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# A "Clanging Silence": Same-Sex Couples and Tort Law

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# ARTICLES

## A “Clanging Silence”: Same-Sex Couples and Tort Law

BY JOHN G. CULHANE\*

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## INTRODUCTION

On January 26, 2001, Diane Alexis Whipple was savagely attacked and mauled to death just outside the door of her San Francisco apartment building by two large dogs.<sup>1</sup> Had she been legally married, her spouse would have had standing to sue the dogs' owners for wrongful death under California law, and might have recovered substantial damages.<sup>2</sup> Diane Whipple, however, was a lesbian in a

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<sup>1</sup> John Gallagher, *Looking for Meaning in Tragedy*, THE ADVOCATE, Apr. 24, 2001, at 44, LEXIS, News Library. The article details the attack, the bizarre circumstances surrounding the owners and ownership of the dogs, and the cause célèbre that the case, and Sharon Smith, Ms. Whipple's partner, have become. It also features a moving interview with Ms. Smith. The attorney-couple that had custody of the dogs (ownership is in dispute) have been indicted: Majorie Noller, who was controlling the dogs at the time, on charges of second-degree murder, manslaughter, and failing to control an animal that causes death; and Robert Noel, on the same charges except second-degree murder. Jaxon Van Derbeken, *Mauling Victim's Mother Sues 2 Attorneys, Building Owners*, S.F. CHRON., Apr. 11, 2001, at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2001/04/11/MN115862.DTL>.

<sup>2</sup> Wrongful death statutes permit specified classes of those who survive the wrongly caused death of another to recover against the tortfeasor for the loss of anticipated economic support, and often, for the emotional loss as well. California law is typical in permitting wrongful death recovery to surviving spouses, children, and issue, and to others more remote under the laws of intestacy in the absence of issue. CAL. CODE CIV. PRO. § 377.60(a) (2001). A second class of plaintiffs, including parents, may also recover "if they were dependent on the decedent." *Id.* § 377.60(b). As the language of the statutes makes clear, Diane Whipple's mother, who has also filed suit, *see* Van Derbeken, *supra* note 1, has a much clearer case for recovery than does Sharon Smith, whose actual damages are presumably much greater. The paradox is explored more fully in Part II.D.2, *infra*. *See generally* W.

committed, seven-year relationship with another woman, Sharon Smith.<sup>3</sup> Although Ms. Smith has filed a wrongful death lawsuit because of her partner's death,<sup>4</sup> she is extremely unlikely to be successful, because the wrongful death statute under which she has brought suit restricts recovery to legal spouses: a status unavailable to same-sex couples.<sup>5</sup> Similarly, had Ms. Whipple survived although suffering severe injuries, Ms. Smith, unlike her opposite-sex counterparts, would likely have had no legal redress for her loss of consortium.<sup>6</sup> Finally, had Ms. Smith observed the attack and suffered emotional harm as a result, she, unlike a legal spouse, would have had no suit for the negligent infliction of such harm.<sup>7</sup> Unfortunately, these results are not unique to California, but could be expected in almost all states.<sup>8</sup>

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PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 951-54 (5th ed. 1984). Wrongful death is discussed more fully in *infra* Part II.C.

<sup>3</sup> See Gallagher, *supra* note 1.

<sup>4</sup> The word "partner" is inadequate to describe same-sex couples, inasmuch as it typically connotes a business relationship. "Spouse" is in some ways better, because its use affirms legal equivalence between same-sex and opposite-sex couples. Given the law's refusal to recognize same-sex couples, however, "spouse" is not fully accurate, either. The terms "husband" and "wife" have the same problem, and are also tied, for many people, to objectionable historical assignment of roles. "Lover" seems too broad. I have chosen "partner" here simply because it is probably the most widely used, and therefore most understood, term. Sharon Smith would support this choice, as she revealed in describing her relationship with Diane Whipple: "I feel privileged to be called her partner." Gallagher, *supra* note 1. Throughout this Article, I use whatever term seems compelled by the context.

<sup>5</sup> See *infra* Part I.D. In California, specifically, voters in March, 2000, approved Proposition 22, recognizing marriages only between a man and a woman. See Carol Ness, *Prop. 22 Passage Forces Gays to Regroup*, S.F. EXAMINER, Mar. 8, 2000, LEXIS, News Library. Interestingly, Sharon Smith's situation has created a groundswell of public and legislative support for changing the state's wrongful death law to permit domestic partners to sue. This point is discussed at *infra* notes 313-18 and accompanying text.

<sup>6</sup> Loss of consortium is the tort that permits recovery by spouses, and sometimes children and parents, for the relational harm they suffer as the result of an injury to a husband, wife, parent, or child. See KEETON ET AL., *supra* note 2, § 125; see also discussion *infra* Part II.B.

<sup>7</sup> Assuming the injury was the result of negligence, some courts permit recovery by bystanders who witness physical injury to a "close relation." The seminal case is *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968). See discussion *infra* Part II.A.

<sup>8</sup> See *infra* Part II. As discussed therein, Vermont and Hawaii are two clear exceptions to these rigid rules.

Sharon Smith's needlessly compounded tragedy highlights an overlooked deficiency in the law as it applies to same-sex couples. Although such couples are achieving some success in other areas of the law, the tort law continues to proclaim, by a "clanging silence," the "erasure of their existence."<sup>9</sup> Mysteriously, research of appellate decisions discloses *no cases* in which a same-sex couple has even sought recovery for the relational injury recognized by the tort of loss of consortium, and only one rather odd (and unsuccessful) case stating a claim by a same-sex partner for negligently inflicted emotional distress.<sup>11</sup> Not counting Sharon Smith's claim, I have found two wrongful death cases involving same-sex couples, where the statutory limitations weigh heavily against recovery.<sup>12</sup> Thus, as far as the law is concerned, tortious injuries to same-sex relations are hardly ever even a fit subject for discussion, much less recovery.

One is at first struck by the seeming oddity of such omission. After all, in virtually every other area of law, courts have struggled with the role, identity, and place of same-sex couples. Consider this by no-means-complete list of legal issues that have had to account for the presence of same-sex couples: adoption and custody;<sup>13</sup> interpretation of contracts for support;<sup>14</sup> the application of rent control and rent stabilization laws;<sup>15</sup> and the right to marry.<sup>16</sup> The results in these cases have been decidedly mixed,

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<sup>9</sup> This phrase is lifted from Judge Oakes's opinion in *Sedima v. Imrex Co.*, 741 F.2d 482, 492 (2d Cir. 1984) (discussing legislative silence on the reach of the Racketeer Influenced and Corrupt Organizations Act), *rev'd and remanded*, 473 U.S. 479 (1985).

<sup>10</sup> The Canadian Supreme Court used this term to describe the effect of legislation that excluded same-sex partners from the definition of "spouse." *M. v. H.* [1999] 2 S.C.R. 3, 7 (Can.). It is important not to get too far into this Article before making the point that, as of July 1, 2000, the State of Vermont does recognize, by statute, all three of the relational torts that are the subject of our discussion. VT. STAT. ANN. tit. 15, § 1204(e)(2) (Supp. 2000). Such recognition was a necessary concomitant of the Vermont legislature's judicially impelled recognition of a new entity called a "civil union," which is the virtual equivalent of marriage for same-sex couples. *See Baker v. Vermont*, 744 A.2d 864 (Vt. 1999) (holding that denial of benefits of marriage to same-sex couples violated "common benefits" requirement of Vermont Constitution, but remitting remedy issue to legislature).

<sup>11</sup> *Coon v. Joseph*, 237 Cal. Rptr. 873 (Dist. Ct. App. 1987), discussed in *infra* Part II.D.1.

<sup>12</sup> *See cases cited and discussed in infra* Part II.D.2.

<sup>13</sup> *See cases cited and discussed in infra* Part I.C.

<sup>14</sup> *See cases cited and discussed in infra* Part I.B.

<sup>15</sup> *See cases cited and discussed in infra* Part I.A.

<sup>16</sup> *See cases cited and discussed in infra* Part I.D.

but courts have not been able to avoid addressing the issues. Matters are different in the law of torts.

At a deeper level, though, the deletion of same-sex relationships from the tort law is all-too-consistent with the overall judicial, legislative, and societal treatment of gay men and lesbians. Law makers and courts have sometimes displayed sophistication in cases involving same-sex couples, but usually only where focus can be directed toward some issue *other than the intimate life of the couple itself*. A few examples will illuminate the point. Zeroing in on the best interest of a child may drive a court to permit a lesbian or gay male partner to adopt the other's child,<sup>17</sup> while avoiding discussion of the couple's intimate life implied by such a decision. In New York, the regulations listing factors to consider in deciding whether a same-sex partner can accede to the rent-control benefits enjoyed by a deceased partner include every indicium of "couplehood" *except* "intimate sexual relations," which are expressly declared inadmissible.<sup>18</sup> A court might be willing to uphold a contract for support between two gay men, but only by engaging in economic bargain analysis and expressly disallowing any "consideration" based on the sexual relationship.<sup>19</sup>

Reluctance to confront issues of sexual intimacy is an odd feature of our legal culture, generally, but the situation is profoundly more acute when discussion turns to same-sex couples.<sup>20</sup> The uniformly dismal results to date on the question of same-sex marriage, where the intimate life of the couple is front-and-center, reinforce this observation. Courts, and now legislatures, enshrine public opinion in their refusal to grant this basic right of citizenship to gay men and lesbians.<sup>21</sup> Recognizing this right would constitute "the

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<sup>17</sup> See *infra* Part I.C and cases discussed therein.

<sup>18</sup> See *infra* notes 39-42 and accompanying text.

<sup>19</sup> See *infra* Part I.B.

<sup>20</sup> Although consideration of the Supreme Court's jurisprudence on the issue of sexual intimacy is worth an Article in itself, one need look no further than *Bowers v. Hardwick*, 478 U.S. 186 (1986), for the exclamation point to the statement in the text. There, the Court distinguished its earlier cases affirming the value of intimacy, holding that those decisions were based on marriage, procreation and family; none of which, it held, bore "any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy." *Id.* at 190-91. Never mind that one of the earlier privacy cases, *Eisenstadt v. Baird*, 405 U.S. 438 (1972), had embraced *unmarried* people who, under the facts of the case, did not (then) want to start a family—the case was about the right to purchase contraception.

<sup>21</sup> In 1996, Congress enacted the Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. V 1999) and 28 U.S.C. § 1738C (Supp. IV 1998)), which President Clinton signed on

ultimate societal vindication of the reality of the lives of gay and lesbian people."<sup>22</sup> Since that reality importantly includes intimacy, same-sex marriage is a "non-starter."<sup>23</sup>

In all of the above cases *except* same-sex marriage, courts have been able to manage their discomfort with same-sex relations by dodging discussion of the sexual relation itself. Such maneuvering is not possible with loss of consortium or negligent infliction of emotional distress,

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September 21, 1996, in the middle of the night. See Todd S. Purdum, *Gay Rights Groups Attack Clinton on Midnight Signing*, N.Y. TIMES, Sept. 22, 1996, at A22. DOMA both limited marriage to unions of a man and a woman for federal purposes, and purported to allow states to refuse to recognize same-sex marriages celebrated in other states. See *infra* note 112 and accompanying text. More than half the states have since enacted similar legislation, by which they declare their refusal to recognize marriages celebrated in other states, should such unions ever be made legal in some state. These statutes have been tracked and exhaustively analyzed in David Orgon Coolidge & William C. Duncan, *Definition of Discrimination? State Marriage Recognition Statutes in the "Same-Sex Marriage" Debate*, 32 CREIGHTON L. REV. 3 (1998). A recent listing appears in Mae Kuykendall, *Resistance to Same-Sex Marriage as a Story about Language: Linguistic Failure and the Priority of a Living Language*, 34 HARV. C.R.-C.L. L. REV. 385, 392 n.22 (1999). A continually updated tracking of these laws can be found on the website of Lambda Legal Defense. Lambda Legal Defense and Education Fund, *2000 Anti-Marriage Bills Status Report*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=578> (last modified May 25, 2001).

<sup>22</sup> John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1125 (1999) [hereinafter Culhane, *Uprooting the Arguments*].

<sup>23</sup> In fairness to the courts, recent decisions from two state supreme courts have begun to suggest a thawing of this position. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (requiring state to show compelling interest for denying right to marry to same-sex couples), *rev'd and remanded sub nom. Baehr v. Miike*, 994 P.2d 566 (Haw. 1999); *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999) (holding that denial of the benefits of marriage to same-sex couples violates state constitution, but leaving remedy up to the legislature). Two features of these cases counsel caution before allowing oneself too much optimism, however. First, they are from unusually progressive jurisdictions, and have not resulted in same-sex marriage: in Hawaii because of public and legislative opposition that resulted in an amendment to the state's constitution, and in Vermont because the court did not order the remedy of marriage in the first place. Second, even these decisions are hedged in ways that suggest a lingering discomfort with the equality of gay and lesbian people. See discussion *infra* Part I.D. The legislative response to *Baker* is also discussed *infra* Part I.D.

though, because these torts are either defined by, or dependent upon, sexual intimacy.<sup>24</sup> Non-recognition is thus fully consistent with the overall legal treatment of gay and lesbian citizens.

Refusal to recognize a claim is one thing, though, and a decisional void is another. Why are there appellate cases on same-sex marriage, for example, but almost none on tortious losses to same-sex relationships? One might justifiably begin by asking whether it is fair to blame the courts for this silence, inasmuch as the *absence* of cases is not their doing. This statement is only narrowly true, however. Courts *are* responsible for creating the backdrop against which decisions to pursue claims are made. In the case of same-sex relationships in the law of torts, they have fostered three related impediments. The first is mentioned above—litigants know that courts are squeamish when it comes to the intimacy of same-sex couples. Second, judicial comfort with bright-line rules discourages litigation not only by the unmarried opposite-sex couples who have been losing almost all of the relational injury cases, but also by same-sex couples, who have little reason to expect understanding from the courts. Third, the few decided cases on relational injury to same-sex couples only reinforce reluctance to make such claims.

Even taken together, the above observations fall short of a complete explanation for the “clanging silence.” After all, the same points are true of litigation seeking recognition of same-sex marriage, yet marriage cases continue to be brought. So why not tort claims for injuries to relations? My argument is that the relational injuries are plagued by additional, perhaps intractable, difficulties. These obstacles are the inevitable products both of the way tort cases are litigated, and of the derivative nature of relational injuries themselves.

This Article tackles the issue of judicial silence directly, addressing it with respect to the three cognate relational torts: loss of consortium, negligent infliction of emotional distress, and wrongful death. After discussing each of these torts, and offering some explanations for the

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<sup>24</sup> The statement in the text is truer for loss of consortium than for negligent infliction of emotional distress, because the emotional distress claims do not involve recovery for the loss of intimacy itself. Nonetheless, that intimacy may be necessary to qualify as a plaintiff in an emotional distress claim in so-called bystander cases, especially absent a marital relationship. The point is explored *infra* Part II. Further, for reasons developed later in this Article, wrongful death claims are different again, because recovery is often principally for “hard” economic loss, with which courts are more comfortable. These cases present their own problems of statutory interpretation, however. See *infra* Parts II.C, II.D.2.



silence, I suggest a course of action for advocacy groups. Given the right judicial or legislative atmosphere, claims for relational injuries could be successful on two fronts: for the plaintiffs themselves, and as part of the larger project of forging a complete legal existence for same-sex couples.

Part I of this Article develops the argument that, at least in the United States, courts and legislatures have gone to great lengths to avoid acknowledging that same-sex couples exist *qua* intimate units. This Part discusses four diverse examples of this tendency: one state's solution to the issue of accession to rent control benefits; the contractual rights of same-sex couples vis-à-vis each other; the law of adoption; and same-sex marriage. In each case, same-sex relationships are "managed" by diverting focus onto some other issue. Where, as is the case with same-sex marriage, such redirection is not possible, most courts have been unsympathetic. The discussion of same-sex marriage makes the point that courts are loathe to acknowledge the sexual intimacy of same-sex couples in part because of the threat such intimacy poses to traditional gender roles.

In requiring discussion (or at least recognition) of intimacy, the relational torts are like same-sex marriage in that courts have nowhere to hide. Part II begins with a description of each of the three relational tort claims. Unmarried opposite-sex couples have typically been unable to recover in these cases, which spring from the loss to a couple's relationship occasioned by the physical injury to, or death of, one of the partners. Next, I discuss the few cases involving same-sex couples. Finally, I offer further, practical explanations for the almost-complete absence of case law addressing the relational losses suffered by same-sex couples.

Part III is a cautious call to arms. It suggests that potential plaintiffs, and the advocacy groups that might champion their cause, seek out state courts that have recently and consistently demonstrated fidelity to the foundational principles of tort law—imposition of liability, within fair limits, against those whose creation of an unreasonable risk results in foreseeable injury to a class of plaintiffs. Courts that uncritically prefer status-based, bright-line rules are not as faithful to the animating spirit of tort law as those that have shown willingness to exercise flexibility. Indeed, the tort law, given its history of commitment to the fair assignment of liability and its often-powerful rhetoric in service of such fairness, can be a peculiarly apt instrument for broader changes in the law. California and (especially) Texas are discussed as particularly distressing examples of courts that have abdicated their responsibility for the "upkeep of the common law,"<sup>25</sup> while New Jersey offers a heartening instance of judicial

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<sup>25</sup> Elden v. Sheldon, 758 P.2d 582, 594 (Cal. 1988) (Broussard, J., dissenting).

recognition of the reality of injury. Recent developments in Hawaii and Vermont are also mentioned as supporting a legislative approach to the problem.

### I. KEEPING THE "SEX" OUT OF "SAME-SEX COUPLES"

For reasons of politics and morale, gay and lesbian advocacy groups have understandably trumpeted the substantial victories of the movement toward equality.<sup>26</sup> These achievements, however, mask an important failure of the struggle: Only rarely do policymakers acknowledge, much less respect, the intimate lives of same-sex couples. This aversion stems from a deep-seated, but often unstated, discomfort with the challenge to gender roles that same-sex couples present.<sup>27</sup> Civil rights advocates might respond to this observation by noting that American society is not generally comfortable in acknowledging the sexual lives of *any* of its citizens<sup>28</sup> and

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<sup>26</sup> Two high-profile examples are hate crimes and employment antidiscrimination laws. For a graphic summary of the state-by-state status of hate crime legislation, see *Still in Need of Protection*, THE ADVOCATE, Oct. 12, 1999, at 46 (citing National Gay & Lesbian Task Force as source). As to anti-discrimination laws, Nevada recently became the twelfth state to offer protection against discrimination based on sexual orientation, NEV. REV. STAT. §§ 613.310, .330, .350 (2000), and Maryland became the thirteenth such state, just as this Article went to press. Senate Bill 205, Antidiscrimination Act of 2001 (May 15, 2001). For a compendium of these statutes, including the more limited protection offered by executive orders and by local ordinances, see Lambda Legal Defense and Education Fund, *Summary of States Which Prohibit Discrimination Based on Sexual Orientation*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=217> (last modified May 25, 2001).

<sup>27</sup> This point forms a central thesis of my article, Culhane, *Uprooting the Arguments*, *supra* note 22. Other works addressing the connection between the fear of same-sex marriage and rigid notions of gender are Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187; Cass R. Sunstein, *Homosexuality and the Constitution*, in *SEX, PREFERENCE, AND FAMILY: ESSAYS ON LAW AND NATURE* 208 (David M. Estlund & Martha C. Nussbaum eds., 1997). See discussion *infra* Part I.D.

<sup>28</sup> Commentators have noted that the aversion to sex has produced an unhealthy inconsistency: on the one hand, sex is not considered a fit topic for "official discussion;" on the other, since human beings are vitally sexual creatures, this puritanical denial seeds a barely contained sexual titillation, at the expense of sober discussion of important issues concerning sexuality and intimacy. See, e.g., WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 183-84 (1996); RICHARD A. POSNER, *SEX AND REASON* 9-10 (1992) ("[S]ex is not a fully respectable subject for public discussion

that, anyway, civil rights, not private lives, are what the *state* needs to recognize. In my view, however, complicity in the closeting of the sexual aspects of gay lives, whatever its perceived short-term necessity as a matter of strategy, is a mistake. When the dominant society is allowed to avert its eyes from intimate gay lives,<sup>29</sup> it feeds a culture in which many gay people are driven to internalize and repress important elements of their identity. Thus, one hears implausible comments such as: “My sexual identity is a non-issue at work”; or “In my family, sex isn’t discussed by anyone. It’s got nothing to do with being gay.” These statements betray the disquieting reality that gay people have been forcibly socially constructed in ways different from their straight co-workers and family members. With rare exceptions, straight people *do* discuss their personal lives—including family and spouse—at work, in ways as subtle as displaying a photograph at one’s desk.<sup>30</sup> That gay people do not often act similarly, or even see the oppression, underscores the force of that oppression.

In a closely related way, this enforced de-sexing of gay and lesbian people both limits the effectiveness of victories, and prevents other advances entirely. For example, a law protecting against employment

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in the United States (at the same time it permeates the popular media, and for that matter high-brow art and literature as well).”).

<sup>29</sup> Admittedly, there is a distinction between sexual intimacy and personal intimacy. This Article makes that distinction where necessary to the discussion of courts’ eagerness to look at anything *but* sexual intimacy.

<sup>30</sup> For this reason, the military’s “don’t ask, don’t tell” (and the often-omitted “don’t pursue”) policy is as cruel as it has proven unworkable. Under this policy, service members are to be discharged for homosexual acts, for statements that they are gay, and for marrying (or attempting to marry) a member of the same sex. *See* 10 U.S.C. § 654 (1994). While the military culture supports the constant discussion of matters of sex (to those often deprived of it for extended periods of time), any such discussion by gay members is expressly prohibited. Worse, the need for camouflage naturally supports self-abnegating heterosexual “displays” or statements by gay men (in particular) and raises questions for women who do not respond to the advances of males in the military. For a discussion of the policy, see, for example, Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military’s Don’t Ask, Don’t Tell Policy*, 63 BROOK. L. REV. 1141 (1997); Kay Kavanaugh, *Don’t Ask, Don’t Tell: Deception Required, Disclosure Denied*, 1 PSYCHOL. PUB. POL’Y & L. 142 (1995); Carl Riehl, *Uncle Sam Has to Want You: The Right of Gay Men and Lesbians (and all Other Americans) to Bear Arms in the Military*, 26 RUTGERS L.J. 343 (1995). The federal appellate courts that have considered the policy thus far have uniformly upheld it. *Able v. United States*, 155 F.3d 628 (2d Cir. 1998); *Holmes v. Cal. Army Nat’l Guard*, 124 F.3d 1126 (9th Cir. 1997); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996); *Thomasson v. Perry*,

discrimination based on sexual orientation should deter an employer from firing a gay employee, but is not, in itself, sufficient to make that employee's need to care for an ailing same-sex partner sympathetic to the employer—even if the employee has overcome the barrier of supported silence mentioned above.<sup>31</sup> As to advances precluded entirely, one need look no further than same-sex marriage, which, as of this writing, is nowhere legal in the United States.<sup>32</sup> Because courts and legislatures are uncomfortable with the statement about intimacy that marriage signals, gay people have found themselves reduced to battling for the often weak, spotty package of *economic* benefits offered by domestic partnership.<sup>33</sup>

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80 F.3d 915 (4th Cir. 1996). Support for the policy has not been as unwavering as these results suggest, however. In joining with four other judges in dissenting from the denial of a request for a rehearing en banc in *Holmes*, Judge Pregerson of the Ninth Circuit displayed a high degree of awareness about the practical effect of imposing silence on gay and lesbian military personnel; it can “lead others to presume that they assent to a view about their own sexuality that they do not espouse.” *Holmes v. Cal. Army Nat’l Guard*, 155 F.3d 1049, 1050 (1998) (Pregerson, J., dissenting). Like the employee who feels she cannot display the photo of her same-sex partner, the military employee would be discharged “simply because [she] wishes to make a statement about . . . her innermost self.” *Id.*

<sup>31</sup> If heterosexual employees were consistently given more sympathetic treatment than their gay co-workers, a claim of discrimination would be valid, but probably unlikely to be brought. Given the financial and psychological costs of suing one's employer, only actions as serious as firing or failing to promote are likely to be pursued. *Cf.* Mary Coombs, *Title VII and Homosexual Harassment After Oncale: Was it a Victory?*, 6 DUKE J. GENDER L. & POL’Y 113, 144 (1999) (noting that, even where employment discrimination against gays and lesbians is illegal, “not all discrimination is readily apparent. Thus, rules that make . . . discrimination more economically rational for employers will likely lead to more discrimination in fact.”).

