at http://www.365gay.com/news/gay-marriage-legal-in-vermont (last visited October 1, 2009).

160. For an account of the tragic circumstances of Diane Whipple's death, see John Gallagher, *Looking for Meaning in Tragedy*, ADVOCATE, Apr. 24, 2001, http://findarticles.com/p/articles/mi m1589/is2001April 24/ai 73308457. Marjorie Knoller and Robert Noel, the couple charged in connection with Whipple's death, were both convicted of involuntary manslaughter and sentenced to four years in prison. *Knoller Gets Maximum Manslaughter Sentence*, DATA LOUNGE, July 16, 2002, http://www.datalounge.com/datalounge/news/record.html?record=20068. The jury also found Knoller, who was controlling the dogs at the time of the attack, guilty of second-degree murder. The judge, however, threw out that finding, citing a lack of evidence to support such a conviction. Knoller and Noel were then both paroled after receiving time off for good behavior, and both appealed their convictions. Moreover, the California Attorney General's office appealed the dismissal of Knoller's second murder conviction. Associated Press, *Woman Convicted in Dog-Mauling Death is Freed*, CNN, Jan. 2, 2004, http://www.cnn.com/2004/LAW/01/02/dog.attack.ap/.

as written, it seemed that Ms. Whipple's surviving same-sex partner would not be considered a spouse, and therefore unable to pursue a claim against the dog owners. Yet the decedent's mother did have a claim, even though her actual financial loss was insignificant compared to that of the surviving partner, Sharon Smith.[161] Surprisingly, Smith's case survived a motion to dismiss despite the statute's apparently clear directive.[162] In reaching its decision, the trial court pointed out that while Smith and Whipple could have entered into various legally enforceable agreements to protect their financial and personal interests, there was no way to avoid the strictures of the wrongful death law. Thus, the court refused to read the statute to create an "insurmountable obstacle" to recovery. Such an obstacle was at odds with the purpose behind the wrongful death statute, which is "to provide compensation for the loss . . . .resulting from decedent's death . . . Plaintiff's sexuality has no relation to the nature of the wrong allegedly inflicted upon her and denying recovery would be a windfall for the tortfeasor."[163]

Thus, even before the wrongful death law was changed, at least one court took as given the availability of private ordering for same-sex couples, and then extended that recognition outward to effectively rewrite a statute that worked a deprivation on the surviving members of such couples without any corresponding benefit; under the facts of this case, in particular, it would be hard to devise a compelling policy argument for letting the defendants profit from their reckless (or worse) misconduct. Another point worth making is that the court was willing to work around not only the statute but the then-recent California voter initiative that had defined marriage as "one man, one woman." Indeed, the court simply ignored the initiative, as did the California legislature in enacting the first in what turned out to be a series of increasingly expansive domestic partnership laws. Ar-

161. At least a strict reading of the statute would not have permitted recovery. But the trial court allowed the case to proceed even under the former law. Smith v. Knoller, No. 319532, slip op. (Cal. Super. Ct. Aug. 9, 2001). The court reasoned that the statute, if read to exclude plaintiff, would create an insurmountable burden to her recovery (because there was no way to contract around the prohibition against recovery), and held that the statute had to be interpreted to allow surviving members of same-sex couples to recover (upon a sufficient factual showing) to save it from unconstitutionality as a violation of equal protection. *Id.* at 3–4.

162. *Id.*

163. *Id.* In recognizing that wrongful death law should not penalize a party who is unable to protect him or herself, the court developed a line of argument that traces back to *Levy v. Louisiana*, in which the Supreme Court declared unconstitutional laws that discriminated against out-of-wedlock children in actions to recover for a relative's death. 391 U.S. 68, 71 (1968). In so holding, the Court articulated rationales that closely parallel those invoked by the Smith court, including the "intimate, familial relationship," the wrong suffered, the unfairness of denying rights for a status beyond the individual's control, and the prospect of a windfall to the tortfeasor. *Id.* In sum, the Court found that the classification had "no relation to the nature of the wrong" suffered. *Id.* at 72.

guably, these moves again illustrate that it is easier to confer the benefits of marriage than it is the marriage label itself.