<sup>32</sup> The statement in the text remains literally true, but Vermont's civil union law purports to grant same-sex couples all of the benefits and responsibilities of marriage, withholding only the marriage label. *See supra* Part I.D.

<sup>33</sup> *See, e.g.*, D.C. CODE ANN. §§ 36-1402, 1404, 1405, 1406 (Supp. 2000) (establishing requirements for domestic partnership and extending health care benefits to domestic partners); Phila., Pa., Ordinance Bills 970745, 970749, 970750 (1998) (granting limited benefits to “life partners” of city employees and defining “life partnerships”). As of January 1, 2000, California began a state-wide domestic partnership registry, including only two benefits: hospital visitation rights and health insurance benefits to the dependents of certain government employees. Amy Pyle, *State Begins Accepting Gays’ Domestic Partner Sign-Ups*, L.A. TIMES, Jan. 4, 2000, at A1. The Hawaii “package,” which is actually rather comprehensive (short of marriage), is discussed in *infra* Part II.D.2. For one well-articulated

Looking at several discrete areas of law, this Part develops the argument that judicial and legislative willingness to extend rights and recognition to same-sex couples depends on the ability of these entities to find some decisional "peg" other than the intimate lives of those couples. As the discussion below demonstrates, where such indirection is possible, progress towards equality is evident. Where focus on intimacy seems necessary, however, the choice is often between denial and defeat.

*A. Accession to Rent-Controlled Apartments: The New York Experience*

Apartments subject to rent-control laws are usually much less expensive than other rental units, but the landlord is permitted to raise the price substantially once the apartment changes lessees. The death of a tenant typically triggers the landlord's right to dispossess others in the apartment (and then to raise the rent), but New York has created an important exception to this right for "family members" and "spouses," who are permitted to remain and to accede to the benefits of lower rents. The interesting question for present purposes is whether a same-sex partner qualifies as a family member or a spouse.

In a path-breaking decision, the New York Court of Appeals ruled that a gay man's surviving intimate partner was indeed a "family" member within the meaning of the rent control regulation.<sup>34</sup> Such recognition is commendable, but a closer look at the court's language and holding reveals an effort, perhaps necessary, to shift focus away from the couple itself.

The regulation at issue prohibited dispossessing "either the surviving spouse of the deceased tenant or some other member of the deceased tenant's *family* who ha[d] been living with the tenant."<sup>35</sup> Using language that reflects an understanding of the couple's relationship, the court of appeals found that the plaintiff could qualify as a surviving family member:

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expression of the view that domestic partnership ought to be preferred to marriage for same-sex couples because the latter is too rooted in patriarchy and oppression, see Charles R.P. Pouncy, *Marriage and Domestic Partnership: Rationality and Inequality*, 7 TEMP. POL. & CIV. RTS. L. REV. 363, 376-77 (1998). *But see* Barbara J. Cox, *A (Personal) Essay on Same-Sex Marriage*, in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 27 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) (focusing on the openness that gay and lesbian marriages signal); ESKRIDGE, *supra* note 28, at 51-85 (discussing and rejecting the arguments against same-sex marriage).

<sup>34</sup> *Braschi v. Stahl Assocs.*, 543 N.E.2d 49, 53-54 (N.Y. 1989).

<sup>35</sup> *Id.* at 50 (quoting N.Y. COMP. CODES R. & REGS. tit. 9, § 2204.6(d) (1987)).

[The two men] lived together as permanent life partners for more than 10 years. They regarded one another, and were regarded by friends and family, as spouses. The two men's families were aware of the nature of the relationship, and they regularly visited each other's families and attended family functions together, as a couple. Even today, appellant continues to maintain a relationship with [the deceased's] niece, who considers him an uncle."<sup>36</sup>

As this heartening language suggests, the court of appeals distanced itself from "fictitious legal distinctions [and] genetic history," preferring to build its case from the "foundation [of] the reality of family life."<sup>37</sup> There is no denying that the decision is unusually progressive, and that it provides a powerful source of argument for cases in other areas of law, where litigants argue for a functional definition of family.<sup>38</sup> It is important to note, though, that the court avoided considering whether the couple might be considered "spouses" under the law. The decision to look to the word "family" instead of "spouses" might be justified as a matter of cleaner statutory interpretation,<sup>39</sup> but construing the word "family" probably made

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<sup>36</sup> *Id.* at 55.

<sup>37</sup> *Id.* at 53.

<sup>38</sup> See, e.g., *Taylor v. Alger*, 495 N.Y.S.2d 120 (Fam. Ct. 1985) (allowing visitation by step-great-grandfather and great-grandmother of child, based on "best interest" standard); *In re Jamal B.*, 465 N.Y.S.2d 115 (Fam. Ct. 1983) (dismissing petition to terminate parental rights where maternal grandmother had exhibited a consistent concern for, and involvement in, the welfare of autistic child). *But see* *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991) (holding that former partner in a lesbian couple is without standing to seek visitation of the child raised by the couple); cf. Brent Staples, *Why Same-Sex Marriage is the Crucial Issue*, N.Y. TIMES, Sept. 5, 1999, at § 4, at 10 (describing the battle of gay Arizona legislator Lieutenant Steve May to defeat a bill that would have barred counties from permitting domestic-partner benefits; in May's words, the bill was "an attack on my family. If you are not going to treat me fairly, stop taking my tax dollars. I'd like to ask this Legislature to leave my family alone.").

<sup>39</sup> The rent control regulations in effect at the time (and interpreted by the court in *Braschi*) did not specifically define "family member," whereas the rent stabilization regulations did. Compare N.Y. COMP. CODES R. & REGS. tit. 9, § 2520.6[n] (defining and listing immediate family members for the rent stabilization code), with *id.* § 2204.6[d] (more broadly referring to spouses "or some other member of the deceased tenant's family who has been living with the tenant"). One may have inferred from the looser definition under the rent-control regulations some willingness to read the term "family" expansively; given the specific legal meaning of the word "spouse" in other contexts, such an inference would have

the court feel more comfortable.<sup>40</sup> By looking beyond the couple itself to the extended family, the court was able to shift the focus from the couple's intimate life to a portrait with which it was more familiar.<sup>41</sup>

Such reticence to deal squarely with intimacy was subsequently ratified by New York's Division of Housing and Community Renewal ("DHCR"). In regulations passed in the immediate wake of *Braschi*, and challenged in *Rent Stabilization Ass'n of New York City v. Higgins*,<sup>42</sup> the DHCR defined family broadly to include: "Any other person residing with the tenant . . . who can prove emotional and financial commitment, and interdependence between such person and the tenant . . ." <sup>43</sup> As the court of appeals stated in *Higgins*, the regulation provides a list of non-exclusive factors relevant to determining whether such commitment and interdependence exist,<sup>44</sup> but

been harder to support. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 5-1.2(a) (McKinney 1999) ("[a] husband or wife is a surviving spouse"); N.Y. VOL. FIRE BEN. § 70.2. (McKinney 1988) ("[d]ependent husband' means the 'surviving spouse' of a female fireman").

<sup>40</sup> As I point out at *infra* notes 46-47 and accompanying text, this is not to say that indicia of family besides sexual intimacy should not be considered. Particularly in the context of landlord-tenant law, there will be many de facto families in which sexual intimacy forms no part of the analysis. *See, e.g.*, 2-4 Realty Assocs. v. Pittman, 523 N.Y.S.2d 7, 7-9 (Civ. Ct. 1987) (providing a detailed and sympathetic account of the deep emotional and familial ties between tenant, an elderly disabled man, and a mother and son with whom the tenant had developed a close bond, and also noting that "nonlegal and biological families" have long been prevalent in the American black family), *aff'd*, 547 N.Y.S.2d 515 (App. Term. 1989).

<sup>41</sup> *See* Culhane, *Uprooting the Arguments*, *supra* note 22, at 1141 ("[T]he sexless uncles attended family functions and were accepted by the niece, thereby creating a simulacrum of straight life that enabled dodging the challenge to gender-based assumptions that would otherwise be presented.").

<sup>42</sup> *Rent Stabilization Ass'n of New York City v. Higgins*, 630 N.E.2d 626 (N.Y. 1993).

<sup>43</sup> *Id.* at 629. The court lists the sources of the regulations for both rent control and rent stabilization, for both New York City and the rest of the state. *Id.* at 629 n.2.

<sup>44</sup> *Id.* at 629.

The specified factors are: (i) longevity of the relationship; (ii) whether the parties share household expenses; (iii) intermingling of finances; (iv) whether they engage in family-type activities; (v) whether they have formalized legal obligations toward each other; (vi) whether they hold themselves out as family members; (vii) whether they regularly perform family functions; and (viii) any other pattern of behavior that evidences an intention to create a long-term, emotionally committed relationship.

*Id.*

“[i]n no event would evidence of a sexual relationship between such persons be required *or considered*.”<sup>45</sup> Of course evidence of a sexual relationship should not be required; to *exclude* such evidence, however, does not make sense. Sexual intimacy, after all, might in a given case provide some of the “intention to create a long-term emotionally committed relationship”<sup>46</sup> that the DHCR seeks.

One might apologize for this ban on evidence of sexual intimacy by arguing that the benefits of succession are economic, not emotional, but this response misses the point. At issue is the nature of the relationship needed to give rise to these economic benefits, and certainly a long-term sexual relationship, where present, is evidence of a committed relationship. Moreover, the deliberate (and inexplicable) decision to exclude sexual intimacy from the determination, while not particularly troublesome to same-sex couples here, has the more generally pernicious effect of furthering the ban on discussion of sexual intimacy from legal discourse.<sup>47</sup>

For a compelling and contrasting example of judicial and legislative willingness to acknowledge sexual intimacy, consider the recent decision by the Canadian Supreme Court in *Attorney General for Ontario v. H.*<sup>48</sup> The court was called upon to interpret a provision of the Family Law Act enabling one member of a couple to seek support from the other upon dissolution of a long-term relationship. The provision defined “spouse” to include married couples and “a man and a woman who are not married to each other and have cohabited, . . . continuously for a period of not less than three years.”<sup>49</sup> Plaintiff at trial was one half of a former lesbian couple, who sought support from her former partner under the above section. Because the language of the provision precluded her from doing so, she challenged the validity of the section under a provision of the Canadian Charter of Rights and Freedoms that is roughly analogous to the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.<sup>50</sup>

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<sup>45</sup> *Id.* at 629 (citing sources set forth in *id.* at 629 n.2) (emphasis added).

<sup>46</sup> *See id.*

<sup>47</sup> Generally, the reluctance to weigh sexual intimacy affects opposite-sex couples as well as same-sex couples, but the effect is more pronounced on the latter, since they do not have marriage available as a container for legal benefits.

<sup>48</sup> *M. v. H.* [1999] 2 S.C.R. 3 (Can.) (indexed as *M. v. H.*).

<sup>49</sup> Family Law Act, R.S.O., ch. F-3, § 29 (1990) (Ont.).

<sup>50</sup> Compare CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15(1) (“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination . . . based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”), with U.S. CONST. amend. XIV, § 1 (“No State



The court struck down the challenged section, finding that it did indeed violate the Charter, and that no compelling justification had been adduced to save the provision.<sup>51</sup> For present purposes, the most interesting aspect of the court's decision is its interpretation of the term "cohabit." Elsewhere in the statute, the term is defined as "liv[ing] together in a conjugal relationship, whether within or outside marriage."<sup>52</sup> What, then, is meant by the term "conjugal relationship"? Inasmuch as the phrase is not defined by statute, the court furnished its own meaning, relying both on its own sense of the term's general meaning, and on an earlier lower court decision.<sup>53</sup> Beginning with the stark statement that "[c]ertainly same-sex couples will often form long, lasting, loving and intimate relationships,"<sup>54</sup> the court noted that the "approach to determining whether a relationship is conjugal must be flexible."<sup>55</sup> The factors to be considered are: "shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple."<sup>56</sup> Finally, consider this significant language: "[N]either opposite-sex nor same-sex

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shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."). Even though the term "sexual orientation" is not expressly included in the above list of protected groups, the Canadian Supreme Court's earlier decisions had established that the term is present by implication. *See Andrews v. Law Soc'y of B.C.* [1989] 1 S.C.R. 143 (holding that the protections of the above section are to be afforded to "new" kinds of discrimination analogous to those enumerated); *Egan v. Canada* [1995] 2 S.C.R. 513 (holding unanimously that sexual orientation is such an analogous ground). For a discussion of these points, see ROBERT WINTEMUTE, *SEXUAL ORIENTATION AND HUMAN RIGHTS: THE UNITED STATES CONSTITUTION, THE EUROPEAN CONVENTION, AND THE CANADIAN CHARTER* 151-64 (1995). For a critical analysis of Wintemute's treatment of these issues, see John G. Culhane, *Review of Sexual Orientation and Human Rights*, 16 WISC. INT'L L.J. 579, 590-94 (1998) (book review).

<sup>51</sup> Under § 1 of the Charter, the rights and freedoms protected are "subject only to such reasonable limits . . . as can be demonstrably justified in a free and democratic society." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1(1). The Attorney General for Ontario argued, unsuccessfully, that the provision was saved by § 1. *M. v. H.* [1999] 2 S.C.R. at 72-73.

<sup>52</sup> Family Law Act, R.S.O., ch. F-3, § 1(1).

<sup>53</sup> *Molodowich v. Penttinen* [1980] 17 R.F.L. (2d) 376 (Ont. Dist. Ct.).

<sup>54</sup> *M. v. H.* [1999] 2 S.C.R. at 50.

<sup>55</sup> *Id.* at 51.

<sup>56</sup> *Id.* at 50.

couples are required to fit precisely the traditional marital model to demonstrate that the relationship is 'conjugal.' . . . [T]he relationships of all couples will vary widely."<sup>57</sup>

This refreshingly candid recognition that sexual intimacy plays a significant part in many committed relationships stands in telling opposition to the express refusal by New York's DCHR to find this highly probative evidence even admissible. The Canadian Supreme Court honors same-sex couples, recognizing that such couples can be loving and intimate even though they do not fit the traditional model. Further, the Court is unafraid of the flexible inquiry that will be required to determine whether a relationship is conjugal.<sup>58</sup> Such an unabashed view of non-traditional couples can advance the cause of opposite-sex couples as well as same-sex couples, by creating fertile soil for changing laws—such as those applying to tortious injuries to relations—that are now rooted in simplistic rules based on narrow notions of legal status.

### *B. Support Agreements Between Same-Sex Partners*

Beginning with the well-known case of *Marvin v. Marvin*,<sup>59</sup> courts have shown some willingness to enforce contractual arrangements entered into between unmarried cohabitants.<sup>60</sup> One consistent limitation, however, has been that sexual services can form no part of the consideration for such an agreement. Courts have typically based the prohibition on the illicit nature of sex between unmarried people, but this justification misses the mark. Even a married couple should not be permitted to contract for sexual services, and not just because of the law against payment for sex (i.e., prostitution). Rather, two people in an intimate sexual relationship are (or should be) deriving mutual fulfillment and pleasure from their mo-

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<sup>57</sup> *Id.* at 51.

<sup>58</sup> As I argue in Part III.A, the need for flexibility is particularly acute in tort law.

<sup>59</sup> *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976). The case involved an opposite-sex couple, of which one member was the actor Lee Marvin.

<sup>60</sup> Martha Ertman has argued that contract provides a sort of "halfway house" between complete legal non-status and full recognition. Martha M. Ertman, *Contractual Purgatory for Sexual Minorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107 (1996). The argument, in sum, is that the state may be willing to allow gay people and couples to enter into enforceable contracts before it is "ready" to grant full legal recognition. *See id.*

ments of intimacy. Given such mutuality, what justifies paying for the sex itself?<sup>61</sup>

Here, then, is an instance where a court *should* look for a way to sever the sexual relations from the other services alleged to form the consideration for the contract. In many of these cases, one partner is the traditional "bread-winner," while the other remains at home and attends to a myriad of tasks—housework, cooking, "chauffeuring," bill-paying and family accounting, and so on. Courts have properly held that such tasks are compensable. They have recognized that, in many cases, one member of the couple gives up a career outside of the home. Although the separation of sex from other signs of a committed relationship is defensible in this context, the cases demonstrate, from a different perspective, the ability of unsympathetic courts to use the intimacy of same-sex couples to deny them fair treatment.

Of course, one tactic is to ignore the relationship altogether, but, as *Crooke v. Gilden*<sup>62</sup> shows, considerable effort is required to do so. There, the court had before it the validity of a contract for the partition of real estate between—who knows? The court says nothing about the parties, refusing even to divulge their sex! In fact, the case involved a lesbian couple, but one has to do some detective work to discover that simple fact, which appears nowhere in the decision.<sup>63</sup> The court's reference to the relationship is similarly cryptic: "Crooke contends . . . that parol evidence showing an illegal and immoral relationship between the parties is admissible and demonstrates that this contract is void . . ."<sup>64</sup> The court upheld the contract without further discussion of the relationship.

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<sup>61</sup> One should not be so naive as to suppose that the power differential in a couple, particularly a male-female couple, will preclude one partner's engaging in sexual relations with the other out of economic necessity. Indeed, women have sometimes stated that they perceived it as their role to engage in sexual relations with the men with whom they cohabit. *See, e.g., Alderson v. Alderson*, 225 Cal. Rptr. 610, 617 (Ct. App. 1986). Inasmuch as there are other incidents of the cohabitation relationship that should be compensable, however, a strong argument against commodifying the sexual relationship can be stated. This point is not inconsistent with the theory underlying the tort of loss of consortium. The latter involves a loss caused by a *third party's* negligence to a relationship that the couple was, in fact, enjoying. As difficult as such a relationship is to quantify, that loss is both real and uninvited. On the other hand, there is no legal duty for either member of the couple to "remit" sexual services to the other.

<sup>62</sup> *Crooke v. Gilden*, 414 S.E.2d 645 (Ga. 1992).

<sup>63</sup> *See Nancy Ehrenreich, The Progressive Potential in Privatization*, 73 DENV. U. L. REV. 1235, 1249 (1996).

<sup>64</sup> *Crooke*, 414 S.E.2d at 646 (citation omitted).

In most courts, somewhat less of a Jane Austen sensibility is in evidence. Inasmuch as the cases intractably involve some element of intimacy, the question then becomes whether a same-sex couple will be given fair treatment. Two California appellate decisions stand in instructive contrast. In *Jones v. Daly*,<sup>65</sup> the court ruled that the illegal consideration for sex could not be separated from plaintiff's agreement to act as "traveling companion, housekeeper or cook."<sup>66</sup> In *Whorton v. Dillingham*,<sup>67</sup> on the other hand, the 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, . . . constant companion, confidant, [and] traveling and social companion."<sup>68</sup> 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.<sup>69</sup> The *Jones* court, on the other hand, refused to so regard the plaintiff's efforts as "housekeeper" or "cook."<sup>70</sup> Further, the *Jones* court cited *Marvin v. Marvin* approvingly, even though the plaintiff's promises there—to act as "companion, homemaker, housekeeper and cook"—were indistinguishable from those in the case before it.<sup>71</sup>

The real problem with the agreement in *Jones* is something of a flip-side to the courts' usual inability to "see" the intimacy of same-sex couples. 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. Note what happened when Jones dared to call himself the defendant's "lover:"

[T]hey agreed that . . . plaintiff would render his services to Daly as "a lover, companion, homemaker, traveling companion, housekeeper and cook." . . . [P]laintiff allowed himself to be known to the general public as the "lover and cohabitation mate" of Daly. These allegations clearly show that plaintiff's rendition of sexual services to Daly was an insepara-

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<sup>65</sup> *Jones v. Daly*, 176 Cal. Rptr. 130 (Ct. App. 1981).

<sup>66</sup> *Id.* at 134.

<sup>67</sup> *Whorton v. Dillingham*, 248 Cal. Rptr. 405 (Ct. App. 1988).

<sup>68</sup> *Id.* at 406-07.

<sup>69</sup> *Id.* at 409.

<sup>70</sup> *Jones*, 176 Cal. Rptr. at 134.

<sup>71</sup> *Id.*

ble part of the consideration for the “cohabitators agreement,” and indeed was the predominant consideration. . . . [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.<sup>72</sup>

What other word, besides “lover,” was the plaintiff supposed to use? Husband and wife would have worked, apparently; in *Marvin*, the court effectively held that the words “husband and wife” did not mean that sexual relations were part of the “package” of services.<sup>73</sup> Unfortunately for the plaintiff, though, the law’s refusal to grant legal recognition to the committed relationships of same-sex couples deprived him of that option. Perhaps the more business-like “partner” would have worked;<sup>74</sup> if so, the point about judicial unwillingness to recognize the intimate lives of same-sex couples is again underscored. In short, the plaintiff was punished for “flaunting” (by mentioning) his intimacy.<sup>75</sup>

Another same-sex support case shows that unwillingness to see same-sex partners as equivalent to “husband and wife” may have damaging ripple effects. In *Silver v. Starrett*,<sup>76</sup> the defendant claimed that her agreement to pay support was obtained through duress. Under the facts of the case, no such argument could be successfully made. Nonetheless, the New York Supreme Court (New York County) took a detour into dictum to note that, had the plaintiff been husband and wife, duress would have been more easily proven because of the fiduciary relationship that attaches to the marital state.<sup>77</sup> As to “nonmarital agreements,” “strict surveillance as to

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<sup>72</sup> *Id.* at 133.

<sup>73</sup> See *Whorton*, 248 Cal. Rptr. at 408 (discussing the holding in *Marvin* and noting that “apparently the [*Marvin*] court did not interpret [husband and wife] as expressly indicating sexual services were part of the consideration”).

<sup>74</sup> In the movie *American Beauty* (Dreamworks SKG 1999), the powerful association between the term “partner” and business is played for a laugh. One of the characters is an ex-military suburbanite who, upon hearing that his two cohabitating male neighbors are partners, asks them what business they are in. The character later inveighs against gays who “flaunt” their sexual identity. At the risk of ruining one of the movie’s revelations, the character turns out to be a closeted gay man himself.

<sup>75</sup> It should be noted that the court in *Whorton* could have done the same thing as the court in *Jones*, because the plaintiff in *Whorton* also used the word “lover”—albeit at the end (not the beginning) of the “string.” *Whorton*, 248 Cal. Rptr. at 407.

<sup>76</sup> *Silver v. Starrett*, 674 N.Y.S.2d 915 (S. Ct. N.Y. County 1998).

<sup>77</sup> *Id.* at 918.

separation agreements” does not apply.<sup>78</sup> Whatever the state’s policy as to same-sex marriage, the court’s approach elevates status over reality, and submerges same-sex intimacy. It is thus at odds with the functional analysis mandated by the New York Court of Appeals in *Braschi*.<sup>79</sup> In practice, the same-sex (or unmarried opposite sex) couple is quite as likely to have the same kinds of psychological issues between them as those animating the fiduciary rule for legal spouses. As we shall see, this kind of formalism poses problems for torts plaintiffs as well.

### C. *Same-Sex Adoption and Custody*

Anyone who has given thought to the matter will have been struck by the paradox that courts have been far more willing to permit same-sex couples to create families with children than to permit same-sex marriage. Social science research suggests that children do better in stable families,<sup>80</sup> and marriage creates stability. Why is it, then, that at least some courts recognize that the best interests of children may be served by permitting gay and lesbian adoption and custody, but do not allow the marriages that will further those interests?<sup>81</sup> Again, the answer lies in the court’s ability, in cases involving children, to focus on issues other than the intimate (sex) lives of the couple. In the adoption and custody cases, courts look squarely at what is best for the child. When the issue moves to marriage, the discomfort with intimacy bubbles to the surface. It is therefore predictable that the hardest cases involve conflicts between gay and straight parents over custody, where courts must accommodate the cardinal principle that the child’s best interest is paramount with their ingrained view that a

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

<sup>79</sup> See *supra* notes 34-41 and accompanying text.

<sup>80</sup> In a provocative (and provocatively titled) article, Barbara Dafoe Whitehead summarized some of the research, and suggested that the uncomfortable implications of the studies’ conclusions—including that divorce and single-parent households are bad for children—have kept them from the center of public discourse. Barbara Dafoe Whitehead, *Dan Quayle Was Right*, THE ATLANTIC MONTHLY, Apr. 1993, at 47. She acknowledges that not all of the studies tend toward those conclusions, however. *Id.* at 82. If stability is better for children, then recognizing same-sex marriages promotes that goal.

<sup>81</sup> See ESKRIDGE, *supra* note 28, at 111 (“By opposing same-sex marriage the objectors are in reality subverting families . . . and penalizing children. State prohibition of same-sex marriage is antifamily, anticommunity, and anti-children.”); see also Kathryn Kendall, *Lesbian Couples Creating Families*, in ON THE ROAD TO SAME-SEX MARRIAGE 41, 42 (Robert P. Cabaj & David W. Purcell eds., 1998).

straight household, however dysfunctional, remains superior to a “queer” household.<sup>82</sup> Substantial scholarship has been devoted to the complex issues concerning gay family law issues, including adoption and custody.<sup>83</sup> My limited purpose here is to highlight a few developments that illustrate judicial inconsistency when it comes to serving the best interests of children.

The simplest cases are those involving simple, uncontested adoptions by a gay man or a lesbian, or by a same-sex couple. Assuming no contrary state statutory law,<sup>84</sup> some of these cases show deep empathy for the family.<sup>85</sup> In fact, a judge who shows unfounded hostility towards such adoptions may find herself at the receiving end of a strong rebuke from the appellate court. In *In re C.M.A.*,<sup>86</sup> the First District Illinois Appellate Court excoriated trial judge Susan McDunn for what it called “extreme and patent bias against the adoptive parents based upon their sexual orientation.”<sup>87</sup> Judge McDunn’s handling of the case had indeed been both appalling<sup>88</sup> and

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<sup>82</sup> My use of the term “queer” in this context is meant to signal the courts’ general view that households headed by gay and lesbian people are odd and inexplicable.

<sup>83</sup> See, e.g., WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 827-68 (1997); Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 *CARDOZO L. REV.* 1299 (1997); Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscegenation Analogy*, 25 *SUFFOLK U. L. REV.* 981 (1991).

<sup>84</sup> Until recently, only Florida prohibited gay adoptions. *FLA. STAT. ANN.* § 63.042(3) (West 1997) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”). Recent legislation in Mississippi and Utah also prohibits such adoptions, as do state agency rules in Arkansas. See *States That Prohibit Homosexuals from Adopting Children*, at <http://www.gayrightsinfo.com> (last modified May 4, 2000). New Hampshire recently changed its law against such adoptions. 1999 N.H. LAWS Ch. 18 (“An Act removing the prohibition on adoption and foster parenting by homosexual persons.”). The law went into effect on July 2, 1999.

<sup>85</sup> See cases discussed in Christensen, *supra* note 83, at 1300-02.

<sup>86</sup> *In re C.M.A.*, 715 N.E.2d 674 (Ill. App. Ct. 1999).

<sup>87</sup> *Id.* at 679.

<sup>88</sup> Her dismal handling of the case is summarized by Lambda Legal Defense and Education Fund. See Press Release, Lambda Legal Defense and Education Fund, Illinois Appeals Court Officially Rebukes Rogue Judge, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=461> (July 21, 1999). According to the summary, she “ignored positive recommendations from court-appointed guardians and testimony from social workers that said the children were thriving and that ‘highly recommended’ the adoptions as in their best interests.” *Id.* In addition to delaying the adoptions, “she appointed the anti-gay Family Research Council to represent the best interests of the children.” *Id.*

defiant,<sup>89</sup> but the court's language focused as much on affirming the couple's relationships with the children as on criticizing the trial judge. The parents "came to our state court system in order to be allowed to adopt children, children with whom they had already formed a loving relationship over a period of time. *A higher purpose cannot be imagined.*"<sup>90</sup> It bears repeating that this "higher purpose" does not include same-sex marriage, despite the court's rhetoric.

A more impressive example of judicial willingness to look favorably at same-sex adoptions arises in those states with statutes requiring, in contests between a biological parent and a putative adopting parent, a demonstration that the biological parent is unfit. Typically, such statutes create an exception where the person wishing to adopt is a stepparent of the child.<sup>91</sup> The logic for the exception is that, inasmuch as the stepparent and the biological parent are going to raise the child together, requiring a demonstration of the biological parent's lack of fitness defeats the purpose of the general rule. The problem for same-sex couples is that their inability to marry makes them technically incapable of being stepparents, so that the statutory exception is, on its face, unavailable to them.

Caught in this squeeze between recognizing the reality of the same-sex couple's de facto marriage and serving the best interests of the child, at least some courts have permitted the stepparent exception to apply in these cases.<sup>92</sup> It is crucial to highlight that courts can reach this result only by reading the statute in apparent defiance of its clear language, and thereby recognizing the couple, for this purpose at least, as effectively married. As the Vermont Supreme Court stated: "[I]t would be against common sense to terminate the biological parent's rights when that *parent* will continue to raise and be responsible for the child, albeit in *a family unit with a*

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<sup>89</sup> *Id.* ("Even after the presiding judge removed Judge McDunn from both cases for bias and other causes, she refused to relinquish control of them and . . . issued orders purporting to void her removal and block the adoptions.").

<sup>90</sup> *In re C.M.A.*, 715 N.E.2d at 680 (emphasis added).

<sup>91</sup> This point is ably explored by Marla J. Hollandsworth, *Gay Men Creating Families Through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom*, 3 AM. U. J. GENDER & L. 183, 238-39 (1995).

<sup>92</sup> *See, e.g.*, *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995); *Adoption of B.L.V.B.*, 628 A.2d 1271 (Vt. 1993). *But see In re Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994). Even in *Angel Lace*, however, a concurring justice expressed frustration at being constrained by the statute, and encouraged the legislature to rewrite it. *Id.* at 687 (Geske, J., concurring).



partner who is biologically unrelated to the child.”<sup>93</sup> Further, sympathetic courts reinforce this recognition by relying on the length of the relationship as evidence that the child’s best interest will be served by permitting the stepparent to adopt.<sup>94</sup> Thus, the judiciary approaches tacit recognition of the intimate (married) life of the couple by indirection, avoiding focus on what it finds most vertiginous.

In cases pitting straight and gay parents against each other in custody battles, the wall between the courts’ views of the same-sex couple, on the one side, and the family, including children, on the other, cannot easily be propped up. Because the central issue remains the child’s best interests, the courts have had to accommodate their own views about the supposed superiority of opposite-sex orientation to the reality of the child’s life. This imagined tension has led to confusion and inconsistency in the decisional law.

Although courts have been moving away from a *per se* rule excluding gay and lesbian parents from gaining or retaining custody of, or visitation rights to, their children,<sup>95</sup> a number of them have impeded custody (or even

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<sup>93</sup> *Adoption of B.L.V.B.*, 628 A.2d at 1274 (emphasis added). With the enactment of Vermont’s civil union law, this decision’s statutory interpretation is probably moot, because the stepparent exception should apply to the non-biological parent in such a union just as it would with a married (opposite-sex) couple. The civil union law is discussed more fully in *infra* Part I.D.

<sup>94</sup> See *Adoption of Tammy*, 619 N.E.2d at 316 (ten years); *In re Jacob*, 660 A.2d at 398 (nineteen years); *Adoption of B.L.V.B.*, 628 A.2d at 1272 (seven years). By contrast, in a leading case involving the attempted adoption by one same-sex partner of the other, the court read the statutory language of the adoption statute narrowly to avoid allowing one same-sex partner to adopt the other. *In re Robert Paul P.*, 471 N.E.2d 424 (N.Y. 1984). Since no third party’s interests were at stake, the court retreated to its basal discomfort with same-sex intimacy, a discomfort lanced by the dissenting opinion: “[N]othing in the statute requires an inquiry into or evaluation of the sexual habits of the parties to an adult adoption . . .” *Id.* at 429 (Meyer, J., dissenting). Nonetheless, the court was sufficiently spooked by the prospect of such an adoption that it failed to perceive that the statutory language that it quoted actually supported the adoption, which had to be “‘in the best interests of the [adoptee].’” *Id.* at 426.

<sup>95</sup> See ESKRIDGE & HUNTER, *supra* note 83, at 832-33 (citing early cases and literature). One commentator has discerned three broad approaches to the question of the suitability of a gay or lesbian parent: some courts create an irrebuttable presumption against such a parent; others require the parent to rebut a presumption of unfitness; and still others do not regard same-sex orientation as disqualifying, although they do look to see whether a harm to the child is likely. Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102

visitation) by parents of same-sex orientation by creating presumptions against, or imposing special conditions on, them.<sup>96</sup> In *Bottoms v. Bottoms*,<sup>97</sup> the Virginia Supreme Court, although noting that it had earlier discarded the rule that a lesbian parent was inherently, or *per se* unfit,<sup>98</sup> upheld the trial judge's determination that custody should be awarded to the *grandmother*, not the biological (lesbian) mother. The court reached its conclusion even though the trial judge had *applied the per se rule*. Ordinarily, of course, the lower court's application of the wrong rule of law would have resulted in a remand for new findings, if not a new hearing.<sup>99</sup> Since the mother was a lesbian, however, the Virginia Supreme Court did not trouble itself to follow the proper procedure.

Even in those jurisdictions exhibiting a less benighted approach, the cases are sometimes redolent of homophobic assumptions about the "best interests" of the child. For example, in *Conkel v. Conkel*,<sup>100</sup> the court stressed the child's best interest in letting stand the trial court's decision to allow overnight visitation to the gay father. But that same decision had imposed the condition that the father not have present any non-related male person.<sup>101</sup> It is unlikely that such a condition would have been imposed—or allowed to stand by the appellate court—if the father were involved with a woman.<sup>102</sup> The court's repeated assumption that same-sex orientation is a "fault,"—meant, oddly, as supporting the rights of a gay parent, since we all have "faults"<sup>103</sup>—underscores the court's disparate treatment of straight

HARV. L. REV. 617, 619-20 (1989). Too much should not be made of such categories, however, especially in an area so volatile. One recent work places the English courts somewhere between the second and third categories mentioned above. See NICHOLAS BAMFORTH, *SEXUALITY, MORALS AND JUSTICE* 52 (1997).

<sup>96</sup> See ESKRIDGE & HUNTER, *supra* note 83, at 837. As the authors point out, some state statutes require the court to consider the parent's "moral fitness," while the judiciary in other states has presumed against the gay or lesbian parent in a dispute with their straight former spouses. *Id.*

<sup>97</sup> *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995).

<sup>98</sup> *Id.* at 108.

<sup>99</sup> This point was expressed in Justice Keenan's dissent. *Id.* at 109 (Keenan, J., dissenting).

<sup>100</sup> *Conkel v. Conkel*, 509 N.E.2d 983 (Ohio Ct. App. 1987).

<sup>101</sup> *Id.* at 984. Some decisions have refused to impose such a requirement. See, e.g., *Birdsall v. Birdsall (In re Marriage of Birdsall)*, 243 Cal. Rptr. 287 (Ct. App. 1988); *In re Marriage of Diehl*, 582 N.E.2d 281 (Ill. App. Ct. 1991); *North v. North*, 648 A.2d 1025 (Md. Ct. Spec. App. 1994); *Blew v. Verta*, 617 A.2d 31 (Pa. Super. Ct. 1992).

<sup>102</sup> See ESKRIDGE & HUNTER, *supra* note 83, at 836-37.

<sup>103</sup> *Conkel*, 509 N.E.2d at 986.

and gay parents. Again, when the focus moves to the private lives of same-sex couples, the results are not encouraging.

#### D. Same-Sex Marriage

This is not the place for a full-throated discussion of same-sex marriage.<sup>104</sup> My goal, instead, is to lead into the discussion of the tort law's silence on relational injuries to same-sex couples by explaining and emphasizing the strength of opposition to their intimate lives in the setting that has generated the most heat.

From a purely legal standpoint, same-sex marriage has been an unremitting failure, to date. A spate of early cases dismissed the discrimination claims of same-sex applicants for marriage licenses with little analysis, leaning on the unhelpful tautology that marriage *means* the union of a man and a woman.<sup>105</sup> A breakthrough once seemed imminent in Hawaii, when that state's supreme court ruled, in *Baehr v. Lewin*,<sup>106</sup> that the state needed to show a compelling interest in order to deny marriage licenses to same-sex couples. Even this decision, though, reiterated judicial squeamishness with the intimate lives of same-sex couples. The decision was based not on the fundamental right to marry, but on the impermissibility, under the Hawaii State Constitution, of distinctions based on sex.<sup>107</sup> Moreover, the court ignored the parties' sexual orientation (and therefore their intimate lives) in the face of their proclamation of such orientation, stating that the parties to a same-sex marriage might not be "homosexual."<sup>108</sup> Note the willful uncoupling of sex and marriage that this statement achieves.

In any event, the trial court held on remand that no such interest had been shown.<sup>109</sup> While the case was under a second appeal to the Hawaii Supreme Court, however, the electorate voted to grant the legislature the

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<sup>104</sup> See Culhane, *Uprooting the Arguments*, *supra* note 22, at 1121 n.5 (citing some of the vast literature on the subject).

<sup>105</sup> See *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (stating that the historic institution of marriage "uniquely involv[es] the procreation and rearing of children"); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974) (explaining that marriage is a relationship "which may be entered into only by two persons who are members of the opposite sex").

<sup>106</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). When the state's director of public health was replaced by Lawrence Miike, the case name changed accordingly.

<sup>107</sup> *Id.* at 60.

<sup>108</sup> *Id.* at 51 & n.11, 52 & n.12.

<sup>109</sup> *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

power to amend the state constitution to define marriage as a union between "a man and a woman."<sup>110</sup> After that development, the Hawaii Supreme Court reversed and remanded the case for entry of judgment against the plaintiff.<sup>111</sup>

If anything, the Hawaii experience shows the force of opposition to same-sex marriage. Not only did the electorate vote, by approximately a 2-1 margin, to permit the constitutional amendment, but the very possibility that even one state might grant such recognition triggered something of a national panic. Shortly after the Hawaii Supreme Court issued its first ruling, Congress threw aside its long-standing deference to the states on eligibility for marriage by overwhelmingly enacting the defiantly named Defense of Marriage Act ("DOMA"). DOMA both defined marriage, for federal purposes, as between a man and a woman, and purported to grant the states power to deny recognition to same-sex marriages performed in another state.<sup>112</sup> For their part, states enacted "mini-DOMAs" that declared it to be state policy not to recognize same-sex marriages celebrated in any other state.<sup>113</sup>

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<sup>110</sup> The proposed amendment to Art. I. of the state constitution provided: "Section 23. The legislature shall have the power to reserve marriage to opposite-sex couples." 1997 Haw. Sess. Laws H.B. 117, § 2. Voters overwhelmingly accepted this amendment in November 1998. See Sam Howe Verhovek, *From Same-Sex Marriage to Gambling, Voters Speak*, N.Y. TIMES, Nov. 5, 1998, at B1.

<sup>111</sup> *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999) (unpublished table decision). For the full opinion of the court, see *Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391 (Dec. 9, 1999).

<sup>112</sup> See Defense of Marriage Act (DOMA), Pub. L. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. V 1999) and 28 U.S.C. § 1738C (Supp. IV 1998)). DOMA provides, in relevant part:

No state . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.

28 U.S.C. § 1738C. It further states:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife.

1 U.S.C. § 7.

<sup>113</sup> See Kuykendall, *supra* note 21, at 392-93 n.22; see also discussion *supra* note 21.

The reaction triggered by the possibility that same-sex couples from other states might celebrate their marriage in Hawaii, and then demand recognition of that marriage in their state of residence, reveals the visceral hostility to same-sex marriage. A solid majority of the population opposes same-sex marriage, even though, on other issues, people are much more supportive of the rights of gay and lesbian people.<sup>114</sup> The fall-out from *Baehr* reveals the deep source of discomfort with same-sex intimacy, which the prospect of marriage obviously calls up in the most fundamental way.

Even the recent decision by the Vermont Supreme Court in the landmark case of *Baker v. State*<sup>115</sup> reveals lingering disquiet with gay and lesbian lives. There, the court unanimously held that the state's denial of the benefits of marriage to same-sex couples violated the state's guarantee of equal protection, expressed in Vermont through the state constitutional requirement that no citizen be deprived of the common benefits of the law.<sup>116</sup> Note that the court found only that the denial of *the benefits of marriage* violated the common benefits clause, stopping short of holding that same-sex couples have the right to marry.<sup>117</sup> The matter of how to afford the benefits of marriage was left to legislative determination. The Vermont legislature then passed, and the governor signed, a bill to create an entity called the "civil union," which provides "all the same benefits, protections and responsibilities" that spouses now have.<sup>118</sup> In so acting, the legislature solved, if only in Vermont, the problem under discussion in this Article, by allowing parties to a civil union to bring all "causes of action related to or dependent upon spousal status, including an action for wrongful death, emotional distress, loss of consortium, . . . or other torts . . .

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<sup>114</sup> See Marc Peyser, *Battling Backlash*, NEWSWEEK, Aug. 17, 1998, at 50, 51 (citing Newsweek poll in which 83% favored equal employment rights, 75% were for equal housing rights, and slightly more than 50% favored allowing same-sex partners to inherit each other's Social Security benefits, but only 33% favored legalizing same-sex marriage). A more recent Newsweek poll yielded quite similar results, leading to the comment that, "[o]n more intimate issues. . . straight people are not always so comfortable." John Leland, *Shades of Gay*, NEWSWEEK, Mar. 20, 2000, at 46, 49.

<sup>115</sup> *Baker v. State*, 744 A.2d 864 (Vt. 1999).

<sup>116</sup> *Id.* at 867.

<sup>117</sup> *Id.* at 886-88 (discussing the appropriate remedy).

<sup>118</sup> VT. STAT. ANN. tit. 15, § 1204(a) (Supp. 2000). A good discussion and summary of the "civil union" act can be found at the website of the Human Rights Campaign. *Recent Developments in Sexual Orientation and Gender Identity Law*, LAW BRIEFS (Human Rights Campaign, Washington, D.C.), at <http://www.hrc.org/pubs/lawbriefs/lawb0302.html> (Spring 2000).

related to, or dependent upon spousal status.”<sup>119</sup> Nonetheless, the court’s approach underlines the point about discomfort with same-sex intimacy.

The court’s stated reason for its deference to the legislature is one of modesty and respect for a coordinate branch of government.<sup>120</sup> Inasmuch as the court required that same-sex couples receive *the same* benefits as opposite-sex couples, it may seem uncharitable to criticize what was surely a sound political compromise.<sup>121</sup> Nonetheless, nothing short of marriage can achieve even formal equality.<sup>122</sup> More significantly, the court’s approach is sadly similar to the “separate but equal” status under which African-Americans labored for a full century following the end of the Civil War.<sup>123</sup> The decision betrays a lingering allegiance to a caste system of sexual orientation that subtly devalues the intimate lives of gays and lesbians by denying them access to the social approbation that enshrines the institution of marriage.

Such approbation, in turn, remains tethered to a static portrait of marriage that is in fact out-of-step with reality, but that continues to be reinforced through ritual. Consider the traditional trappings, even today, of most weddings. From the ceremonial wedding dress and tuxedo, to the

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<sup>119</sup> VT. STAT. ANN. tit. 15, § 1204(e)(2).

<sup>120</sup> *Baker*, 744 A.2d at 888. The court was also alive to the possibility that judicially requiring the state to issue marriage licenses to same-sex couples would invite the same type of legislative and popular response that mooted decisional law in Alaska and Hawaii. *Id.*

<sup>121</sup> *Cf.* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 101 (1996) (“Courts do best by proceeding in a way that is catalytic rather than preclusive, and that is closely attuned to the fact that courts are participants in the system of democratic deliberation.”).

<sup>122</sup> For example, a Vermont same-sex couple that attempts to use its “civil union” status in some other state, perhaps during a vacation, may encounter difficulties that a married couple would not. It seems to me unlikely that the state or private actors in other states would accord this unique legal creature the status of marriage. After all, if the state of origin does not deem the couple worthy of the “real thing,” why should any other state? On the other hand, the term “civil union” is not covered by the various defense of *marriage* statutes, so that such statutes do not literally apply to this entity. Even absent a state defense of marriage act, these problems of definition and application compound the difficulty that courts will have to face when these statutes are challenged.

<sup>123</sup> Although the U.S. Supreme Court declared racially segregated schools inherently unequal in 1954, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), it was not until 1967 that a similar “separate but equal” statute prohibiting certain interracial marriages was struck down, *Loving v. Virginia*, 388 U.S. 1 (1967), thereby bringing to a belated end the era of anti-miscegenation laws.

bachelor party, to the public celebration and affirmation of the couple's commitment, weddings reflect frozen images of gender roles.<sup>124</sup> Although feminists have done much-needed work in challenging the scripted roles assigned to "husband" and "wife,"<sup>125</sup> the stubborn persistence of traditionalism that surrounds the wedding ritual reflects resistance to those challenges.<sup>126</sup> Supporters of the recently passed Proposition 22 in California, which purports to "define" marriage as a union "between a man and a woman," played this "tradition card" to winning effect in television advertisements depicting a Mexican-American couple celebrating their fiftieth anniversary.<sup>127</sup> With relatives gathered around the couple, the voice-over tied this portrait to its political end: "The family just gets bigger and bigger, with children, grandchildren, and now great-grandchildren. . . . Marriage and family—that's what Proposition 22 is all about."<sup>128</sup> What it is *not* about is the reality of the intimate lives of same-sex couples.

Same-sex couples, obviously, pose a far greater challenge than, say, working women, to traditional understandings of the proper expressions of gender identity. On the level of ritual alone—a level that should not be discounted—same-sex couples require viewing a different portrait.<sup>129</sup> That

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<sup>124</sup> Surely no more dramatic example can be found of the continuing power of such gender roles than the FOX television network's hugely successful show, *Who Wants to Marry a Multi-Millionaire* (FOX television broadcast, Feb. 15, 2000), in which a tuxedoed rich guy chose a bride from among fifty female hopefuls, and married her (after a swim suit competition, among other selection criteria) on the air. That blind adherence to such roles is a mistake was borne out by subsequent events: the couple's "marriage" didn't survive their honeymoon.

<sup>125</sup> See, e.g., BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963); Phyllis T. Bookspan, *A Delicate Imbalance—Family and Work*, 5 *TEX. J. WOMEN & L.* 37, 74 (1995) ("We should . . . dig out the old idea that no man can take full care of a child and that every woman can." (quoting PENELOPE LEACH, *CHILDREN FIRST* 32 (1994))).

<sup>126</sup> A related point is that some of the opposition to same-sex marriage can be attributed to the fear that the presence of legally sanctioned same-sex couples would unmask the truth that the institution of marriage has already undergone seismic and irreversible change. John G. Culhane, *Same-Sex Marriage: The Depth of the Opposition and the Importance of Victory*, 3 *J. GAY & LESBIAN MED. ASS'N* 103, 106 (1999).