In a more recent case, a New York state trial judge followed a similar approach. In *Langan v. St. Vincent's Hospital*,[164] a trial judge in New York State recognized a civil union entered into by two New York residents in Vermont for the limited purpose of allowing the survivor's wrongful death claim to proceed.[165] The relevant facts were these: Neal Spicehandler died, allegedly as the result of medical malpractice, and his surviving partner, John Langan, brought suit against St. Vincent's Hospital for wrongful death.[166] The New York wrongful death statute is typical in restricting recovery to named classes of beneficiaries, including spouses but not unmarried partners.[167] The court, however, permitted Langan's case to proceed despite this apparent infirmity.

The court used a great number of tools in constructing its decision, beginning by charting the lives of the couple in a way reminiscent of the approach of courts recognizing marriage equality. Justice Dunne emphasized that Langan and Spicehandler had been together for fifteen years, had jointly bought a house, were completely financially and legally intertwined through wills and life insurance policies, and had traveled to Vermont and entered into a civil union, which evinced their desire to confirm their status as a couple to the extent legally possible.[168] The court also pointed to the willingness of New York courts to read certain laws expansively to give legal standing to the surviving member of same-sex couples in other areas, including accession to rent-controlled apartments,[169] and the willingness of the New York legislature (which is fairly progressive on same-sex issues) to grant rights in such diverse areas as adoption,[170] discrimination,[171] and eligibility for certain state-conferred death benefits.[172] The court also stressed the importance of recognizing a sister state's laws, including Vermont's civil union law, and in harmony with the California trial court, found that allowing the claim would be consonant with the purpose of the

164. 765 N.Y.S.2d 411 (N.Y. Sup. Ct. 2003), *rev'd in part*, 802 N.Y.S.2d 476 (N.Y. App. Div. 2005).

165. *Id.* at 422.

166. *Id.* at 412.

167. N.Y. EST. POWERS & TRUSTS LAW § 5-4.4(a) (McKinney 2004).

168. *Langan*, 765 N.Y.S.2d at 412–13.

169. *Id.* at 415 (citing Braschi v. Stahl Assocs., 543 N.E.2d 49 (N.Y. 1989)).

170. *Id.* at 416 (citing *In re* Jacob, 660 N.E.2d 397 (N.Y. 1995)).

171. N.Y. EXEC. LAW § 291(1)-(2) (McKinney 2004); *Langan*, 765 N.Y.S.2d at 416 (citing N.Y. CIV. RIGHTS LAW § 40-c(2) (McKinney 2004)).

172. *Langan*, 765 N.Y.S.2d at 416 (citing New York City, N.Y., Local Law No. 24 Int. 114-A (2002)).

wrongful death laws. Finally, the court also stated that its expansion construction of the statute was in part to avoid the equal protection concern that denial of the claim would raise.

These decisions, though, are outliers. *Langan* was overturned on appeal, with the appellate court taking the simple and direct course of reading the statute literally; since only marriage (not even civil unions) permits the surviving member to recover, Mr. Langan had no claim.[173] Smith disappears from the record after the trial court's decision, but a line of California appellate cases suggests that this decision, too, was fragile.

Even in Massachusetts, a loss of consortium claim—not even a wrongful death claim (which would have been barred by statute)—brought by the surviving member of a same-sex couple based on events occurring before *Goodridge* was denied.[174] The case is a striking example of the continued toll of discriminatory laws on same-sex couples, inasmuch as it was the court that pioneered marriage equality that also denied the claim, again pinning its holding on the still strong desire to fix a bright line between marriage and "mere cohabitation."[175] This conclusion was reached despite the couple's long life together and, perhaps more to the point, their decision to seek a marriage license on the very first day the law changed to accommodate them.[176]

Of course, the difficulty in these cases is eliminated by marriage equality and also by civil unions and the "full plate" domestic partnership approach found in Oregon.[177] But legislation is not even necessary for courts to give recognition to private agreements, and increasingly these are regarded as enforceable—even in states with the most restrictive anti-equality laws. For example, consider *Stroud v. Stroud*,[178] in which a Virginia appellate court construed a divorcing couple's property settlement agreement as terminated by the former wife's cohabitation with a same-sex partner. The document had provided that the husband's support obligation would terminate if the wife were to cohabitate with anyone in a "situation analogous to marriage." The trial court had held that, under Virginia law, a same-sex relationship could amount to neither marriage nor a situation analogous thereto. There was some warrant for doing so, given Virginia's extremely broad prohibition against not only same-sex marriages, but also

173. 802 N.Y.S.2d 476, 478-80 (N.Y. App. Div. 2005).