<sup>127</sup> Nita Lelyveld, *Prop. 22 Ads Focused on Traditional Family*, *PHILA. INQUIRER*, Mar. 13, 2000, at A8.

<sup>128</sup> *Id.*

<sup>129</sup> Such visual vertigo also provides some part of the explanation for the long and extant opposition to interracial marriage. Even relatively recently, a survey revealed that, although most people believed such marriages should be legal, there

such a challenge causes vertigo even among those who might otherwise be expected to be sympathetic to same-sex marriage is reflected in statements such as “I feel I’m on ground full of quicksand,”<sup>130</sup> by then-Senator Bill Bradley. When it comes to same-sex couples, many have difficulty in seeing beyond sexual intimacy—an intimacy that, in turn, presents a threat to scripted roles of male and female. In sum, the Vermont Supreme Court was in plentiful company in denying same-sex couples access to the one institution that would make them testaments to the changed truth about once-rigid gender roles.

Justice Denise Johnson, concurring in part and dissenting in part with the majority’s holding in *Baker*, showed rare insight in perceiving the vestigial link between the continued restriction of marriage to opposite-sex couples and archaic notions of the “proper” roles of men and women. As she stated, these “stereotypical imaginings”<sup>131</sup> are tied to “the outmoded conception that marriage requires one man and one woman, creating one person—the husband.”<sup>132</sup> The state, she concluded, should have no part in fostering the continuation of such dehumanizing myths.

The commitment of Western society to simplistic notions of gender as determined by biological differentiation into male and female is not inevitable.<sup>133</sup> For a backyard example of more diverse representations of gender, consider that the pre-Columbian Natchez tribe had among them a man called “chief of the women,” who had the dress and occupations of the women in the tribe, as well as the role of household helper to the male

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was still not a majority that approved of them. See Lynne Duke, *25 Years After Landmark Decision, Still the Rarest of Wedding Bonds*, WASH. POST, June 12, 1992, at A3 (explaining that in a 1991 Gallup Poll 45% disapproved and 44% approved; when question was of approval of such marriages involving a close relative, disapproval jumped to 65%).

<sup>130</sup> 142 CONG. REC. S10124 (daily ed. Sept. 10, 1996) (statement of Sen. Bradley on DOMA).

<sup>131</sup> *Baker v. State*, 744 A.2d 864, 910 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part).

<sup>132</sup> *Id.* at 912.

<sup>133</sup> See JAMAKE HIGHWATER, *THE MYTHOLOGY OF TRANSGRESSION: HOMOSEXUALITY AS METAPHOR* (1997); see also ESKRIDGE & HUNTER, *supra* note 83, at 262-82; LEILA J. RUPP, *A DESIRED PAST: A SHORT HISTORY OF SAME-SEX LOVE IN AMERICA* 17-19 (1999) (noting that some Native Americans recognized three genders: male, female, and a transformative, half man/half woman, third gender); *id.* at 24-27 (discussing same-sex activity and gender diversity among Africans before enslavement). A novel that chronicles the life of a Native American Berdache (a biological man with dominant female aspects) is TOM SPANBAUER, *THE MAN WHO FELL IN LOVE WITH THE MOON* (1991).



hunters.<sup>134</sup> More recently, the Zuni Indians counted among themselves a biological man, We'wha, whose sex was presumed female (even to an anthropologist studying the tribe) until death.<sup>135</sup> We'wha was a religious and tribal leader; far from being vilified for a rare expression of gender, We'wha was celebrated as a manifestation of the divine.<sup>136</sup> Further, she was married to a man.

Nonetheless, *our* society has religious, cultural, and hierarchical investments in maintaining the strict dichotomy between the sexes. Same-sex couples, particularly in their expressions of intimacy, threaten those investments. It is therefore only to be expected that same-sex marriage is powerfully resisted, even if the reasons for doing so are not always fully articulated. Inasmuch as the relational torts present a similar challenge, judicial silence is not surprising.

## II. TORT LAW (NON) TREATMENT OF SAME-SEX RELATIONSHIPS

Three torts deal specifically with injuries to relationships: negligent infliction of emotional distress, loss of consortium, and wrongful death.<sup>137</sup> This Part begins with a brief description of the history and current state of each of these torts. Particular attention is paid to the problem that unmarried *opposite-sex* couples have experienced in all three classes of cases. Emphasis then moves to a discussion of the few cases involving same-sex couples that have been decided, and the section concludes by offering some

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<sup>134</sup> HIGHWATER, *supra* note 133, at 80.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 80-81.

<sup>137</sup> The tort of intentional infliction of emotional distress also covers relational interests in cases where the extreme and outrageous conduct is directed at a third party, and emotional distress is intentionally or recklessly caused to another person (the plaintiff) who is present at the time. RESTATEMENT (SECOND) OF TORTS § 46(2) (1965). If the person suffering emotional distress is an immediate family member of the victim against whom the conduct is principally directed, bodily injury need not be shown; otherwise, bodily injury is supposed to be a prerequisite for recovery. *Id.* To me, this section of the Restatement has never seemed necessary. As long as the emotional distress is intentionally or recklessly caused to the *plaintiff*, whoever that is, it is in that sense "directed" toward that plaintiff as well as the "third person" who may be the more direct victim of it. Further discussion of this tort, which raises substantially different issues from those presented by the three torts under consideration here, is beyond the scope of this Article.

possible explanations for the virtual absence of such cases from the reporters.

*A. Negligent Infliction of Emotional Distress*

This tort, which had its genesis around the end of the nineteenth century, has vexed courts since its inception. Reduced to essentials, the question is whether, or under what circumstances, a defendant should be required to compensate a plaintiff for emotional suffering that results from negligence. One of the chief problems is judicial unease with the causal component: judges are simply not as comfortable with the conclusion that emotional distress has resulted from an act of negligence as they are with the connection between impact and physical injury.<sup>138</sup> Another problem, though, is that courts are understandably concerned about the potentially limitless liability that could be imposed for a merely negligent act. When a celebrity is struck by a negligent motorist and injured, should all of her fans who suffer (some level of) emotional distress have a claim against that motorist? Our gut feeling is that they should not, but does it then follow that, say, her spouse should have no such claim? What about any children, nieces and nephews, or close friends? What if the negligent motorist narrowly misses the celebrity? Should she be able to recover for the distress she suffers from the close call?

The courts have responded to these complex questions incrementally and inconsistently. The first cases to allow a claim for emotional distress pinned liability on a showing of impact.<sup>139</sup> In such cases, plaintiffs were permitted to recover if the defendant had actually made contact with them, even if such conduct resulted in no demonstrable physical injury, such as broken bones. The impact itself was thought to provide a sufficiently strong guarantee of emotional distress that courts were able to manage their discomfort with causation. Also, permitting liability in such cases did not extend the orbit of the defendant's liability beyond the very person whom the defendant had struck.

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<sup>138</sup> See RICHARD A. EPSTEIN, TORTS §§ 10.14 - .15 (1999); John G. Culhane, *The Emperor Has No Causation: Exposing a Judicial Misconstruction of Science*, 2 WIDENER L. SYMP. J. 185, 190-92 (1997).

<sup>139</sup> The most notorious case standing for this rule is *Mitchell v. Rochester Ry. Co.*, 45 N.E. 354 (N.Y. 1896), where the plaintiff could not recover although the defendant's out-of-control horses surrounded her head when they stopped. The term "claim for emotional distress" is used here as shorthand for "negligent infliction of emotional distress."

The next development was to allow the plaintiff to recover upon a showing that the defendant's misconduct placed plaintiff in fear for his or her own safety.<sup>140</sup> This so-called "zone of danger" rule marked an important advance. It recognized that, even absent impact, one was quite likely to suffer emotional distress as long as one was sufficiently close to the accident to fear for one's own safety; i.e., in the zone of danger. Further, the accretion of liability was slight: Even though the defendant might now be liable to a larger group, that limit was nonetheless tightly circumscribed by the contours of the zone of danger. Not more than a few people are likely to be close enough to the site of an accident to harbor a real fear for their safety; as to the others, the court could declare, as a matter of law, that any fear they might experience would be unreasonable.

A seismic shift occurred, though, in *Dillon v. Legg*,<sup>141</sup> decided by the California Supreme Court in 1968. As is typical with cases heralding a major change in law, the facts were sympathetic, and the result seemed required by justice. There, a mother and a sister witnessed the gruesome death of a third family member, a girl, at the hands of a negligent motorist. Under prevailing law, the surviving sister would have had a claim while the mother would not have. The facts made clear that the mother was too far from the accident to fear for her own safety, whereas the sister might have been in the zone of danger.<sup>142</sup> This distinction the court found too fine to support the difference in legal result, and therefore changed the law to accommodate its sense of "natural justice."<sup>143</sup> In place of the zone of danger, now characterized by the court as an "artificial island[ ] of exception[ ]",<sup>144</sup> the court anchored its decision in one of the central principles of tort law: liability should be based on the foreseeability of injury. The court was clear that foreseeability is not determinable in a given case by reference to an arbitrary set of criteria, but did note several of the non-exclusive factors that would aid future decision-makers in resolving the issue: (1) whether the plaintiff was located near the accident, as opposed to some distance from it; (2) whether there was contemporaneous observa-

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<sup>140</sup> Early cases following this rule include *Purcell v. St. Paul City Ry. Co.*, 50 N.W. 1034 (Minn. 1892); *Waube v. Warrington*, 258 N.W. 497 (Wis. 1935); *Dulieu v. White & Sons*, 2 K.B. 669 (1901).

<sup>141</sup> *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968).

<sup>142</sup> *Id.* at 914-15.

<sup>143</sup> *Id.* at 914.

<sup>144</sup> *Id.* at 925.

tion of the event; and (3) whether the plaintiff stood in a close relation to the injured party.<sup>145</sup>

Other courts have either followed *Dillon* in basing liability on the foreseeability of harm to the plaintiff, or have expressly rejected it in favor of the easier-to-apply, liability-restricting, zone of danger rule.<sup>146</sup> In jurisdictions retaining the zone of danger rule, of course, the question of closeness of relationship should not surface as a legal issue, because recovery is only available to those who fear for their own safety. That fear is unrelated to the plaintiff's relationship with the person who suffers physical injury. Indeed, there need not even be a third party present.<sup>147</sup>

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<sup>145</sup> *Id.* at 920. It should be noted that recovery for negligent infliction of emotional distress, when based on foreseeability of harm, cannot be successfully limited to situations involving imminent fear of physical harm. California jurisprudence, in particular, has become convoluted by a host of decisions attempting to decide whether a defendant who negligently causes a plaintiff's emotional distress owes an independent duty to that person. These decisions rely on foreseeability only inconsistently. See *infra* notes 343-45 and accompanying text.

<sup>146</sup> In *Tobin v. Grossman*, 249 N.E.2d 419 (N.Y. 1969), the New York Court of Appeals rejected *Dillon*'s reliance on foreseeability. In *Rickey v. Chicago Transit Auth.*, 457 N.E.2d 1 (Ill. 1983), the Illinois Supreme Court opted for the zone of danger rule. See DANB.DOBBS, *THE LAW OF TORTS* 840 n.4 (2000) (citing cases following the zone of danger rule). "Most states now appear to have joined *Dillon* in rejecting the zone of danger limitation in favor of some less mechanical limitations." *Id.* at 840. For a list of cases that have joined *Dillon*, see *id.* at 840 n.11.

<sup>147</sup> Unfortunately, the simple distinction between fearing for one's own safety and experiencing distress because of the harm suffered by another has sometimes been elided. For instance, in *Hislop v. Salt River Project Agric. Improvement & Power Dist.*, 5 P.3d 267, 268 (Ariz. Ct. App. 2000), the Arizona Court of Appeals upheld the grant of summary judgment against two workers who had seen their close friend and co-worker electrocuted and killed. The co-workers were plainly in the zone of danger: the court stated that the same "fireball" that had killed their friend had "momentarily engulfed appellants, although they were not burned." *Id.* at 268. Inasmuch as they were in the zone of danger, they should have been able to recover even under that more restrictive rule. The court, however, would not permit recovery unless the plaintiffs were in the zone of danger *and* stood in a close relationship with the decedent (and their relationship did not satisfy the latter requirement). *Id.* at 271-72. This approach confuses bystander cases with those in which one experiences emotional distress because one's own physical safety is threatened. Being "engulfed in a fireball" should qualify as such a threat! The following statement recognizes the difference between the two kinds of cases—recovery is proper for a "bystander to an accident *or* [one who] was in fear

In jurisdictions that have adopted this more flexible foreseeability standard in emotional distress cases, the injury for which compensation is sought is the emotional harm caused by seeing *someone else* imperilled, not the shock of being in danger oneself.<sup>148</sup> In these cases, courts have had to decide what is to count as a close relationship. Unfortunately, these decisions have retreated from the very foreseeability principle that animated the expansion in the first place, by defining “close relation” in a narrow, status-based way. Thus, with only rare exceptions, lineal relations have been able to recover for injuries to those above or below them,<sup>149</sup> while even slightly more distant relations, such as first cousins, have not been successful.<sup>150</sup> It is vital to note, therefore, that judicial denial of claims

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of physical consequences to [one’s] own person.” *Rine v. Sabo*, 680 N.E.2d 647, 654 (Ohio Ct. App. 1996) (emphasis added).

<sup>148</sup> If one suffers an impact, or is in the zone of danger, however, recovery for emotional distress will not be narrowly defined to exclude the emotional distress suffered by seeing another injured or killed. Rather, the plaintiff will simply recover for emotional distress, whatever its source. In *Alba v. Robb*, 97 L. 15025 (Cook Cty. Cir. Ct., June 18, 1999), a lesbian couple’s auto was struck from behind by defendant. The surviving member of the couple “suffered fractured ribs, a concussion, and an injury to her left shoulder that required two surgeries.” *Id.*, reported at [www.atlanet.org/homepage/lrj00.ht](http://www.atlanet.org/homepage/lrj00.ht) (site visited May 23, 2001). She recovered about \$1 million in damages, including about \$700,000 for pain and suffering. This latter amount included recovery for posttraumatic stress disorder at seeing the death of a “friend,” but the pain and suffering damages were not broken down more specifically. As the word “friend” suggests, the jury was not told of the couple’s intimate relationship. In fact, the plaintiff’s attorney filed a motion in limine (which was granted) to bar evidence referring to the plaintiff’s sexual orientation. The attorney, one Jeff Kroll, stated that the decision to file the motion resulted from focus group work done before trial: “We learned from the focus group that the gay relationship between [the two women] drove the verdict down.” *Id.*

<sup>149</sup> See, e.g., *Ochoa v. Superior Court*, 703 P.2d 1 (Cal. 1985) (parent-child); *Dillon*, 441 P.2d at 912; *Mobaldi v. Bd. of Regents*, 127 Cal. Rptr. 720 (Ct. App. 1976) (parent-foster child). The only appellate case involving a grandchild-grandparent relationship is *Vasquez-Gonzalez v. Superior Court*, 231 Cal. Rptr. 458 (Ct. App. 1986). This case was ordered not to be officially published. Whatever uncertainty existed regarding grandparents was cleared up by the California Supreme Court in *Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989), where the court held that recovery in bystander negligent infliction of emotional distress cases should, “[a]bsent exceptional circumstances, . . . be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim.” *Id.* at 829 n.10.

<sup>150</sup> *Trapp v. Schuyler Constr.*, 197 Cal. Rptr. 411 (Ct. App. 1983). An exception is *Kriventsov v. San Rafael Taxicabs, Inc.*, 229 Cal. Rptr. 768 (Ct. App. 1986), where the uncle/nephew relationship sufficed. Since plaintiff uncle lived with his

brought by same-sex couples might be expected not only because of courts' usual reticence on matters of (same)-sex intimacy, but also because same-sex couples do not have the legal status of married couples.<sup>151</sup>

This point is borne out by the cases involving opposite-sex couples. While legal spouses have recovered for injuries to the other spouse, those in "spouse-like" relations have usually not been successful. Typical of cases denying such claims, even where the couple's relationship was "close" by any reasonable definition of that term, is *Elden v. Sheldon*.<sup>152</sup> Elden and his unmarried cohabitant, Linda Eberling, had both been in Eberling's car when the car was struck by defendant. Elden watched as Eberling was thrown from the car; she died a few hours later from the injuries caused by the impact.<sup>153</sup> Under the foreseeability principle enshrined in *Dillon*, decided by the same court twenty years earlier, Elden had surely stated a claim. Indeed, the *Elden* court had to acknowledge both a host of post-*Dillon* cases extending recovery based on "[t]he emotional attachments of the family relationship and not legal status,"<sup>154</sup> and *Dillon*'s teaching that "foreseeability of the risk [was] the 'chief element in determining whether defendant owes a duty to . . . plaintiff.'"<sup>155</sup>

Nonetheless, the court refused to recognize the claim, ostensibly for two reasons. First, allowing an unmarried couple to recover would "inhibit" the "state's interest in promoting marriage."<sup>156</sup> Second, to permit the claim would be unduly to burden the fact-finder, who would be called upon to "inquire into the relationship of the partners to determine whether the 'emotional attachments of the family relationship' existed between the parties."<sup>157</sup> Such an inquiry would entail "a massive intrusion into the private life of the partners," the court added.<sup>158</sup>

As Justice Broussard pointed out in dissent, the second of these rationales is thin, because all spousal loss of consortium cases require an

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nephew, he qualifies as a proper plaintiff under the "relatives residing in the same household" category. *See Thing*, 771 P.2d at 829 n.10.

<sup>151</sup> Cf. *Grotts v. Zahner*, 989 P.2d 415, 416 (Nev. 1999) (drawing bright-line that limits emotional distress claims to family members).

<sup>152</sup> *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988).

<sup>153</sup> *Id.* at 582.

<sup>154</sup> *Id.* at 584 (quoting *Mobaldi v. Bd. of Regents*, 127 Cal. Rptr. 720, 726 (Ct. App. 1976) (holding that a foster mother was permitted to recover for witnessing child's death owing to negligently administered dose of glucose)).

<sup>155</sup> *Id.* at 586 (quoting *Dillon v. Legg*, 441 P.2d 912, 920 (Cal. 1968)).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 587 (quoting *Mobaldi*, 127 Rptr. at 726).

<sup>158</sup> *Id.*

investigation into the couple's private life, at least to the extent of determining damages.<sup>159</sup> In fact, though, the court's concern is of a piece with its solicitude toward marriage, which it called "at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime."<sup>160</sup> Even if that proposition is true, Justice Broussard stated, the law should not disfavor other types of relationships. Indeed, the majority's "offensive" assumptions "ignore the reality of our evolving social fabric and the corresponding accommodations made in both statutory and decisional law."<sup>161</sup> For the majority, it seems, loss of consortium could be presumed in a marital relationship, but was otherwise not even worth the trouble of considering.

Although denial of recovery to cohabitating, opposite-sex couples has been the rule, a few courts have looked beyond the binary marriage/non-marriage question, allowing recovery to couples who can establish that their relationship is, in Justice Broussard's words, "stable and significant."<sup>162</sup> Courts permitting recovery on that basis correctly recognize that, problems of proof notwithstanding, allowing intimate partners to recover does not much expand the class of potential plaintiffs: each physically injured person will have, at most, only one such partner. In the leading case of *Dunphy v. Gregor*,<sup>163</sup> for example, Eileen Dunphy saw her fiancé, Michael Burwell, killed when a negligent motorist slammed into him while he was changing the tire on a friend's car. Refusing to be constrained by the happenstance that the couple had yet to be officially married, the court honored the bedrock tort principle that "a foreseeable risk is the indispensable cornerstone of any . . . duty,"<sup>164</sup> and noted that difficulties in establishing the factual basis of a claim should not operate to bar such a claim. This enlightened decision has been followed in only a few other cases.<sup>165</sup> Further, as we shall see, only one reported case even discusses whether the emotionally injured member of a same-sex couple may recover for such distress.<sup>166</sup> It is hardly surprising that the case was unsuccessful.

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<sup>159</sup> *Id.* at 592-93 (Broussard, J., dissenting).

<sup>160</sup> *Id.* at 586.

<sup>161</sup> *Id.* at 592 (Broussard, J., dissenting).

<sup>162</sup> *Id.* (Broussard, J., dissenting); *accord* *Ledger v. Tippitt*, 210 Cal. Rptr. 814 (Ct. App. 1985). The majority in *Elden* disapproved of the result in *Ledger*. *Elden*, 758 P.2d at 585-86.

<sup>163</sup> *Dunphy v. Gregor*, 642 A.2d 372 (N.J. 1994).

<sup>164</sup> *Id.* at 376. As discussed *infra* Part III.B., the court understood that foreseeability is a necessary but not a sufficient condition to the imposition of liability.

<sup>165</sup> *See, e.g.*, *Smith v. Bell Sports, Inc.*, 934 F. Supp. 70, 77 (W.D.N.Y. 1996).

<sup>166</sup> *See infra* Part II.D.1.

### B. *Loss of Consortium*

Unlike negligent infliction of emotional distress, the tort of loss of consortium has been long recognized by courts, dating back at least as far as 1618.<sup>167</sup> Such early birth means that the tort was grounded in an element of “hard” damages that were more easily proven than the emotional suffering that courts had historically been loathe to acknowledge.<sup>168</sup> Thus, although the term “loss of consortium” has come to mean the loss of spousal “sex, society and service,” at its inception the tort covered only the loss of service a husband suffered via injury to his wife, or to one or more of his children.<sup>169</sup> Indeed, the tort—*per quod consortium amisit*—was expressly analogized to the cause of action a man had for the loss of a servant’s services—*per quod servitium*—through the tortious conduct of another.<sup>170</sup> The family was viewed as an economic unit, so that injury to any member upset the assignment of tasks, thereby injuring the whole. The husband/father, as legal and social ruler of the family, held the cause of action. Indeed, the other family members, like servants, were the legal property of the patriarch. A corollary, of course, is that the wife had no claim for the loss of her husband’s service.<sup>171</sup>

This view of the family has mostly disappeared from American life.<sup>172</sup> As it waned, a corresponding transformation took place with loss of

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<sup>167</sup> *Guy v. Livesey*, 79 Eng. Rep. 428 (K.B. 1618), reprinted in PETER B. KUTNER & OSBORNE M. REYNOLDS, JR., *ADVANCED TORTS: CASES AND MATERIALS* 9 (2d ed. 1997). For a summary of the origin and meaning of the claim, see *id.* at 11-12 nn.1-2.

<sup>168</sup> Thus, even the tort of assault was originally recognized as a means of preventing further breaches of the peace, not so much as a vehicle for redressing injury caused by apprehension of imminent contact. See Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 486 (1982).

<sup>169</sup> See KEETON ET AL., *supra* note 2, § 125, at 931, 934.

<sup>170</sup> See, e.g., *Guevin v. Manchester St. Ry.*, 99 A. 298, 300-04 (N.H. 1916) (discussing the similarities and differences between the two causes of action).

<sup>171</sup> See KEETON ET AL., *supra* note 2, § 125, at 931.