174. Charron v. Amaral, 889 N.E.2d 946, 948 (Mass. 2008).

175. *Id.* at 948–49.

176. *Id.* at 948.

177. *See supra* note 129 (discussing California's summary of civil union and domestic partnership laws).

178. 641 S.E.2d 142, 145 (Va. Ct. App. 2007).

the "civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage."[179] But the appellate court looked to the reality of the relationship and the likely intentions of the parties in creating the agreement (including parol evidence) in concluding that the obligation should be terminated.[180] Tellingly, the court stated that its decision did not grant any legal status (which would presumably have been impermissible under Virginia law) to the cohabitation relationship, but was based "upon the factual relationship of [the same-sex couple]."[181] Well, yes and no: Surely the court was using the relationship to affect another legal obligation, and thereby giving it at least derivative legal effect. One would hardly expect a different result, given the basic unfairness to the obligor spouse of the contrary result.

Indeed, counseling and drafting of private agreements between same-sex couples has been a profitable business for attorneys, given the law's failure to accord such couples the benefit of default rules that govern the marital relationship. One recent article, written by an attorney who routinely creates such agreements, demonstrates that they have become commonplace, cover a wide variety of property, parenting, and tax issues, and are usually enforceable if sufficiently clear.[182] Whether such agreements will be universally enforceable may be in some doubt, however, given the ever-extending reach of some of the anti-marriage equality initiatives. In a distressing development, the Michigan Supreme Court recently ruled that that state's broadly worded anti-equality marriage amendment prohibits public employers from granting health-insurance benefits to their employees' same-sex domestic partners.[183] The court also declined to rule out the possibility that the law would also prohibit private employers from provid-

179. VA. CODE ANN. § 20-45.3 (West 2008). A Utah case also regarded a same-sex relationship as one of cohabitation, and thereby terminated support payments under a state statute (as opposed to the agreement in *Stroud*) that regarded cohabitation as a basis for such termination. Garcia v. Garcia, 60 P.3d 1174 (Utah Ct. App. 2002). Regarding the essence of cohabitation as sexual contact, the court rejected the lower court's conclusion that same-sex couples could not cohabitate, stating:

> [T]he district court only points out that 'same sex' couples are not afforded the same legal rights as . . . married couples. We fail to see how the differing legal rights of married and same-sex couples necessitates the statutory interpretation that same-sex couples may not have sexual conduct [amounting to cohabitation under the case law].

Id. at 1175 n. 1, 1175.

180. *Stroud*, 641 S.E.2d at 145–47.

181. *Id.* at 151.

182. *See* Wendy S. Goffe, *Preparing Effective Cohabitation Agreements for Unmarried Couples*, 34 EST. PLAN. 7 (2007). In skeptical jurisdictions, especially Illinois, the agreement must always be in writing (absent a difficult constructive trust argument). *Id.* at 9. But the point is that the enforceability of support and other such agreements is largely uncontroversial today.

183. Nat'l. Pride at Work v. Governor of Mich., 748 N.W.2d 524, 543 (Mich. 2008).

ing such benefits,[184] but one would be justified in worrying about that result, as well as about whether private property arrangements will continue to be "recognized," if they are considered to create a union "similar" to marriage (whatever that means). The Michigan case is an anomaly, however, and even there one would be surprised were the court not to recognize private agreements under standard contract principles.

CONCLUSION

On November 4, 2008, anti-gay forces succeeded in passing four separate, state-wide initiatives making life more difficult for gay families. Arizona amended its constitution to prohibit same-sex marriages.[185] Florida voters ratified an amendment to that state's constitution that prohibits same-sex marriages, and goes further, also prospectively disqualifying any "substantial equivalent," a term perniciously vague.[186] As noted earlier, California voters narrowly approved Proposition 8, which purports to strip gay couples of the right to marry they already possess.[187] Worst of all, perhaps, is the Arkansas voters' passage of a law that, in an effort explicitly aimed against gay couples,[188] prohibits any unmarried cohabitants from adopting or fostering children.[189] This, in a state that, like many others, has a shortage of loving homes where needy children might be placed.[190]

In light of these retrograde developments, one might be tempted to see the movement for equality as having crested, with the anti-equality forces now in full cry. But that would be too pessimistic a conclusion to draw. On November 12, the first same-sex marriages took place in Connecticut.[191] Iowa's first same-sex marriage followed shortly thereafter, on April 27, 2009.[192] Vermont moved from civil unions to full marriage equality, with

184. *Id.* at 529–30 n.1.

185. *See* Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage,* N.Y. TIMES, Nov. 5, 2008, at A1.

186. *Id.*

187. *Id. See also supra* note 9 and accompanying text.

188. *See* Andrew DeMillo, *Arkansas Judges Oppose Proposed Foster, Adoption Ban,* BAXTERBULLETIN, http://www.baxterbulletin.com/apps/pbcs.dll/article?AID=/20081006/UPDATES01/81006008/1002/NEWS01 (last visited Nov. 14, 2008).

189. *See* McKinley & Goodstein, *supra* note 177, at A1.

190. *All Things Considered: Arkansas Voters to Decide Unmarried Adoption,* (National Public Radio Broadcast Oct. 26, 2008) *available at* http://www.npr.org/templates/story/story.php?storyId=96154280.

191. Lisa W. Foderado, *A New Day for Marriage in Connecticut,* N.Y. TIMES, Nov. 13, 2008, at A31.

192. Amy Lorentzen, *Same-Sex Couples Begin Tying the Knot in Iowa,* SFGATE, Apr. 27, 2009, http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2009/04/26/national/a101108D74.DTL&type=printable.

licenses issued on September 1.[193] New Jersey and possibly New York are expected to follow within the next two years.[194] President Barack Obama pledges to lead the repeal the Defense of Marriage Act,[195] and the newly ascendant Democratic majority in both houses of Congress may be set to enact the long-dormant Employment Non-Discrimination Act, that would protect gays, lesbians, and (I hope) the transgendered on the job,[196] thereby federalizing the current patchwork of laws that leaves many employees unprotected. As this article was going to press, the U.S. House of Representatives passed a hate crimes bill.[197]

There's more to cheer. First-time voters in California rejected Proposition 8, and, in general, the opposition to marriage equality is closely correlated with voter age: the younger the voter, the likelier he or she is to support full equality.[198] Indeed, younger citizens, linked up by the vast and creative web community, have led demonstrations against Proposition 8 since its passage.[199] These citizens have come of age in an era where *visible* gay people and gay relationships are almost universal, both in media depictions and among their own circle of family and friends. Their paths have been forged, and their confidence fueled, by the inspiring work and courage of pioneers for equality and justice like Phyllis Lyon and the late Del Martin.

193. *See supra* note 159.

194. *New Legislatures Expected to Take Up Gay Marriage Bills in 5 States*, 365GAY, Nov. 5, 2008, http://www.365gay.com/news/new-legislatures-expected-to-take-up-gay-marriage-bills-in-5-states.

195. *Would Obama Position Spread Same-Sex Marriage?*, ABC NEWS, Aug. 7, 2007, http://blogs.abcnews.com/politicalradar/2007/08/would-obama-pos.html.

196. For an interesting "insiders' view" of then-candidate Obama's views on marriage equality and the ENDA, see *Obama Holds LGBT Fund-Raiser in NYC*, ADVOCATE, April 1, 2008, http://www.advocate.com/news_detail_ektid53048.asp (stating his position that a trans-inclusive ENDA likely did not have sufficient votes to pass the Senate, and that he favored civil unions and was open to being persuaded in the future about full marriage equality).

197. *See House Passes Inclusive Hate Crimes Bill*, 365GAY, Apr. 29, 2009, http://www.365gay.com/news/house-passes-inclusive-hate-crimes-bill/. The bill, supported by President Obama, was just introduced into the U.S. Senate. *Id.*

198. For a typical searching analysis of the exit polling data, see Posting of Nate Silver to FiveThirtyEight, http://www.fivethirtyeight.com/2008/11/prop-8-myths.html (Nov. 11, 2008, 14:47 EST).

199. *See* Jessica Garrison, *Angrier Response to Prop 8 Steps Up*, L.A. TIMES, Nov. 13, 2008, http://www.latimes.com/news/printedition/front/la-me-prop813-2008nov13,0,7887437.story.