<sup>172</sup> Although it would seem hard to believe that anyone today would regard a wife as the property of the husband, some do advocate the “next best thing”—traditional assignment of roles, with women invariably remaining at home to raise the children (which are presumed to exist) while their bread-winning husbands earn the family’s income. See, e.g., Robert Dreyfuss, *The Holy War On Gays*, ROLLING STONE, Mar. 18, 1999, at 38, 39 (quoting Robert Knight of the Family Research Council, who warned that “America’s ‘man-based culture’ could shudder and fall with the advent of a sexual revolution brought about by gays. ‘As man is reduced in stature, all hell will break loose.’”).



consortium. First, it broadened to include the less-tangible aspects of the spousal relation that unquestionably suffer when one member is injured. Thus, husbands began to recover for the loss of the wife's "society," or affection, and sexual intimacy. By the beginning of the twentieth century, the service element had been all but bleached out of the tort, leaving mostly the now-central intangible injury to the relation. By that same time, the wife, having become a recognizable legal entity, also had her own claim for the loss of a husband's consortium.<sup>173</sup>

The new logic of the tort, though, means that it is not so neatly cabined by the legal entity of marriage; even if sexual intimacy is defined as essential to the tort,<sup>174</sup> such intimacy is neither present in all marriages, nor absent outside of its confines. Perhaps forecasting the tort's growth as a result of its less economically bound definition, a few courts and legislatures have taken the bold step of eliminating loss of consortium completely.<sup>175</sup> In retrospect, other courts probably wish they had done away with the tort while they had the chance. Those that have retained it have had to deal with the problem that the injury for which loss of consortium now compensates is foreseeably suffered not only by a husband or a wife, but also by unmarried intimates. Most of the challenging cases have involved cohabitating intimates, sometimes of long-standing, sometimes engaged to be married. Courts have thus had to face the stark choice of whether strictly to require marriage.

A few early cases were sympathetic to injured intimates, permitting recovery outside of marriage. A leading case was *Butcher v. Superior Court*,<sup>176</sup> in which the court's adherence to the foundational precepts of tort led it to extend recovery to unmarried cohabitants who could demonstrate

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<sup>173</sup> This victory was the outcome of changes in state laws that are known collectively as the Married Women's Acts. See KUTNER & REYNOLDS, *supra* note 167, at 12 n.5.

<sup>174</sup> In *Borer v. American Airlines, Inc.*, 563 P.2d 858, 863-64 (Cal. 1977), the California Supreme Court strongly suggested that sexual intimacy is essential to the tort, as it relied on the absence of such intimacy in the parent-child relationship to distinguish—and deny—the whole class of claims for loss of parental consortium.

<sup>175</sup> The most interesting development in this regard is the statutory demise of the tort in Great Britain, its nation of origin. Administration of Justice Act, 1982, c. 53, § 2 (Eng.); see also *Wollam v. Kennecott Corp.*, 648 F. Supp. 160 (D. Utah 1986) (discussing Utah law's apparent refusal to recognize the tort); *Tondre v. Thurmond-Hollis-Thurmond, Inc.*, 706 P.2d 156 (N.M. 1985) (explaining New Mexico's failure to recognize the tort), *overruled by* *Romero v. Byers*, 872 P.2d 840 (N.M. 1994).

<sup>176</sup> *Butcher v. Superior Court*, 188 Cal. Rptr. 503 (Ct. App. 1983); see also *Bulloch v. United States*, 487 F. Supp. 1078 (D.N.J. 1980).

that their relationship had the characteristics of a legally recognized marriage. The court stated that, with the basis of the tort now firmly anchored in the loss of intimacy that serious injury visits on the couple, tying recovery to marriage is no longer defensible.<sup>177</sup> This modest move toward recognition of actual loss was quickly blocked, however. In *Elden v. Sheldon*,<sup>178</sup> discussed above in connection with negligent infliction of emotional distress, the California Supreme Court referred the reader to “some of the factors recited . . . in [its] discussion of . . . negligent infliction of emotional distress”<sup>179</sup> in denying the consortium claim. The same concerns about promoting marriage and “the difficulty of assessing the emotional, sexual and financial relationship of cohabitating parties”<sup>180</sup> were now welded to “the virtual absence of authority to support plaintiff’s position.”<sup>181</sup>

At first blush, the marriage requirement might seem to make somewhat more sense in the loss of consortium context than it does in negligent infliction of emotional distress cases. Courts in the emotional distress cases began from first principles in extending recovery to those in “close relationships,” an open-ended term that would only have been coined by a court comfortable with the similarly flexible concept of foreseeability.<sup>182</sup> In loss of consortium cases, by contrast, a strict, family-based definition was midwived along with the tort. This sort of thinking impelled the decision in *Leonardis v. Morton Chemical Co.*,<sup>183</sup> another case involving unmarried cohabitants, where the New Jersey appellate court held that loss of consortium “is founded upon the marriage relation. Absent such relationship, the right does not exist.”<sup>184</sup> It is significant that a recent federal district court decision applying New Jersey law quoted this language in 1996,<sup>185</sup> even after that state’s binding decision in *Dumphy v.*

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<sup>177</sup> *Butcher*, 188 Cal. Rptr. at 509-11.

<sup>178</sup> *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988). The case is discussed in detail in *supra* Part II.A.

<sup>179</sup> *Elden*, 758 P.2d at 589.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> As Justice Broussard pointed out in his dissenting opinion in *Elden*, “[t]he parties’ closeness is only pertinent to foreseeability; once foreseeability is established, the nature of their relationship has no logical connection to the plaintiff’s legal standing.” *Id.* at 591 (Broussard, J., dissenting).

<sup>183</sup> *Leonardis v. Morton Chem. Co.*, 445 A.2d 45 (N.J. Super. Ct. App. Div. 1982).

<sup>184</sup> *Id.* at 45 (emphasis added).

<sup>185</sup> *Smith v. Bell Sports, Inc.*, 934 F. Supp. 70, 79 (W.D.N.Y. 1996).

*Gregor*<sup>186</sup>—some twelve years after *Leonardis*—permitting unmarried cohabitants to recover for negligent infliction of emotional distress. Rather than read *Dunphy*'s broad language and logic to encompass loss of consortium, the court in *Smith v. Bell Sports, Inc.*<sup>187</sup> was terse and dismissive, even though the case also involved a good claim (post-*Dunphy*) for negligent infliction of emotional distress.

Despite the superficial appeal of the marriage requirement for loss of consortium cases, the logic of tort drives toward a different result. Whatever may have been the case hundreds of years ago, there is no escaping that the bundle of interests that it now protects is neither germinated nor limited by marriage. This is obviously true of society and sexual intimacy, but it may, in a given case, also be true of whatever remains of the service component. Although the majority in *Elden* is correct in pointing out that marriage creates legal rights and responsibilities, unmarried cohabitants may assume many of the same responsibilities, and so should be accorded corresponding rights.<sup>188</sup> Indeed, the court inadvertently acknowledges as much in citing the hallmark case of *Marvin v. Marvin*,<sup>189</sup> in which the California Supreme Court held enforceable express and implied promises of division of property and support. *Marvin* exposes the question-begging approach in *Elden*: the issue is not whether marriage creates certain rights and responsibilities, but whether such rights are necessarily restricted to married couples. Since *Marvin* itself shows that they are not,<sup>190</sup> the better approach would be to carefully consider whether anything *intrinsic* to marriage requires the court to award it special status in the context of decision. In tort, elevating static, status-based definitions over the “facts of life” is particularly problematic, as Justice Cardozo pointed out more than sixty years ago.<sup>191</sup>

One possible distinction between cases such as *Marvin* and these relational torts ends up *supporting* tort recovery, even if the opposite

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<sup>186</sup> *Dunphy v. Gregor*, 642 A.2d 372 (N.J. 1994).

<sup>187</sup> *Smith*, 934 F. Supp. at 70.

<sup>188</sup> One caveat here is that not all of the responsibilities attendant to marriage can be assumed outside of it. While the incompleteness of this package of responsibilities gives plausibility (but not more) to the argument that marriage should be required for loss of consortium, fairness dictates that it have no similar effect in the case of same-sex couples who, denied the right to marry, create the best legal approximation of marital responsibilities available to them. For a fuller discussion of this point, see *infra* Part II.D.

<sup>189</sup> *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

<sup>190</sup> See also *supra* Part I.B. and cases discussed therein.

<sup>191</sup> See *Pokora v. Wabash Ry.*, 292 U.S. 98, 104 (1934).

conclusion might at first suggest itself. In contract cases such as *Marvin*, the agreement bound only the two principals, whereas loss of consortium affects a third party—the tort defendant. But courts have granted rights to same-sex couples in other contexts even where doing so has adversely affected the rights of a third party.<sup>192</sup> Once the categorical approach is rejected, the question becomes whether imposing a cost on a third party is fair. It was fair in the rent-control context of *Braschi*, at least in part, because the landlord should have expected that, given the statute even before the current regulations went into effect, the benefits of rent control would be passed along to *someone* upon the tenant's death. Given the slightly larger class of possible beneficiaries imposed by permitting unmarried, but cohabitating, surviving intimates to accede to these benefits, and the hardship that would be imposed on the survivor were the court to have held for the landlord, the balance of equities favored the tenant. Much the same can be said in favor of recovery by unmarried intimates in loss of consortium and negligent infliction of emotional distress cases. Even unsympathetic courts agree with the proposition that a negligent defendant can foresee a loss of consortium, or an emotional injury, to an intimate companion of the physically injured victim. Thus, allowing such plaintiffs to recover extends liability only slightly, since there will be only one plaintiff standing in that class in any one case. If it is argued that the defendant would not have been liable at all if the court disallows the claim, the argument has come full circle, because the question is whether the claim *should* be disallowed.

### C. Wrongful Death Claims

The common law did not recognize death as a compensable event. Thus, the negligently (or, for that matter, intentionally) caused death of another human being brought no tort liability, while even slight injury *would* result in such liability. This bizarre and counterintuitive result<sup>193</sup> was probably the result of the common law's close association, if not confusion, between criminal and civil law. As the court stated in *Huggins v. Butcher*,<sup>194</sup> a case involving a wife's death from an assault by defendant, "if

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<sup>192</sup> See, e.g., *Braschi v. Stahl Assocs.*, 543 N.E.2d 49 (N.Y. 1989) (holding that surviving partner of a same-sex relationship is not precluded, as a matter of law, from seeking noneviction protection).

<sup>193</sup> See EPSTEIN, *supra* note 138, at 454: "How this sad state of affairs demonstrates the efficiency of the (early) common law is anyone's guess."

<sup>194</sup> 1 Brownl. & Golds. 205 (1606), reprinted in KUTNER & REYNOLDS, *supra* note 167, at 56.

one beats the servant [or wife] . . . so that [s]he die of the beating, the master shall not have an action . . . for the battery and loss of service, because . . . it is now become an offence against the Crown, and turned into felony, and this hath drowned the particular offence."<sup>195</sup> The odd result of this rule was that defendants who caused death were insufficiently deterred by tort law from their negligent acts.<sup>196</sup> Although the criminal law provides its own deterrence, there was something to the observation that this rule made it more profitable for defendants to "finish off their victims" than to leave a potential plaintiff alive.<sup>197</sup> With few exceptions, the rule obtained in the United States<sup>198</sup> as well as in England.

Taking their cue from the statutory repeal of this inane doctrine in England,<sup>199</sup> the very nation of its birth, each of the United States has by now created a statutory remedy for fatal injuries.<sup>200</sup> These statutes define the kinds of damages for which recovery may be sought and the plaintiffs who have standing to bring suit.<sup>201</sup> Although the issue of standing is of

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<sup>195</sup> *Id.*

<sup>196</sup> A related question that arises is whether sufficient deterrence might be found in the deceased victim's own action, now passed along to his or her estate. First, as the quoted text suggests, the common law rules barred not only a claim for the death itself, but also extinguished any already-existing claims for harm suffered by the victim before death. So-called survival statutes have by now been enacted in virtually every common law jurisdiction that "breathe fresh life" into such claims. A useful statement of the current status of the law, with appropriate citations, is found in KUTNER & REYNOLDS, *supra* note 167, at 60-61 n.3. Survival statutes alone do not provide much deterrence, however, when the defendant's negligence causes the immediate death of the plaintiff, because there may be no pain, and there will be no medical expenses, lost wages, etc. Similarly, loss of consortium claims compensate for the loss of society of a spouse who is alive, but seriously injured—there is no consortium "missing" when the spouse dies. As we shall see, however, the loss of consortium for what should have been the decedent's lifespan is compensable under some wrongful death statutes.

<sup>197</sup> *Borer v. Am. Airlines, Inc.*, 563 P.2d 858, 865 (Cal. 1977).

<sup>198</sup> Long before attaining statehood, Hawaii, under certain circumstances, recognized a common law action for wrongful death. *See Hall v. Kennedy*, 27 Haw. 626, 628 (1923) (describing the circumstances in which Hawaiian courts recognized a cause of action for wrongful death). The United States Supreme Court accepted a common law action as well in the maritime context, but not until it had before it a wealth of wrongful death statutes it could look to in support of the principle that negligently caused death should be a compensable event. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

<sup>199</sup> Lord Campbell's Act, 9 & 10 Vict. C. 93 (1846).

<sup>200</sup> *See EPSTEIN*, *supra* note 138, at 453-55.

<sup>201</sup> *See DOBBS*, *supra* note 146, at 813-15 (discussing parties named as potential statutory beneficiaries in the suit); *id.* at 807-13 (discussing damages available).

more interest for present purposes, a word on the issue of recoverable damages is in order. The older approach, still in effect in some jurisdictions, is to limit recovery to "pecuniary losses."<sup>202</sup> This term generally includes the economic benefit that the plaintiff expected to receive from the defendant over the course of the decedent's expected lifetime, but has often been interpreted broadly to include such intangible "services" as instruction, guidance and nurturing. In *Gaydos v. Domabyl*,<sup>203</sup> for example, the court stated that "pecuniary loss" in the case of a mother with both adult and minor children would properly include "indefinable acts of tender solicitude, frugality, industry, usefulness, and attention."<sup>204</sup> Would such an approach be broad enough to take in loss of consortium? In the absence of specific statutory language on point, courts have been divided on the issue.<sup>205</sup> A few states make explicit that loss of consortium *is* covered; in Alaska, for instance, the court or jury, in fixing damages, "*shall* consider . . . loss of consortium."<sup>206</sup> Similarly, Florida includes among the surviving spouse's compensable damages "loss of the decedent's companionship,"<sup>207</sup> and Hawaii covers all bases by allowing recovery for the "[l]oss of society, companionship, comfort, consortium, or protection."<sup>208</sup>

Inasmuch as the action for wrongful death is statutory, one might expect "cleaner" answers than the common law provides on the question of who may be entitled to recover. Indeed, the statutes are quite specific in defining their potential beneficiaries. In so doing, they exhibit some variation from state to state. All of those that name their beneficiaries begin with "spouse" (or some more gender-specific words),<sup>209</sup> and then may move

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<sup>202</sup> See *id.* at 807-13 (citing statutes).

<sup>203</sup> *Gaydos v. Domabyl*, 152 A. 549 (Pa. 1930).

<sup>204</sup> *Id.* at 554.

<sup>205</sup> Compare *Sedillo v. City of Flagstaff*, 737 P.2d 1377 (Ariz. App. 1987) (allowing damages for loss of companionship), with *Ladd v. Douglas Trucking Co.*, 523 A.2d 1301 (Conn. 1987) (answering "no" to certified question of whether spouse can recover damages for postmortem loss of consortium).

<sup>206</sup> ALASKA STAT. § 09.55.580(c)(4) (Michie 2000) (emphasis added).

<sup>207</sup> FLA. STAT. ANN. § 768.21(2) (West 1997).

<sup>208</sup> HAW. REV. STAT. § 663-3(b)(1) (Supp. 1999). Hawaii's recent domestic partnership legislation extends wrongful death actions to same-sex couples. See *infra* Part II.D.

<sup>209</sup> See, e.g., ARIZ. STAT. § 12-612 (2000) ("surviving husband or wife" has a cause of action); CAL. CIV. PROC. CODE § 377.60(a) (West 1998) (action for "surviving spouse"); DEL. CODE ANN. tit. 10, § 3724(a) (1998) ("action . . . for the benefit of the spouse"); IDAHO CODE § 5-311(2)(b) (Michie 1998) (action for "decedent's spouse"); IND. CODE ANN. § 34-23-1-1 (Michie 1998) ("damages . . . inure to the . . . benefit of the widow or widower"); KY. REV. STAT. ANN. § 411.130(2)(a) (Michie 1998) (action on behalf of "widow or husband").

to offspring,<sup>210</sup> parents,<sup>211</sup> siblings,<sup>212</sup> and then to other next of kin, as defined by the state law of intestacy. The statutes may either name the beneficiaries as above, or may refer to the intestate distribution law of the state.<sup>213</sup>

Another small group of statutes permits beneficiaries named in the deceased's will to recover against the tortfeasor, but only with substantial qualifications and limitations. Typically, such recovery is only possible in the unusual case where none of the beneficiaries named in the statute survive.<sup>214</sup> Accordingly, those who take under the will generally do not qualify for wrongful death's substantial benefits. Some states, however, permit certain specified classes of damages to be distributed directly to the

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<sup>210</sup> See, e.g., DEL. CODE ANN. tit. 10, § 3724(a) (1998) (action for the benefit of a child of the deceased person); IND. CODE ANN. § 34-23-1-1 (Michie 1998) (damages to "dependent children"); IOWA CODE ANN. § 633.336 (West 1998) (damages "apportioned . . . among the surviving spouse and children of the decedent"); KY. REV. STAT. ANN. § 411.130(2)(b) (Michie 1998) (statute divides recovery between surviving "widow or husband" and children according to a formula, and not according to the real loss each might have suffered).

<sup>211</sup> See, e.g., ARK. CODE ANN. § 16-62-102(d) (Michie 1998) ("father and mother" have a cause of action); DEL. CODE ANN. tit. 10, § 3724(a) (1998) ("parent" has a cause of action); KY. REV. STAT. ANN. § 411.130(d) (Michie 1998) ("mother and father of the deceased" have a claim only if the deceased leaves no "widow, husband, or child.").

<sup>212</sup> See, e.g., ARK. CODE ANN. § 16-62-102 (Michie 1998) (claim for "brothers and sisters" of the deceased); MICH. COMP. LAWS ANN. § 600.2922 (West 1998) (comprehensive statute takes in "spouse, children, descendants, parents, grandparents, brothers and sisters"); MISS. CODE ANN. § 11-7-13 (1998) ("sister, or brother" appear at the end of a list of those who may recover).

<sup>213</sup> Some do both, as by specifically naming some of the beneficiaries, and then declaring the rest eligible to recover under the law of intestacy. Maryland does this by creating two categories. First come primary beneficiaries ("wife, husband, parent, and child"). If there are no such survivors, the secondary beneficiaries ("any person[s] related to the deceased person by blood or marriage who was substantially dependent upon the deceased") can recover. MD. CODE ANN., CTS. & JUD. PROC. § 3-904(a), (b) (1998). Kansas takes a simpler approach, allowing an action to any "heirs at law of the deceased who has sustained a loss by reason of the death." KAN. STAT. ANN. § 60-1902 (1994).

<sup>214</sup> See, e.g., ARIZ. REV. STAT. § 12-612 (2000) (distribution to surviving spouses, children, or parents; if none of these exist, those entitled to take under the will may bring suit); W. VA. CODE § 55-7-6 (2000) (in addition to named beneficiaries, anyone who was "financially dependent" on the decedent entitled to damages; if none of the named survivors exist, proceeds of wrongful death are "distributed in accordance with the decedent's will").

estate. Generally speaking, such damages are limited to out-of-pocket costs, such as medical expenses incurred by the decedent before death and funeral expenses, that would otherwise be the responsibility of the estate to pay.<sup>215</sup> Such recovery simply transfers the costs from the estate to the tortfeasor, thereby "softening the blow" that would be struck by permitting the defendant to avoid paying even those costs most directly attributable to the culpable conduct.

Because the statutes define the potential beneficiaries with such precision, there are only a few cases in which unmarried cohabitants have even sought recovery for wrongful death, and hints from other cases suggest that they have little reason to be optimistic. In denying recovery to unmarried cohabitants for loss of consortium and negligent infliction of emotional distress, courts often cite the state's refusal to grant similar rights under wrongful death statutes as evidence that state policy disfavors these common-law claims as well. In *Elden v. Sheldon*,<sup>216</sup> for example, the California Supreme Court listed the state's wrongful death statutes among a host of laws conferring unique benefits on married couples. Although such cases do not directly answer the question of whether wrongful death statutes might be invoked by surviving unmarried intimates, they effectively discourage such claims from even being brought.

Nonetheless, a handful of decisions squarely address whether opposite-sex, unmarried cohabitants might be entitled to recover under wrongful death statutes. One plaintiff's tactic, thus far unsuccessful, has been to try to avoid the wrongful death statute entirely, by casting the complaint under a different legal theory. In *Matuz v. Gerardin Corp.*,<sup>217</sup> the camouflage was easily pierced, because the surviving partner alleged loss of consortium. This tort, however, is only appropriate where the plaintiff's partner *survives* the injury; when death results, wrongful death is the proper claim.<sup>218</sup> In this

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<sup>215</sup> See, e.g., FLA. STAT. § 768.21 (2000) (if no child or spouse survives, estate's personal representative may bring action to recover funeral expenses and medical costs, as well as decedent's lost earnings until his or her death); 740 ILL. CON. STAT. 180/2 (2000) (spouse or children may bring action, but if neither survives, personal representative can bring suit only to recover medical costs incurred before death and burial expenses); IND. CODE ANN. § 34-23-1-1 (2000) (same).

<sup>216</sup> *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988).

<sup>217</sup> *Matuz v. Gerardin Corp.*, 254 Cal. Rptr. 725 (Ct. App. 1989).

<sup>218</sup> Claims arise in which the injured party survives for a time, then dies of the injuries incurred by the negligence. In such cases, the survivor has a loss of consortium claim for the period of time before death, and a wrongful death claim for the death itself. A good discussion of the point is found in *Ladd v. Douglas Trucking Co.*, 523 A.2d 1301, 1302 (Conn. 1987).



case, death had been immediate. Plaintiff and her companion had both been involved in an airplane crash. She survived, but witnessed his gruesome death. The facts alleged sufficient intimacy (cohabitation for five years with plans to marry; exclusive sexual relations; and a “high degree of economic cooperation and entanglement”), but the court affirmed dismissal of the claim.

Similarly, in *Nieto v. City of Los Angeles*,<sup>219</sup> plaintiff, whose intended spouse was “recklessly shot and killed” by a Los Angeles police officer,<sup>220</sup> was not able to avoid disqualification under the wrongful death statute by casting her complaint as “quasi-intentional interference with contractual relations, negligence and breach of warranty.”<sup>221</sup> The “contract” in issue was an oral agreement between the two intimates to marry; the wedding was to have taken place just *four days* after the shooting occurred.<sup>222</sup> On appeal, plaintiff was forced to concede that the claim was in fact one for wrongful death, and that, under a literal reading of the statute, she could not recover.<sup>223</sup> The court declined to read the law more broadly, instead leaning on standard language tying marriage to the acceptance of responsibilities that are simply not present in “meretricious” relationships.<sup>224</sup> This observation was particularly inapt in the case before the court, as the couple’s imminent marriage was driven, at least in part, by their willingness to assume such responsibilities. Less than four months before decedent’s death, plaintiff had given birth to a child that the decedent had acknowledged as his natural daughter.<sup>225</sup> Thus, the marriage was intended to “legitimize” the couple in the eyes of the law, and to cement the responsibility that the two must have felt they owed each other. The court’s broad brush-off simply did not fit the facts.<sup>226</sup>

Occasionally, though, a surviving unmarried companion does bring a wrongful death claim without seeking cover. One good example of why this strategy is not pursued more often is *Roe v. Ludtke Trucking, Inc.*<sup>227</sup> There,

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<sup>219</sup> *Nieto v. City of Los Angeles*, 188 Cal. Rptr. 31 (Ct. App. 1982).

<sup>220</sup> *Id.* at 32.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 35.

<sup>225</sup> *Id.* at 32.

<sup>226</sup> By the facts, I mean the facts alleged. The promise to marry was oral, so it might be difficult to prove at trial. Absent such proof, the case for assumption of responsibility weakens considerably. Nonetheless, plaintiff should have the right to prove the case, perhaps by calling witnesses who knew of the promise.

<sup>227</sup> *Roe v. Ludtke Trucking, Inc.*, 732 P.2d 1021 (Wash. Ct. App. 1987).

the surviving intimate, Kathryn Roe, had lived with the decedent, Stephen Tibbetts, for some thirteen years. As the court stated, it was “undisputed that they shared a long-term, stable, and marital-like relationship.”<sup>228</sup> Nonetheless, the Washington wrongful death statute, which listed “wife” among its beneficiaries, offered nothing to Roe. Her argument, simply stated, was that the wrongful death statute, created to remedy a deficiency in the common law, should be read liberally so as to define her as a “wife” based on the reality of her relationship with Tibbetts. The court took a pass on the issue of how liberally the statute should be read, finding that under *no* construction of the statute could Roe prevail: “Since the term ‘wife’ is not defined in the statute, it should be given its plain . . . meaning, which may be determined by resort to dictionaries.”<sup>229</sup> Turning then to whichever unspecified edition of Webster’s New Collegiate Dictionary was handy, the court noted that under “the only definition of the word relevant here, . . . a ‘wife’ is a ‘married woman.’”<sup>230</sup>

This definition of “wife” is consistent with the Tenth Edition of the same dictionary,<sup>231</sup> but, since the court was relying on dictionary definitions rather than the overall statutory scheme, it should have gone further to examine the word “married.” According to the Tenth Edition, one of the two definitions of married is “united, joined.”<sup>232</sup> Under a reasonable interpretation of those defining words, Roe and Tibbetts were “married.” This semantic exercise is not meant to suggest that the court misinterpreted the statute. Indeed, even if the term “wife” is nowhere defined specifically in the Washington code, it is likely that the term, as used throughout, necessarily implies a relation of legal marriage. The point is that the court’s result-driven agenda led it to a somewhat sloppy analysis.<sup>233</sup>

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<sup>228</sup> *Id.* at 1022.

<sup>229</sup> *Id.* at 1023 (citation omitted).

<sup>230</sup> *Id.*

<sup>231</sup> According to that source, one definition of wife is “a female partner in a marriage.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1353 (10th ed. 1998).

<sup>232</sup> *Id.* at 713.

<sup>233</sup> It should also be noted that the court also considered the argument that, even if plaintiff could not recover under the statute, she should prevail under a common law theory. The support for that argument was derived from the United States Supreme Court’s decision in *Moragne v. States Marine Line, Inc.*, 398 U.S. 375 (1970), where the Court avoided an unintended lacuna in coverage between maritime law and state law by recognizing a common law remedy for wrongful death. *Id.* at 402-03. Whether or not this result is defensible, the Washington court’s decision not to allow a common law remedy seems to me correct. If it is clear that the state intended to exclude unmarried cohabitants from recovery, then, absent a successful constitutional challenge, the court is bound to honor legislative

One final point about *Roe* is worth making: The court, in a long footnote, stated that it was not deciding whether it would recognize a claim for loss of consortium when the injury does not result in the death of the cohabitant. The court noted that while “a few courts have looked favorably on such a cause of action,” “[t]he vast majority” have not.<sup>234</sup> Again, this suggested willingness to at least entertain a loss of consortium claim underscores the near-impossibility of prevailing in wrongful death cases, where the legislature has spoken with a clear voice.

#### *D. Same-Sex Couples and the Relational Torts: A Clanging Silence*

Given the difficulty that unmarried, opposite-sex couples face in these relational torts, one would hardly expect same-sex couples to be more successful. As demonstrated in Part I, *supra*, courts are uncomfortable with sexual intimacy—*especially* intimacy between two members of the same sex. Inasmuch as the relational torts, like same-sex marriage, offer no refuge from the issue of intimacy, judicial lack of sympathy is quite predictable.

Nonetheless, one might at least expect a developing body of case law on these torts, because one powerful argument is available to same-sex couples that unmarried opposite-sex couples do not have: same-sex couples are not legally permitted to be married. Grist for such an argument might be derived from the court’s observation in *Sykes v. Propane Power Corp.*,<sup>235</sup> that unmarried opposite-sex couples cannot claim they are unconstitutionally discriminated against, because they “voluntarily choose not to marry.”<sup>236</sup> Justice Broussard made the point explicitly in his dissent in *Elden v. Sheldon*: “Clearly the state’s interest in marriage is not advanced by precluding recovery to couples who could not in any case choose marriage. The categorical exclusion of same-sex couples particularly highlights the injustice of an approach that recognizes only those commitments ratified by the state.”<sup>237</sup> This point has been emphasized in

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intent. It is worth noting, though, that the court’s unwillingness to read the statute broadly stands in contrast to the hard work that some courts have done to avoid the statutory language in the “stepparent cases.” See *supra* Part I.C. This difference underscores courts’ commitment to the best interests of children.

<sup>234</sup> *Roe*, 732 P.2d at 1024 n.3.

<sup>235</sup> *Sykes v. Propane Power Corp.*, 541 A.2d 271 (N.J. Super. Ct. App. Div. 1988).

<sup>236</sup> *Id.* at 279.

<sup>237</sup> *Elden v. Sheldon*, 758 P.2d 582, 592 n.2 (Cal. 1988) (Broussard, J., dissenting); see also *Smith v. Fair Employment & Housing Comm’n*, 913 P.2d 909, 952 n.7 (Kennard, J., dissenting in part) (in a case involving whether a religious

two recent dissenting opinions. In *Hislop v. Salt River Project Agricultural Improvement & Power District*,<sup>238</sup> Judge Garbarino, in dissent, borrowed language from dissenting Chief Justice Rose of the Nevada Supreme Court in *Grotts v. Zahner*.<sup>239</sup> In decrying the majority's denial of a claim brought by co-workers and close friends of a man electrocuted in their presence, Judge Garbarino noted that the bright-line status rule creates unfairness to gays and lesbians in committed relationships. They will be "denied the right to even claim damages for emotional distress for witnessing injury or death to their partner for no other reason than that they are not legally married, a status they cannot prevent."<sup>240</sup>

This observation also eliminates one of the earlier-discussed objections to extending the tort: Only those couples willing to assume the responsibilities attendant to legal marriage should receive the "right" to sue for relational injury.<sup>241</sup> As applied to same-sex couples, at least, that scruple should be overcome where the couple's commitment to each other mirrors that of opposite-sex couples, except for the legal disqualification from marriage.<sup>242</sup> Such commitment might be demonstrated in any of the host of ways that unmarried opposite-sex couples have emphasized in seeking judicial recognition of their lost relational interest: maintaining one residence; partially or completely merging finances; being recognized as

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exemption from a state housing anti-discrimination statute should be afforded a landlord who did not believe in unmarried cohabitation, Justice Kennard stated that "[a]nalysis of whether there is a compelling interest in eliminating discrimination against homosexual couples may well involve different considerations; [for] homosexual couples . . . unmarried status is not a matter of voluntary choice").

<sup>238</sup> *Hislop v. Salt River Project Agric. Improvement & Power Dist.*, 5 P.3d 267, 276 (Ariz. Ct. App. 2000) (Garbarino, J., dissenting), *review denied*, 18 P.3d 1230 (Ariz. 2001).

<sup>239</sup> *Grotts v. Zahner*, 989 P.2d 415, 417 (Nev. 1999) (Rose, C.J., dissenting).

<sup>240</sup> *Hislop*, 5 P.3d at 276 (Garbarino, J., dissenting) (quoting *Grotts*, 989 P.2d at 418 (Rose, C.J., dissenting)). It is also worth noting the court's statement that certain *family* relationships—those "beyond the first degree of consanguinity," *Grotts*, 989 P.2d at 416 n.1, could be considered on a case-by-case basis, but that "any non family 'relationship' fails, as a matter of law, to qualify for NIED [negligent infliction of emotional distress] standing." *Id.* at 416. In *Grotts*, the plaintiff was a woman who had seen her fiance killed in an accident.

<sup>241</sup> *Nieto v. City of Los Angeles*, 188 Cal. Rptr. 31, 35 (Ct. App. 1982).

<sup>242</sup> Such a mirror-image view, though, relies on an understanding that the intimate and committed lives of gay and lesbian people are just as valuable as those of opposite-sex couples. Elsewhere, I have said that "'commitment' is not understood by the dominant society in the same way when it comes to gay people . . . who are not valued members of society in the first place." Culhane, *Uprooting the Arguments*, *supra* note 22, at 1190.

the beneficiary of one's partner's insurance benefits; being named in the other's will; adopting children together, or serving as foster parents; and being recognized by others as a couple.

In addition, at least some same-sex couples would also be able to point to their *ceremonial* marriages, whether recognized by a given religious faith or group, or not.<sup>243</sup> In jurisdictions that permit couples to register as domestic partners, such status would further indicate "couplehood." So would traveling to Vermont to enter into a civil union.<sup>244</sup> Opposite-sex couples might also opt for one of these putative marriage surrogates, but, for at least two reasons, the fit is not as good. First, each is less available to opposite-sex couples than to same-sex couples. In some places, opposite-sex couples are not eligible to register as domestic partners.<sup>245</sup> Similarly, even a church willing to recognize the committed, loving relationship between two members of the same sex might well balk at extending similar approbation to an opposite-sex couple that could (and should, in the church's eyes) marry. These observations suggest the second "fit" problem with these options, as applied to opposite sex couples: Since they *can* choose to marry, courts can and do focus on the decision not to do so in denying recovery. The difference might be expressed as follows: Since same-sex couples cannot marry, approximating that favored state to the extent the law allows might engender judicial sympathy, while opposite-sex couples who spurn that option may be (and have been) "punished" for making the court's task more difficult.<sup>246</sup> These arguments and observations

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<sup>243</sup> In THE CASE FOR SAME-SEX MARRIAGE, Professor Eskridge presents examples of the text of same-sex commitment ceremonies. ESKRIDGE, *supra* note 28, at 193-217.

<sup>244</sup> The Vermont civil union law expressly permits out-of-staters to enter into a civil union in Vermont. VT. STAT. ANN. tit. 78, § 5160(a) (2000). What effect doing so will have in other states is yet unknown.

<sup>245</sup> See, e.g., HAW. REV. STAT. § 572C-4(3) (Supp. 1999) (to qualify for benefits under reciprocal beneficiary law, parties must be "legally prohibited from marrying one another"); see also Philadelphia's "life partnership" ordinance, which restricts that status to "two unmarried individuals of the same gender." Phila., Pa., Ordinance Bill 970750 (1998).

<sup>246</sup> The closer analogy might be between same-sex couples who seek the best available approximation of marriage and opposite-sex couples who are engaged to be married. At the point of engagement, the parties are signaling—often publicly—a willingness to accept the responsibilities attendant to marriage. Indeed, in *Dunphy v. Gregor*, 642 A.2d 372, 373 (N.J. 1994), the successful plaintiff in the negligent infliction of emotional distress suit had been engaged to marry the decedent, a point that the court made in the very first sentence of its factual discussion. On the other hand, the couple's engagement ("contract to marry") did not move the court to grant recovery in *Nieto*, even though the circumstances

might or might not be appealing to courts, but they are supported by sufficient logic and sympathy to commend to same-sex intimates the effort of making them.

Nonetheless, and likely for the reasons developed throughout this Article, I have been able to unearth only three cases that even address relational loss to same-sex couples: one negligent infliction of emotional distress case, and two wrongful death cases.<sup>247</sup> No loss of consortium cases involving same sex-couples have been found. The remainder of this section is structured as follows: First, I analyze these three cases. Then, I offer some further possible reasons for the almost complete lack of case law in this area.

### 1. *Negligent Infliction of Emotional Distress*

*Coon v. Joseph*,<sup>248</sup> handed down in 1987, was decided in the final year of the high-water era for unmarried couples in California. Since *Dillon v. Legg*'s pronouncement, in 1968, that foreseeability was to be the touchstone of liability in negligent infliction of emotional distress cases,<sup>249</sup> at least one appellate court had allowed unmarried, opposite-sex cohabitants to state a claim for such distress.<sup>250</sup> In 1988, though, the California Supreme Court decided *Elden v. Sheldon*, disqualifying unmarried couples from claims for both loss of consortium and negligent infliction of emotional distress.<sup>251</sup> The following year, *Thing v. La Chusa* hollowed out *Dillon*'s core, converting its foreseeability factors—particularly contemporaneousness of observation and close relationship—into requirements, and defining with specificity the class of eligible plaintiffs.<sup>252</sup> But in 1987, a same-sex couple might have been forgiven for believing that a court might take seriously *Dillon*'s insistence that liability follow foreseeable risk.

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strongly suggested that the "contract" was made expressly to assume the responsibilities attendant to raising a child. See *supra* notes 219-26 and accompanying text.

<sup>247</sup> Sharon Smith's case has been filed, but, as of this writing, no disposition of any kind has been made.

<sup>248</sup> *Coon v. Joseph*, 237 Cal. Rptr. 873 (Ct. App. 1987).

<sup>249</sup> *Dillon v. Legg*, 441 P.2d 912, 919 (Cal. 1968).

<sup>250</sup> *Ledger v. Tippitt*, 210 Cal. Rptr. 814 (Ct. App. 1985). The *Ledger* court denied claims for wrongful death and loss of consortium, however. *Id.* at 817, 822. In *Butcher v. Superior Court*, 188 Cal. Rptr. 503 (Ct. App. 1983), a loss of consortium claim had been permitted.

<sup>251</sup> *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988).

<sup>252</sup> *Thing v. La Chusa*, 771 P.2d 814, 828 (Cal. 1989); see *supra* note 141 and accompanying text.

Plaintiff Gary Coon and his "intimate male friend" (to use the court's term), one Ervin, were attempting to board a municipal bus in San Francisco when the bus driver, defendant Michael Joseph, allegedly "verbally abused Ervin and struck his face. When [Coon] observed the assault on his friend, he suffered great . . . emotional distress."<sup>253</sup> Coon sought relief under several causes of action, including intentional and negligent infliction of emotional distress.<sup>254</sup> The lower court dismissed the entire complaint, and the Court of Appeal for the First District affirmed.<sup>255</sup>

The problem with the negligent infliction of emotional distress claim, said the court, was that, as a matter of law, the parties could not establish the "close relation" required by *Dillon*.<sup>256</sup> In so deciding, the court avoided addressing the strength of the relationship. Coon alleged that he and Ervin had an "intimate, stable and 'emotionally significant' relationship as 'exclusive life partners,'" <sup>257</sup> and that the two had been living together for a year. 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. Indeed, the court cited a number of cases interpreting the close relationship requirement narrowly, as requiring either husband-wife, parent-child, or grandchild-grandparent.<sup>258</sup> The two, or maybe three,<sup>259</sup> cases to the contrary were regarded as

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<sup>253</sup> *Coon v. Joseph*, 237 Cal. Rptr. 873, 874 (Ct. App. 1987).

<sup>254</sup> Coon also claimed negligence and violation of his civil rights under California law. *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 876-78.

<sup>257</sup> *Id.* at 874.

<sup>258</sup> *Id.* at 876.

<sup>259</sup> The equivocation arises from a debate over whether the relation of mother-foster child in one of the cases, *Mobaldi v. Bd. of Regents*, 127 Cal. Rptr. 720 (Ct. App. 1976), counts as parent-child. The *Coon* court thought it did, *Coon*, 237 Cal. Rptr. at 876 n.1, and therefore did not count the case as an exception. As discussed in the text, the more interesting question is *why* the court would so regard that relationship, elevating it above the committed relationship of (in particular) a same-sex couple. The other two cases involved, respectively, the relation of uncle to nephew, *Kriventsov v. San Rafael Taxicabs, Inc.*, 229 Cal. Rptr. 768 (Ct. App. 1986), and an unmarried, opposite-sex couple. *Ledger v. Tippitt*, 210 Cal. Rptr. 814 (Ct. App. 1985).

“exceptions,” and either ignored,<sup>260</sup> explained away,<sup>261</sup> or disapproved.<sup>262</sup> As we have seen, such treatment infects many decisions in this area. Courts prefer “the establishment of a clear and definite standard limiting liability.”<sup>263</sup>

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. 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.*<sup>264</sup>

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 committed

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<sup>260</sup> *Coon*, 237 Cal. Rptr. at 876 (citing but not discussing *Kriventsov*, 229 Cal. Rptr. at 768). *Kriventsov* involved an uncle and a nephew. Since they were “relatives” living in the same household, they would today be able to recover in California, as stated by the California Supreme Court in *Thing v. La Chusa*, 771 P.2d 814, 828 (Cal. 1989). Despite the greater intimacy—including sexual intimacy—that same-sex couples enjoy, they are (presumably) frozen out under *Thing*, as they are not “related.” Given the California court’s generally conservative leanings today, *see infra* Part III.A, I am not at all optimistic that the court would regard an intimate same-sex couple as related. The passage of Proposition 22, *see supra* note 21 and accompanying text, can only make matters even more difficult.

<sup>261</sup> *See* discussion of *Mobaldi v. Bd. of Regents*, 127 Cal. Rptr. 720, *supra* note 259.

<sup>262</sup> *Ledger*, 210 Cal. Rptr. at 814, discussed in *Coon*, 237 Cal. Rptr. at 877-78. It is fair to say that the court both disapproved the result in *Ledger* and attempted to explain why the claim before it was weaker still.

<sup>263</sup> *Coon*, 237 Cal. Rptr. at 877.

<sup>264</sup> *Id.* at 876 (emphasis added) (quoting W. PAGE KEETON ET AL., *supra* note 2, at 366).



couple: "We view the relationship of mother and foster child. . . as a parent-child relationship."<sup>265</sup>

The court's negation of the intimate life of the couple is obvious enough from its holding and from the analysis above, but it gets worse. The court distinguished the couple before it from the opposite-sex couple in *Ledger v. Tippitt*,<sup>266</sup> where a California appellate court had permitted an emotional distress claim by an unmarried cohabitant to go forward. Rather than simply disapproving the holding in that case, 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."<sup>267</sup> It then stated that, unlike the *Ledger* case, this case did not involve a "de facto" marriage, "[n]or could such an 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."<sup>268</sup>

This language is quite discouraging to any same-sex couple seeking recovery for a loss to their relationship. First, the court does not see that, once it allows *any* "de facto" marriage, it cannot then use the legislative definition of marriage, without more, to exclude same-sex couples. More disturbingly, the court is blind to the unfairness of denying marriage rights to same-sex couples, and then using that denial to erase gay men and lesbians from other areas of legal protection. Finally, the decision's depressing refusal to recognize the couple at all goes hand-in-hand with its inability to see that same-sex couples, deprived of the option to marry, are *more sympathetic* candidates for relaxing the bright-line, marriage-only rule.<sup>269</sup>

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<sup>265</sup> *Coon*, 237 Cal. Rptr. at 876 n.1.

<sup>266</sup> *Ledger*, 210 Cal. Rptr. at 814.

<sup>267</sup> *Id.* at 828 (quoted in *Coon*, 237 Cal. Rptr. at 877).

<sup>268</sup> *Coon*, 237 Cal. Rptr. at 877-78.

<sup>269</sup> *Coon* did inspire what was mislabeled a "dissent." Presiding Judge White actually concurred in the judgment, as he did not believe that the incident was of a type sufficiently serious to warrant recovery to the secondary victim. He dissented, though, from the central holding that the tort's protections should not be available to unmarried intimates, and in fact emphasized the unfairness of disallowing same-sex couples from bringing the claim: "Since homosexuals cannot marry . . . , under the majority's decision, they are precluded from ever recovering for negligent infliction of emotional distress." *Id.* at 882-83 (White, P.J., dissenting). After noting that, in "contemporary society . . . it is foreseeable a homosexual relationship might exist," *id.* at 883, Judge White opted for a more functional definition of family: "'[F]amily' may 'mean different things under different circumstances. The family . . . may be . . . a particular group of people

## 2. *Wrongful Death*

One would expect less likelihood of success on a wrongful death claim brought by the surviving intimate of a same-sex couple, because, as noted earlier, these statutory creations clearly define their beneficiaries, and unmarried cohabitants are not among them.<sup>270</sup> It is therefore unexpected that the two decided cases<sup>271</sup> yield little clarity on the point: one allows such a claim, and the one that does not inspires a strong dissent. Of course, more telling is the lack of case law, which strongly suggests that potential litigants recognize that such claims are likely to be unsuccessful. Nonetheless, the slight sympathy that one finds for survivors of same-sex relationships in these cases is fully consistent with one of the central tenets of this Article: Courts are more comfortable when they are able to look away from the couple's intimate life. Wrongful death claims permit doing so, at least to some extent. Although the tort has, in some jurisdictions, grown to accommodate the loss of consortium, the primary recovery is often for the loss of economic support that the decedent had provided to the survivor. Indeed, the two opinions arguing for recovery emphasize this purpose of

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related by blood or marriage, or not related at all, who are living together in the intimate and mutual interdependence of a single home or household. . . .” *Id.* (quoting *MacGregor v. Unemployment Ins. App. Bd.*, 689 P.2d Rptr. 453, 458 (Cal. 1984)).

<sup>270</sup> *But see* HAW. REV. STAT. § 663-3(b) (Supp. 1999) (which lists “reciprocal beneficiary” among the potential beneficiaries); VT. STAT. ANN. tit. 15, § 1204(e)(2) (Supp. 2000) (wrongful death listed as tort claim available to parties to a civil union). The 1997 Hawaii Amendment is specifically meant to provide a claim to same-sex partners (among others) who meet certain requirements, set forth at HAW. REV. STAT. § 572C (Supp. 1999). This matter is discussed more fully in *infra* notes 292-300 and accompanying text.

<sup>271</sup> Depending on one's definition of a same-sex couple, it is possible to add a third case to this short list—but I would not. In *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999), *cert. denied*, 121 S. Ct. 174 (2000), the court held that a couple that had been legally married for many years had not, in fact, been parties to a valid marriage, because both parties were born as biological men. One of the “men,” however, had undergone sexual reassignment surgery before marriage, and lived as a woman. Despite this fact, the court held that sexual identity was biologically determined. Since this meant that the two men had (illegally) married, there could be no wrongful death claim. In the court's view: “[S]ome things we cannot will into being. They just are.” *Id.* at 231. The decision in this case strikes me as both willfully false and exceptionally cruel, because of the extent to which the court went in denying the reality of the couple's life, thereby depriving the survivor of financial support—and only to protect an allegedly negligent defendant.

the tort. Doing so enables avoidance of the "details" of the relationship. To be fair, though, these opinions display at least less embarrassment about the intimate life of the couple than is typically the case.

The winning case is *Solomon v. District of Columbia*,<sup>272</sup> where 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."<sup>273</sup> 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, it appears, 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.<sup>274</sup>

Nonetheless, the court's acknowledgment of the couple's life together is heartening:

The relationship between Ms. Solomon and Ms. Lane [the decedent] 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.<sup>275</sup>

This language is direct and unembarrassed, recognizing the interconnectedness of a life of committed relation. Such a relation includes intimacy of many kinds, and certainly the presence of two children is an important part of *this* intimate relationship. Judge Dorsey seems to have understood the artificiality of separating the parenting role from the spousal one, especially

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<sup>272</sup> *Solomon v. Dist. of Columbia*, 21 Fam. L. Rep. (BNA) 1305, 1316 (D.C. Super. Ct., No. 94-2709, Apr. 26, 1995).

<sup>273</sup> *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.

<sup>274</sup> See D.C. CODE ANN. §§ 19-301 - 316 (1999); see also *Lewis v. Lewis*, 708 A.2d 249, 251-52 (D.C. 1998).

<sup>275</sup> *Solomon v. Dist. of Columbia*, 1995 Lesbian/Gay L. Notes 83.

since failure to recognize the couple as such would have created an anomalous result: "It is clear that the 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. . . ." <sup>276</sup> Whether the court would have been as sympathetic had the couple not had children is open to debate, but the tenor of the discussion suggests a broader empathy than is typical. On the other hand, the couple is obviously no longer in an intimate relationship, so the court could focus on the children and the loss of the economic support the decedent had provided the family, rather than on the couple itself. In any case, *Solomon* confronts the inconsistency, avoided by other courts, between recognizing the children of same-sex relationships while denying the relationships themselves. <sup>277</sup>

The other burst of sympathy for a surviving dependent in a same-sex wrongful death case is Judge Rosenberger's dissenting opinion in *Raum v. Restaurant Associates, Inc.* <sup>278</sup> The opinion is particularly noteworthy, as Judge Rosenberger had to overcome not only the language of the statute, but a host of mostly unfavorable precedent, as well. New York's wrongful death statute limits recovery to spouses and blood relatives, <sup>279</sup> and further states that "[a] husband or wife is a surviving spouse. . . ." <sup>280</sup> While the majority regarded this language as conclusive on the matter, <sup>281</sup> Judge Rosenberger noted that the language in question had the purpose of presuming that a husband or wife was a "spouse" absent divorce, separation, or abandonment, *not* of restricting the term to "husband or wife" in every case. <sup>282</sup>

Once having read the statute as ambiguous, Judge Rosenberger invoked *Braschi*, <sup>283</sup> following that decision's invitation to choose a "functional over

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<sup>276</sup> *Id.*

<sup>277</sup> See *supra* Part I.C.

<sup>278</sup> *Raum v. Restaurant Ass'n*, 675 N.Y.S.2d 343, 345 (App. Div. 1998) (Rosenberger, J.P., dissenting).

<sup>279</sup> NY Est. Powers & Trusts Law §§ 1-2.5, 4-1.1, 5-1.2 (McKinney 1998). The dissent provides an explanation of the statutory mechanism by which the qualifying parties are established. *Raum*, 675 N.Y.S.2d at 345 (Rosenberger, J.P., dissenting). As is typical, those entitled to a distribution under the wrongful death statute are those "who would be entitled to a share of the decedent's property if he died intestate." *Id.*

<sup>280</sup> NY Est. Powers & Trusts Law § 5-1.2.

<sup>281</sup> *Raum*, 675 N.Y.S.2d at 345.

<sup>282</sup> *Id.* at 345 (Rosenberger, J.P., dissenting).

<sup>283</sup> See discussion at *supra* notes 34-41 and accompanying text.

a literal interpretation of 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.”<sup>284</sup> He also noted that, in contrast to other cases in which the court had declined to call same-sex partners “spouses,”<sup>285</sup> “the wrongful-death statute makes no alternative provision for homosexual dependents, which . . . raises equal protection problems unless surviving ‘spouse’ is interpreted more broadly.”<sup>286</sup>

Given the purposes of the wrongful death statute, which include “compensat[ing] the victim’s dependents, . . . punish[ing] and deter[ing] tortfeasors and . . . reduc[ing] welfare dependency,” Judge Rosenberger saw “no rational basis for excluding a class of injured dependents from recovery . . . simply because the dependents did not have a legally-recognized relationship with the decedent.”<sup>287</sup> Thus, even under the permissive, “rational basis” equal protection standard,<sup>288</sup> the statutory exclusion could not be defended.

There is merit in this approach of attempting to avoid a constitutional problem by reading the statute expansively. Further, allowing same-sex marriage would accomplish, wholesale, what otherwise must be accomplished piecemeal. Indeed, this Article would be unnecessary if same-sex

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<sup>284</sup> *Raum*, 675 N.Y.S.2d at 345 (Rosenberger, J.P., dissenting).

<sup>285</sup> 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 (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 (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.

<sup>286</sup> *Raum*, 675 N.Y.S.2d at 346 (Rosenberger, J.P., dissenting).

<sup>287</sup> *Id.* at 347 (Rosenberger, J.P., dissenting).

<sup>288</sup> The particular appellate court on which Judge Rosenberger sat had already taken the rare position that classifications based on sexual orientation should be “‘subjected to strict, or at least heightened, scrutiny.’” *Id.* at 346 (quoting *Under 21 v. City of New York*, 488 N.Y.S.2d 669, 675 (App. Div.), *rev’d on other grounds*, 482 N.E.2d 1 (N.Y. 1985)). Reading the wrongful death statute to exclude same-sex couples would violate even the rational basis standard, according to Judge Rosenberger.

marriage were recognized, because the reforms it demands would be comprehended by that central victory. On the other hand, there is neither reason nor luxury to wait for universal recognition of same-sex couples before seeking other advances. For the reasons developed below, wrongful death statutes constitute a particularly compelling case for reform, for both same and opposite-sex couples.

Judge Rosenberger has sensed, although not clearly articulated, an anomaly concerning these statutes, which should be addressed by legislatures, or, where the statute will so permit, by courts. Creative attempts to avoid the conclusion aside, these statutes restrict recovery either to a small class of beneficiaries that are typically "first up" in the intestacy statutes, or to specifically enumerated beneficiaries.<sup>289</sup> While it is probably still true today that such beneficiaries are the likeliest to be economically bereft by the primary victim's death, what reasonable basis is there for statutorily (and therefore irrebuttably) presuming that to be the case? The answer cannot be administrative convenience, because damages must be proven by *anyone* who seeks to recover, and most of the damages awarded in a particular case are likely to be for the loss of economic support—an element of damage that is comparatively easy to prove. If administrative issues predominated, one would expect the statutes to *restrict* recovery to those damages, but, as noted above, those restrictions are increasingly falling away. Even to the extent they remain, they should apply equally to all potential plaintiffs. Further, one can avoid the effects of the intestacy statute easily enough, but can do nothing to change the outcome in a wrongful death suit. So, for example, a same-sex couple of many years might provide, by will, that the entire estate of the first deceased will pass to the second, but the survivor of that same couple would not be able to recover a penny against the tortfeasor whose negligence resulted in the death of her partner.<sup>290</sup> As we have seen above, this result cannot be

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<sup>289</sup> See *supra* notes 209-13 and accompanying text.

<sup>290</sup> It may sometimes be possible for surviving same-sex partners to recover if they are the beneficiaries under the will, albeit for limited classes of damages. See *supra* notes 214-15 and accompanying text. One possible avenue of more substantial compensation might be punitive damages, if appropriate in the case and under the relevant state's law, because these would become assets of the estate. In Alabama, the *sole* purpose of the wrongful death law is to deter the tortfeasor by punishing him or her. ALA. CODE § 6-5-410 (2000); see *Cherokee Elec. Coop. v. Cochran*, 706 So. 2d 1188, 1193 n.5 (Ala. 1997) (Alabama Supreme Court has construed the statute as permitting only punitive damages, a construction not disturbed by the legislature); *id.* at 1194 (citing *Louis Pizitz Dry Goods v. Yeldell*, 274 U.S. 112 (1927) (United States Supreme Court has upheld application of the

justified by standard tort principles of foreseeability, because such dependence is certainly foreseeable. Lacking any apparent administrative justification, either, the statutes cannot be reasonably defended, as to either same-sex or opposite-sex unmarried couples.<sup>291</sup>

Hawaii and Vermont recently became the first two states to clearly permit the surviving member of a same-sex couple to recover in wrongful death.<sup>292</sup> Particularly in Hawaii, this victory hides a painful defeat, because this and other rights have been accorded gay and lesbian people as a palliative in the wake of the state's rejection of same-sex marriage.<sup>293</sup> To a successful plaintiff, though, having this right will be much better than not having it. Here, I will discuss the mechanics of the Hawaii statute, and then offer a few remarks as to what this important victory may come to mean.<sup>294</sup>

In 1997, Hawaii amended its wrongful death statute, adding to the category of those entitled to recover damages an entity called the "reciprocal beneficiary."<sup>295</sup> That term, in turn, is defined in Title 31, Chapter 572C, of the Hawaii statutes. By agreement, two parties may enter into a

statute to cases involving merely negligent conduct)).

<sup>291</sup> Interestingly, Michigan appears to be the one state in which recovery under the wrongful death statute more closely tracks actual loss. The statute lists three different classes of potential beneficiaries, the third of which is "persons who are devisees under the will of the deceased, except those whose relationship with the decedent violated Michigan law." MICH. STAT. ANN. § 27A.2922(3)(c) (2000). A same-sex partner who is a named beneficiary under a will might therefore recover for actual loss suffered. The limiting language regarding illegal relationships presumably would not be an impediment, because Michigan has abandoned its sodomy law, and a same-sex couple could not get married. An interesting question would arise if the couple went to Vermont to engage in a civil union, however.

<sup>292</sup> HAW. REV. STAT. § 663-3 (1999); VT. STAT. ANN. tit. 15, § 1204(e)(2) (Supp. 2000).

<sup>293</sup> Other rights include: hospital visitation and the right to make health care decisions for the patient, HAW. REV. STAT. § 323-2 (1999); employer-provided health benefits, *id.* § 431:10A-601; the ability to create the same tenancies in property as married couples, *id.* § 509-2; and rights of inheritance, *id.* § 560.

<sup>294</sup> I will have little to add concerning the Vermont statute, as victory for Vermont residents on the relational torts discussed in this Article is complete. VT. STAT. ANN. tit. 15, § 1204(e)(2) lists wrongful death, emotional distress, and loss of consortium as suits available to couples in a civil union. The Vermont Supreme Court's unwillingness to require the remedy of marriage sought by the plaintiffs is discussed in *supra* Part I.D. I explore the point more fully in John G. Culhane, *A Tale of Two Concurrences: Same-Sex Marriage and Products Liability*, 7 WM. & MARY J. WOMEN & L. 447 (2001).

<sup>295</sup> HAW. REV. STAT. § 663-3(b)(5) (1999) & Note on 1997 Amendment.

“reciprocal beneficiary relationship” that provides them with such protections as are expressly set forth by law<sup>296</sup> (such as the wrongful death statute) if they are “(1) each . . . at least eighteen years old; (2) [not] married nor a party to another reciprocal beneficiary relationship; [and] (3) . . . legally prohibited from marrying one another.”<sup>297</sup>

So, same-sex couples (but not intimate opposite-sex couples, who have the option of marrying) can sign up as reciprocal beneficiaries and gain at least some of the same benefits as married couples. Inasmuch as Hawaii’s wrongful death statute allows recovery for loss of consortium, it might appear that the legislature, although uncomfortable with using the word “marriage” in the case of same-sex couples, is at least willing to acknowledge their lives of committed intimacy. The statute represents at least some progress, but that statement should be qualified, in at least two important respects.

First, the Vermont experience—granting same-sex couples in a civil union all of the benefits of marriage, but withholding the label<sup>298</sup>—underscores that legislatures are intransigent when it comes to the word “marriage.” The word is heavily freighted and zealously guarded by the heterosexual center of power. For many, whatever the contemporary realities of their own married lives, the word itself calls up powerful, and ancient, images of ritual and, of course, of two sexes. These images serve more than a descriptive purpose, as they can be used to reinforce, often subtly, the perception that marriage *should* be between a man and a woman. The spluttering inability of many opponents of same-sex marriage to

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<sup>296</sup> HAW. REV. STAT. § 572C-6 (1999) (“[T]he parties . . . shall be entitled to those rights and obligations provided by the law to reciprocal beneficiaries. Unless otherwise expressly provided by law, reciprocal beneficiaries shall not have the same rights and obligations under the law that are conferred through marriage. . .”).

<sup>297</sup> *Id.* § 572C-4. More general requirements under the statute are that (4) “[c]onsent . . . has not been obtained by force, duress, or fraud;” and that (5) “[e]ach of the parties sign a declaration of reciprocal beneficiary relationship.” *Id.*

<sup>298</sup> VT. STAT. ANN. tit. 15, § 1201(2) (parties to a civil union “may receive the benefits and protections and be subject to the responsibilities of spouses”), § 1204(a) (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.”), § 1201(4) (defining marriage as “legally recognized union of one man and one woman”), § 1202(2) (to be eligible to enter into a civil union, the parties must “be of the same sex and therefore excluded from the marriage laws of this state”).



articulate coherent reasons for their opposition serves as powerful evidence of the effectiveness of such prescriptive description.

Second, a closer look at the “eligibility list” for reciprocal beneficiary status shows that the law has economic protection as its centerpiece. By its terms, an adult parent and offspring pair, or a brother and sister, would qualify as reciprocal beneficiaries, since they cannot otherwise marry.<sup>299</sup> While extending benefits to those in such relationships is commendable, the point is that same-sex couples have not been elevated to “virtual spouse” status. It should be noted that same-sex couples do not stand on the same footing as married couples in negligent infliction of emotional distress or loss of consortium cases, at least not yet. Such omission is fully consistent with my premise that these torts require confronting sexual intimacy squarely.<sup>300</sup>

This distinction between wrongful death and the other relational torts is important. Although victory on the wrongful death issue is important, it can be seen as more in line with other reforms that confer some subset of the economic benefits of marriage on same-sex couples. As noted throughout this Article, the project of securing the unembarrassed recognition of the value of gay and lesbian lives will remain fundamentally incomplete until committed lives of intimacy are valued, not vilified. Judicial recognition of loss of consortium and negligent infliction of emotional distress, which rest in vital part on just that intimacy, would nourish that cause, as well as the lives of successful plaintiffs. Why, then, is the common law silent on these important questions? The remarks that follow sketch out some explanations, and are also intended to serve as an invitation to those in the field to take action.

### *E. Explaining the Silence*

The three relational torts are similar principally in requiring some kind of close relationship for recovery. Beyond that core similarity, however, the

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<sup>299</sup> Vermont has also recognized the reciprocal beneficiary relationship, but limits that status to “two persons who are blood-relatives or related by adoption.” 15 V.S.A. § 1301 (2001). Expressly declared ineligible are those who are party to “a civil union or a marriage.” *Id.* Thus, the reciprocal beneficiary relationships in Vermont and Hawaii are entirely different creatures.

<sup>300</sup> Before the Vermont legislature acted, one might have been tempted to argue that negligent infliction of emotional distress and loss of consortium are common-law torts, so we would not expect legislation dealing with the issue. Given Vermont’s willingness to recognize these claims, as well as the confusion the Hawaii courts will encounter in deciding whether to extend recovery under these torts to same-sex couples, legislative guidance would have been welcome.

definitional and practical differences among the three require careful separation in order to understand the obstacles to bringing suit faced by each. The discussions that follow take as a given that the parties (through their attorneys) are aware of the lack of favorable precedent discussed throughout this Article, and then offer further explanations as to why the claims are not being brought. Reiterating the earlier caveat, the exercise that follows is necessarily speculative.

### 1. *Loss of Consortium*

It is easy to see why the same-sex intimates of injured parties do not bring suit for loss of consortium when their partners are injured. First, the second-class citizenship of gay people may cause them to opt out of such a suit for a couple of related reasons. They may not be 'out' enough to feel comfortable in disclosing their relationship to a lawyer. Perhaps equally distressingly, they may have internalized societal opprobrium—undergirded by the plain fact that they cannot marry—to the extent that they themselves do not regard their relationship as equivalent to those of heterosexuals, and therefore do not think they have a claim worth bringing to the lawyer's attention.<sup>301</sup>

For those couples willing to risk bringing the fact of their relationship, and injury, to the attention of a personal injury lawyer, the next point at which same-sex couples might "lose" their loss of consortium claim would be at that lawyer's doing.<sup>302</sup> If he or she has taken in broad societal assumptions about the lesser value of gay and lesbian relationships, the thought that a loss of consortium claim might be available in such a case might never even arise. Anecdotal support for this point came from a discussion with a student who had worked for a personal injury lawyer during the Summer of 1999. In going through a list of standard questions of injured parties, the lawyer would ask: "Are you married?" If so, the possibility of raising a loss of consortium claim would be pursued. If not,

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<sup>301</sup> Deprived of the right to marry, and the concomitant lack of social support for their unions, same-sex couples are met with constant reminders of "society's view of [such relationships] as transitory, illicit, and not to be taken seriously." BETTY BERZON, *PERMANENT PARTNERS: BUILDING GAY AND LESBIAN RELATIONSHIPS THAT LAST 11* (1988).

<sup>302</sup> See Marc Galanter, *Makers of Tort Law*, 49 DEPAUL L. REV. 559 (1999), for a clear-eyed assessment of the role of lawyers in shaping torts claims. As he notes, "tort law is not just tort doctrine, but is enmeshed with procedure, evidence, institutional practice, the organization of law practices, the strategies of lawyers, the proclivity to claim, and much more." *Id.* at 559.

no further inquiries were made. Assuming the idea does occur to the attorney, the financial incentives imposed by the contingency fee arrangement would seem to counsel against encouraging, or even mentioning, such a claim. While failure to mention a viable claim would raise a serious ethical issue,<sup>303</sup> counseling the couple not to pursue the claim raises no such problem. The attorney could say, candidly, that the injury to the primary victim is the "big ticket" item in the litigation, and that the couple might be placing that at risk by seeking loss of consortium,<sup>304</sup> given possible jury prejudice towards gay people. This prejudice is well documented,<sup>305</sup> so perhaps it is unfair to criticize the lawyer for bringing it to the couple's attention. Such a risk hardly seems worth bearing, especially inasmuch as

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<sup>303</sup> Under Rule 1.4 (b) of the Model Rules of Professional Conduct, as amended in 1995, "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The lawyer could argue that, given the lack of case law supporting the claim, he or she was under no duty to bring it to the client's attention. This argument might or might not succeed, depending on whether the claim is deemed to be so far-fetched that mentioning it would exceed a lawyer's duty. In a jurisdiction such as Hawaii or New Jersey that has expressed willingness to regard *opposite-sex* unmarried couples sympathetically, the lawyer would be well advised to discuss the possibility of a loss of consortium claim with a same-sex couple. Even in less sympathetic states, the lawyer's better course of action would be to discuss the claim, if only in the course of advising against it. *Cf.* ABA Comm. on Ethics and Prof'l. Responsibility, Informal Op. 1523 (1987), *cited in* ANN. MODEL RULES PROF'L. CONDUCT R. 1.4 cmt. at 38 (3d ed. 1996) (counseling that the "concept of consultation" encompasses advising the client on the "advisability of the action contemplated"—not just on his or her "legal rights and responsibilities.").

<sup>304</sup> This point assumes that the couple considers itself, at least to some extent, as one financial unit. This assumption will often be correct in cases where the couple is sufficiently intimate to consider a loss of consortium suit. When the couple is not as financially connected, and the loss of consortium plaintiff sees her interest as worthy of protection even though it might adversely affect her partner's suit, the strain on the relationship might make the loss of consortium moot! For one suggestion on how to avoid this paradox, *see infra* notes 380-82 and accompanying text.

<sup>305</sup> *See Beliefs Guide Most Jurors, Poll Suggests*, LOS ANGELES TIMES, Oct. 24, 1998, at A18 (noting that, in a poll conducted for the National Law Journal and a trial consulting company, three out of four jurors were willing to do what they believed was right, even if that were to contradict the judge's instructions on the law, and "were more likely to feel they could not be fair or impartial toward a gay or lesbian defendant than toward a defendant from other minority groups"). *See also supra* note 148 (providing a discussion of litigation strategy excluding mention of lesbian relationship).

the prospects for judicial recognition of the claim may be dismal in most jurisdictions.

It is also possible, if not likely, that mediators and judges are encouraging parties to settle such loss of consortium claims before trial, thereby focusing attention on the less controversial—and more economically valuable—claim and keeping the issue of the parties' sexuality away from the jury. In the alternative, some judges may have dismissed such loss of consortium claims without reported decision. A sober look at precedent (mostly involving opposite-sex couples, as we have seen) might then have convinced the lawyer and the parties not to undertake the expense of appeal.

Finally, there may be a few cases in which the loss of consortium claim did reach a jury, but was denied by that body for any number of reasons unknown: the jury prejudice mentioned above, the jurors' own view that marriage should be strictly required for a loss of consortium claim, or the simple conclusion that there had not, in fact, been such a loss. In principle, it is also possible that some claims were successful at trial, but this seems unlikely for two reasons. First, one would have expected some advocacy group, if not the general media or a legal looseleaf service, to have reported such a positive result.<sup>306</sup> Second, given the strong argument from precedent against such recovery, an appeal would have been expected.

## 2. *Negligent Infliction of Emotional Distress*

The problems with emotional distress suits are quite similar to those explored in the consortium cases, but a few potential differences are worth noting briefly. Although negligent infliction of emotional distress is a relational injury in that it requires a close relationship, recovery is not for loss to that relationship per se, but principally to protect the bystander's own emotional well-being. Accordingly, it may be easier for potential plaintiffs and their lawyers to conceptualize the injury differently from the loss of consortium, by separating the plaintiff's own emotional distress from the physical injury negligently inflicted on the partner. Although this separation is something of an artifice, in that the plaintiff would likely suffer no serious emotional distress absent the relationship, it perhaps explains why courts have shown at least some willingness to allow unmarried cohabitants,<sup>307</sup> as well those not members of the primary victim's

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<sup>306</sup> Recall that *Solomon v. Dist. of Columbia*, 21 Fam. L. Rep. (BNA) 1305, 1316 (D.C. Super. Ct., No. 94-2709, Apr. 26, 1995), was reported in this way.

<sup>307</sup> See *Dunphy v. Gregor*, 642 A.2d 372 (N.J. 1994); *supra* notes 163-66 and accompanying text.

immediate family,<sup>308</sup> to recover in these cases. Perhaps juries, too, would be more sympathetic to such claims, as focus could be shifted to the emotional distress caused by injury to "someone close" (generically put). Such an emphasis might yield greater jury sympathy than the loss of an intimate relationship that is not valued.

These differences aside, the explanations for the excision of possible claims presented in the loss of consortium cases seem equally apt here: the "self-editing" of the same-sex couple; the lawyer's blindness or fear of jeopardizing the more lucrative claim; and the general reluctance of court and jury to honor committed relationships between members of the same sex.

### 3. *Wrongful Death*

The considerations underlying whether to bring a wrongful death claim are rather different from those discussed above. First, as discussed earlier, the principal element of recovery in wrongful death cases is often the economic loss that the bereft partner suffers from the sudden withdrawal of support. Although there is emotional loss, too, such loss does not usually assume the priority of place evident in loss of consortium and negligent infliction of emotional distress cases, if indeed it is recoverable at all.<sup>309</sup> Second, there is often no independent claim that may be lost or compromised by bringing the wrongful death claim. If the primary victim dies immediately, or almost immediately, he or she will pass a small claim, if any, to the estate.<sup>310</sup> Hence, the wrongful death claim might be the "big ticket," or the only ticket. Third, wrongful death claims are statutory, not judicially, derived.

The first two differences outlined above suggest that wrongful death claims might at least be more likely brought than a loss of consortium or negligent infliction of emotional distress claim. For example, while it is still possible that the survivor might not be sufficiently "out" to disclose her sexual orientation to a lawyer, economic exigency might compel a

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<sup>308</sup> See *Thing v. La Chusa*, 771 P.2d 814, 830 n.10 (Cal. 1989) ("[a]bsent exceptional circumstances, recovery should be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim.").

<sup>309</sup> See *supra* Part II.D.2.

<sup>310</sup> So called survival statutes "breathe new life" into claims that once expired when the primary victim did. Such claims now become an asset of the estate, which receives any recovery from the decedent's lawsuit. KUTNER & REYNOLDS, *supra* note 167, at 60-61 (discussing rule against recovery, the history of survival statutes, and some of the questions that continue to arise).

reassessment of that position, as well as of the related, self-abnegating view that the relationship was not deserving of protection. Faced with a choice of real financial hardship or remaining silent, a greater number of potential plaintiffs might be expected to come forward.

Similarly, the case is likely to appear more attractive to a personal injury lawyer, because bringing it does not place another claim at risk, nor does it (necessarily) require exploration of the couple's intimate life.<sup>311</sup> Although the virtual lack of favorable precedent militates against bringing the claim, doing so in a sympathetic jurisdiction might be advisable—except that the third difference noted above creates a disincentive to do so. Inasmuch as the language of wrongful death statutes typically lists an exclusive class of beneficiaries, the absence of unmarried intimates from that list is a daunting impediment to bringing suit.

As to the issue of what a jury might do with the claim, my prediction, consistent with one of the dominant themes of this Article, is that more sympathy might be expected than would be the case in a loss of consortium or emotional distress suit. Jurors might not be comfortable with a same-sex relationship, but that relationship has now ended. Focus now moves away from intimacy to loss, a concept with which many jurors will be familiar. Also, the move from the “fuzzy” relational intimacy—especially that of a same-sex couple—to the hard facts of economic hardship will likely engender sympathy, as well.

In short, if wrongful death were not a statutory tort, one might well expect a fair degree of success by surviving members of same-sex couples. The rigidity of definition imposed by such statutes, however, makes success unlikely. This result is particularly maddening, because wrongful death has been statutorily constituted only because of historical accident.<sup>312</sup> A creative court can read around the statute, or give birth to a common law right to sue for wrongful death, but these are likely to be limited initiatives. As the positive developments in Vermont and Hawaii suggest, statutory reform is the more promising route.

### III. TORT LAW CAN MOVE SAME-SEX COUPLES TOWARD VALIDATION

The first two Parts of this Article are admittedly somewhat dispiriting, in emphasizing the judiciary's general aversion to the intimate lives of

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<sup>311</sup> As suggested earlier, this observation holds little weight when the decedent's own claim is valuable, as where he or she survived for a period after injury, at great pain and expense.

<sup>312</sup> See *supra* Part II.C.

same-sex couples, as well as its fondness for bright-line rules that value legal status over real relationships and loss. Indeed, these obstacles make the project of securing the full rights of citizenship for gay people more difficult than is generally acknowledged. In this Part, though, I infuse a measure of optimism. This enthusiasm is the product of two seemingly paradoxical points. First, tort law has historically had a transformative power that exceeds its central concern with achieving a just outcome in the case before it. Such power is not surprising, upon reflection, because tort concerns itself with the most fundamental questions of the relations between people. As relations change, or are thought about differently, tort can respond only if its foundational principles admit of flexible application. Because of the creative power inherent in tort's elastic capacity, recognizing a right of recovery for relational injury by same-sex couples could begin to change the wider terrain, legal and societal, for gay people.

The second, and paradoxical, point, is that the prospect of judicial recognition of same-sex relational injuries is not, by itself, as frightening as, say, same-sex marriage. As noted earlier, extending "marriage" to same-sex couples has enormous social, definitional, and practical implications: allowing recovery for the loss of relational interest, by itself, does not.

Recent developments in California illustrate this point. On the one hand, the voters of California recently and overwhelmingly approved Proposition 22, which restricts marriage to the union of a man and a woman.<sup>313</sup> On the other hand, Assembly Bill 25, given fresh impetus by Sharon Smith's inability to sue for her partner's wrongful death, would change California law to grant standing to surviving members of domestic partnerships<sup>314</sup> in both wrongful death and negligent infliction of emotional distress cases. Thus, many of the state's legislators, certainly attuned to the clear message from the electorate on the subject of same-sex marriage, have thus far taken a much different view of this new exhortation to create

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<sup>313</sup> See *supra* note 5.

<sup>314</sup> California law has laid the groundwork for such legislation, because same-sex couples are already permitted to register as domestic partners. In 1999, Gov. Gray Davis signed a flimsy bill that established a domestic partner registry and granted such those in such partnerships a few rights, including hospital visitation and health benefits for state workers. Greg Lucas, *Domestic Partner Benefits OK'd by Panel*, S.F. CHRON., Mar. 14, 2001, at A3. The proposal currently under consideration would expand the small group of benefits conferred by such status to include standing to sue for wrongful death and negligent infliction of emotional harm, as well as a small but significant group of additional rights. The bill, A.B. 25, can be tracked at [www.assembly.ca.gov](http://www.assembly.ca.gov).

equality for same-sex couples in tort suits.<sup>315</sup> Although conservative voices have predictably called the bill “an end run around marriage,”<sup>316</sup> it has cleared the Assembly Judiciary Committee, and is thought to stand a reasonable chance of passage.<sup>317</sup> The legislators are not being particularly courageous, either: a majority of Californians, even though they opposed same-sex marriage, support granting same-sex couples legal rights short of that jealously guarded status.<sup>318</sup>

This final section is primarily devoted to the first point above. I explore the power of tort to take the lead in changing the way society thinks and acts about certain issues.<sup>319</sup> This discussion takes in both historical and contemporary examples, focusing on both the rhetorical and practical effects of a selection of decisions, some of which turned out to be epochal. Such transformations, however, are the exception rather than the norm. Those litigating on behalf of same-sex couples should not be falsely optimistic about their chances of unleashing the creative force of judicial change. I discuss the current legal climate in a few states, partly for strategy suggestions as to litigating (or not doing so) in those states, but more to provide competing decisional paradigms that advocates might look to in planning what to do in other jurisdictions.

#### A. (Dis)Respecting Tort Principles

Although retrenchment is today in evidence in many states,<sup>320</sup> tort law has come a long and healthy way since the days of formal, ritualized

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<sup>315</sup> Consistent with one of the central themes of this Article, it is interesting to note that the bill makes no mention of loss of consortium cases, in which the intimate life of the couple is most plainly in view.

<sup>316</sup> Lucas, *supra* note 314 (quoting Randy Thomasson, executive director of the Campaign for California Families).

<sup>317</sup> *Id.*

<sup>318</sup> Hallye Jordan, *Partner of Dog Attack Victim Pushes for Bill that Would Allow Her to Sue*, SAN JOSE MERCURY NEWS, Mar. 14, 2001 (stating that between 59% and 67% of Californians support granting legal rights to gay and lesbian couples).

<sup>319</sup> There is danger of naivete here. Judges tarred as overly progressive can find themselves “replaced,” or “overruled” by statute. My sense is that extending recovery to same-sex couples for relational losses is not the type of advance that would trigger outrage sufficient to upend the decision, cause a recall of the judges (where permitted by law), or jeopardize other gains, but advocates will have a more state-specific sense of likely outcomes.

<sup>320</sup> See Ellen S. Pryor, *Mapping the Receding Boundaries of Tort Law*, 1 (1998) (unpublished manuscript, on file with author): “[T]ort law has become significantly more conservative in the past fifteen years.” Of particular interest for present purposes, Professor Pryor discusses the tendency of courts to employ bright-line, “no duty” rules to keep cases from reaching the jury. *Id.* at 21-23.



pleading, and strict, unbending rules. The evolution towards flexible standards has been occasioned and necessitated by changes in both the surrounding culture and the recognition that such rules no longer serve the interests of justice, if they ever did. A few well-known cases have had the advantage of timing and the power of rhetoric in driving home the need for change. As one particularly compelling example, consider Justice Cardozo's memorable opinion in *MacPherson v. Buick Motor Co.*,<sup>321</sup> abrogating the by-then unworkable rule that product-injured plaintiffs could bring a negligence suit only against the direct seller, even though the negligent actor would likely have been the manufacturer. Conditions of marketing and sales had changed sufficiently by the year of decision, 1916, that the plaintiff was left with a remedy against the wrong person. Whereas consumers once purchased goods from their maker, mass-marketing had come to create a broad retail stratum between maker and buyer. Thus, the so-called privity rule had outlived whatever usefulness it ever had, and Cardozo unleashed the rhetorical power of tort in eliminating the rule: "We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law."<sup>322</sup> Powered by the force of its real-world logic and its lofty rhetoric, *MacPherson* ushered in a wholesale change in the law of liability for defective products.<sup>323</sup>

More recently, in a bold series of decisions beginning in the 1960s and ending in the 1980s, the California Supreme Court unleashed the power of tort law to assist those who, in "our current crowded [and interdependent] society,"<sup>324</sup> had been placed at risk through the carelessness of others. Repeatedly invoking the concept of foreseeability of injury caused by unreasonable risk, the court did away with the strict, medieval categories of entrants onto land, opting instead for a rule of reasonable care under the circumstances;<sup>325</sup> imposed a duty on therapists to warn those identified as potential victims of violence;<sup>326</sup> did away with the all-or-nothing rule of contributory negligence;<sup>327</sup> carried *MacPherson* to the next stage by

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<sup>321</sup> *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

<sup>322</sup> *Id.* at 1053.

<sup>323</sup> DOBBS, *supra* note 146, at 973 ("[o]ver the years, other courts came to accept *MacPherson*").

<sup>324</sup> *Tarasoff v. Bd. of Regents*, 551 P.2d 334, 337 (Cal. 1976).

<sup>325</sup> *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968).

<sup>326</sup> *Tarasoff*, 551 P.2d at 334.

<sup>327</sup> *Li v. Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975). It should be noted that, in this case at least, the California Supreme Court was not breaking new ground. As the court stated, by 1975 "25 states, [had] abrogated the 'all-or-nothing' rule of

imposing strict liability on those who manufacture defective products;<sup>328</sup> and, as we have already seen, abrogated the artificial “zone of danger” requirement in emotional distress cases involving bystanders.<sup>329</sup>

These cases stressed the foreseeability of injury given defendant’s negligence, the creation of incentives to exercise reasonable care, and the relative helplessness of plaintiffs to protect themselves. Such considerations were particularly powerful in cases such as *Tarasoff v. Board of Regents*<sup>330</sup> and *Greenman v. Yuba Power Products, Inc.*,<sup>331</sup> involving, respectively, an unsuspecting victim of a therapist’s patient and a consumer injured by a latent product defect. These cases are noteworthy both for the results they achieve and for their consistent recognition that the default rule for negligently caused personal injuries is liability, at least where harm to plaintiff is foreseeable.<sup>332</sup> In *Rowland v. Christian*,<sup>333</sup> for example, the following language appears: “Although . . . some exceptions have been

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contributory negligence.” However, only one state (Florida) had accomplished the change via judicial decision; the other changes were wrought by legislation. *Id.* at 1232. Thus, *Li* is progressive in its determination that justice to injured plaintiffs need not await statutory change. Courts, the very bodies that created the doctrine, are free to eliminate it.

<sup>328</sup> *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963). This groundbreaking case, augured by Justice Traynor’s prescient concurrence in *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 444 (Cal. 1944) (Traynor, J., concurring) placed strict liability in tort, thereby avoiding the complications that had resulted through efforts to squeeze product defect claims into warranty law.

<sup>329</sup> *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968), *overruling* *Amaya v. Home Ice, Fuel & Supply Co.*, 379 P.2d 912 (Cal. 1963). These and other advanced by the California Supreme Court, as well as the court’s subsequent retreat to bright-line rules, are chronicled in Stephen D. Sugarman, *Judges As Tort Law Unmakers: Recent California Experience with ‘New’ Torts*, 49 DEPAUL L. REV. 455 (1999).

<sup>330</sup> *Tarasoff*, 551 P.2d at 334.

<sup>331</sup> *Greenman*, 377 P.2d at 897.

<sup>332</sup> See Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 440 (1987). The defendant who acts without exercising reasonable care “releases a set of possibilities that due care could have avoided.” Weinrib, a strict formalist, believes that liability should follow when anything in that “set of possibilities” results in injury to a given person. In my view, liability for foreseeable injuries should not be derived formally (and therefore as a matter of course), because of the competing practical considerations relevant to deciding cases. Nonetheless, Weinrib’s powerful appeal to corrective justice between the parties suggests that liability be imposed for foreseeable risk *unless* there is a compelling reason to decide otherwise.

<sup>333</sup> *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968) (abrogating strict categories of entrants onto land).

made to the general principle that a person is liable for injuries caused by . . . failure to exercise reasonable care . . . , no such exception should be made unless clearly supported by public policy.<sup>334</sup> In short, the run of California decisions during this period indicates a commendable awareness of both changing conditions and a move away from formalistic modes of thinking.<sup>335</sup>

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<sup>334</sup> *Id.* at 564; see also *Tarasoff*, 551 P.2d at 342. This is not to say that the California court did not render questionable decisions during this era. For example, in *J'Aire v. Gregory*, 598 P.2d 60 (Cal. 1979), the principle of foreseeability was employed to render tortious the negligence of a contractor in failing to act reasonably in performing its service contract. Inasmuch as the plaintiff's contract was with the City (which in turn had a contract with the contractor), the plaintiff's only recourse against the contractor was in tort. Permitting the claim may have been defensible under the facts that the court emphasized, which seem to have included a high degree of negligence in the face of knowledge of the plaintiff's predicament, but the case set an unwise precedent. In *J'Aire*, the plaintiff could have structured its contractual remedies differently, or might have insisted the contract between the town and the contractor make clear that the benefits were to run to the plaintiff, thereby creating a claim under third-party beneficiary principles of contract. This case does not present the more difficult situation of economic loss suffered by a helpless plaintiff, where, for example, the negligent discharge of oil or chemicals into water causes business losses in the surrounding area. See, e.g., *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974) (oil company has duty not to negligently harm sea life and could be liable for profits lost as result of discharge); *Pruitt v. Allied Chem. Corp.*, 523 F. Supp. 975 (E.D. Va. 1981) (making a fine distinction between marina owners and owners of boat and fish supply shops, who could recover, and businesses deprived of seafood supplies, who could not).

<sup>335</sup> The waning of rigid proscriptive rules undergirded by binary ways of thinking is particularly evident in the movement, beginning in the 1960s and then gathering hurricane force, away from the strict rule that plaintiff's contributory negligence should completely bar recovery. The principal reason for the former rule appears to have been that, in cases of contributory negligence, the plaintiff was thought to have *wholly* caused his own injury. See *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809), reprinted in RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 308-09 (7th ed. 2000) (where plaintiff negligently rode his speeding horse over a pole that defendant had negligently left lying across a road, recovery denied: "If [plaintiff] had used ordinary care he must have seen the obstruction so that the accident appeared to happen entirely from his own fault."). That causal notions supported the rule is evidenced by the now-archival rule of last clear chance, which salvaged the complaint when defendant's last opportunity to avoid the injury *followed* plaintiff's negligence. As further illustration of the power of legal formalism at that time, consider the complex rules under the last clear chance doctrine about the defendant's different duties depending on whether the plaintiff was helpless or "merely" inattentive. See RESTATEMENT (SECOND) OF

Although the general principle at work in personal injury cases is liability for foreseeable risk, an unbending rule to that effect would result in unfair and excessive liability. Rather, courts must define a manageable subset of cases for liability *given* a foreseeable risk. As the New Jersey court straightforwardly recognized in *Dunphy*, the decision whether to recognize a duty involves a “complex analysis.”<sup>336</sup> The considerations that courts have found salient in attempting to fix the boundaries of liability include the blame attached to the defendant’s conduct, the closeness (or remoteness) of damage from the wrongful act, the nature of the injury, and the advisability *vel non* of deterring future harms of this sort.<sup>337</sup>

Nonetheless, some courts seem heedless of the California Supreme Court’s wise epigram that “legal duties are not discoverable facts of nature,”<sup>338</sup> and have shown little inclination to undertake the kind of complex analysis that is often required. In fact, California itself has recently been unwilling to follow the broad principles its own decisions have laid down, and has instead been fortifying the bright-line ramparts.<sup>339</sup> Perhaps the most dramatic example of this flinching is *Thing v. LaChusa*,<sup>340</sup> discussed earlier,<sup>341</sup> in which the California Supreme Court betrayed the central holding of *Dillon*, by holding that the factors relevant to foreseeability in the case of negligent infliction of emotional distress were now to be taken as unbending requirements.<sup>342</sup>

Other California cases involving claims of emotional distress have sometimes been met with a similarly unenlightened, and unprincipled, refusal to extend liability even to plaintiffs who suffer emotionally from negligently caused injury to immediate family members. In *Huggins v.*

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TORTS §§ 479 - 480 (1965).

<sup>336</sup> *Dunphy v. Gregor*, 642 A.2d 372, 376 (1994).

<sup>337</sup> This list is my own, pieced together from cases such as *Dunphy, id.*, and the California cases discussed above.

<sup>338</sup> *Tarasoff*, 551 P.2d at 342.

<sup>339</sup> See Sugarman, *supra* note 329, at 471-87.

<sup>340</sup> *Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989).

<sup>341</sup> See *supra* note 252 and accompanying text.

<sup>342</sup> *Thing*, 771 P.2d at 815. It is worth noting that the court cites favorably to an article by John L. Diamond, *Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L.J. 477, 487-89 (1984), for the proposition that the relationship of plaintiff to the person suffering physical injury is directly relevant to foreseeability of emotional distress—but then fails to apply that insight to the obvious point that the important question is the intimacy of the relationship, not its formal legal status. *Thing*, 771 P.2d at 826.

*Longs Drug Stores Cal., Inc.*,<sup>343</sup> for example, the California Supreme Court denied a parent's claim for emotional distress resulting from injury to their child that was in turn caused by a pharmacist's negligently prescribing five times the appropriate dosage, apparently because the parents and the drug store stood in no special relationship.<sup>344</sup> Why is there not such a relationship based on the obvious fact that the parents purchased the drug for the child's benefit? That question is difficult to answer, especially since, just two years before *Huggins*, the court—by the very same Judge, Baxter—let stand a claim by the entire family, not just the contracting party, against a crematorium for disrespectful treatment of a corpse.<sup>345</sup> So the decisions are inconsistent (and therefore unprincipled), and place the California Supreme Court in the upside-down position of respecting feelings towards bodies ahead of distress caused to a living intimate.

California's approach is enlightened, however, compared to the dismal performance of the Texas Supreme Court.<sup>346</sup> In a series of decisions that can only be explained by enthrallment with the insurance industry,<sup>347</sup> the court has resurrected arcane pleading rules, creating an ever-changing labyrinth for plaintiffs;<sup>348</sup> when that has not sufficed, the court has had no

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<sup>343</sup> *Huggins v. Longs Drug Stores Cal., Inc.*, 862 P.2d 148 (Cal. 1993).

<sup>344</sup> *Id.* at 152-53.

<sup>345</sup> *Christensen v. Superior Court*, 820 P.2d 181 (Cal. 1991).

<sup>346</sup> For discussions of the recent movement of the Texas Supreme Court toward unbending "no duty" rules, see Phil Hardberger, *Juries Under Siege*, 30 ST. MARY'S L.J. 1 (1998); William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699 (1997).

<sup>347</sup> In a revealing telecast, *60 Minutes: Justice For Sale?* (CBS television broadcast, Nov. 1, 1998), the reason for such insurance and business community sympathy was convincingly traced to the process of fund-raising and electing judges in Texas. Walt Borges, once a court reporter and now a consumer advocate, stated that the court finds for the insurance companies "roughly 90 percent of the time." *Id.* Tr. at 3. According to an organization called Texans for Public Justice, "the . . . court . . . receives most of its contributions from corporations and doctors, and their lawyers." *Id.* at 4. According to the organization's director, "members of [the] Supreme Court, in their quest to raise \$9 million, raised \$4 million of that money from the very lawyers and parties who had cases before the court during that period." *Id.* It must be said that, before the past ten or so years, the court had been influenced in the opposite direction. *Id.* at 2.

<sup>348</sup> A powerful example of the Texas Supreme Court's fascination with strict pleading requirements is *H.E. Butt Grocery Co. v. Warner*, 845 S.W.2d 258 (Tex. 1992), a slip-and-fall case. There, the court undertook a wholly artificial separation of "claims" of premises liability and negligence in an activity conducted on the premises, a distinction not supported by tort law. The court then held that plaintiffs

hesitation in simply holding that the defendant owed the plaintiff no duty.<sup>349</sup> Consider how the following two cases betray the foundational principles of tort—unless those principles are taken to include subsidy of the insurance industry.

*Boyles v. Kerr*<sup>350</sup> is the case that, not surprisingly, has received the greater notoriety. As the case involves emotional distress, it is an apt place to begin. Plaintiff, age nineteen, and defendant, age seventeen, were involved in an intimate sexual relationship. Defendant Boyles and three friends, also defendants, set up a video camera to record Boyles and

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had not provided sufficient notice in their pleadings of their allegation that a “bag your own chicken” promotion was itself negligent, despite the plain enough allegation that defendant had “fail[ed] to provide the Plaintiff and the general public with a safe place . . . to shop.” *Id.* at 258-59. The court also stated that plaintiff was injured by a condition on the premises, not by an activity. *Id.* at 259. Since the jury found that defendant neither knew nor should have known of the particular mess of chicken blood on which the plaintiff slipped—the defective condition—she (and her husband) had no claim. *Id.*

Should plaintiffs’ attorneys in future cases allege the tort of “negligent failure to pre-bag chickens,” as Justice Mauzy suggested in dissent? *Id.* at 260 (Mauzy, J., dissenting). Only by doing so, it seems, might the plaintiff have avoided the whipsaw the court created: “[The] complaint about the unbagged chickens is rendered a nullity on the reasoning that [it does not fall] within a general claim of premises liability, and too vaguely plead to permit consideration on a separate basis.” *Id.* Even though plaintiff made clear enough that she was alleging that the unbagged chickens promotion was a negligent decision, she had no remedy. As Justice Mauzy pointed out, the majority’s solicitude toward the insurance injury led to an exhumation of long-dead, formal pleading requirements:

Early common law required that a plaintiff search a register of writs for a “form of action” that fit the particulars of the complaint; if there was none, or if the plaintiff chose the wrong one, the king’s court would provide no remedy. . . . The majority opinion defies modern rules of pleading, which require only that a plaintiff put the defendant on notice of the claim. . . . [The majority’s] retrograde analysis runs counter not only to modern tenets of procedure, but also to this court’s plainly stated determination that ‘an invitee’s suit. . . is a simple negligence action.’

*Id.* at 260-61.

<sup>349</sup> Texas appellate judge Phil Harberger has collected many of the “no duty” cases, and noted that the Texas Supreme Court has used this blunt instrument in combination with others—“no proximate cause,’ ‘no evidence,’ ‘insufficient evidence,’ ‘unreliable experts,’ ‘unqualified experts,’ and ‘junk science’”—as well as increased use of summary judgment to take cases from juries. Harberger, *supra* note 346, at 4.

<sup>350</sup> *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993).

plaintiff Kerr having sexual intercourse. This videotape was then viewed by all four, with a total of ten friends, and on three occasions. Given gender-disparate rules about the inappropriateness of such activity for women, Kerr was stigmatized as a "porno queen" and asked questions about her intimate life.<sup>351</sup>

Kerr's suit alleged a violation of her privacy as well as negligent infliction of emotional distress, but not intentional infliction of emotional distress.<sup>352</sup> The jury was asked to consider only the emotional distress charge, however, and returned findings of liability and substantial damages, both compensatory and punitive, against all defendants. Boyle alone appealed, and the court took the opportunity to overrule its clear and controlling precedent, which had "create[d] a general duty not to inflict reasonably foreseeable emotional distress."<sup>353</sup>

The Texas Supreme Court, which had already recognized a general duty not to negligently inflict emotional distress, beat an unabashed retreat from that position, characterizing its seminal decision as "an anomaly," and reading other cases as consistent with the no-duty rule it was handing down.<sup>354</sup> Now the court found its own precedent to be "out of step" with most other jurisdictions, and held that the right to recover for negligently inflicted emotional distress would only be honored when the plaintiff could establish the breach of some independent duty.<sup>355</sup>

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<sup>351</sup> *Id.* at 594.

<sup>352</sup> There has been much speculation about the decision not to press the intentional infliction case, since the conduct certainly appears to satisfy the "extreme and outrageous conduct" requirement of that tort. Justice Gonzales may have been correct in his concurring opinion, attributing that decision to the observation that insurance was not available for intentional torts. *Id.* at 603-05 (Gonzales, J., concurring.) As Justice Doggett pointed out in dissent, however, the status of the intentional infliction tort was unclear at the time of suit. *Id.* at 605-07 (Doggett, J., dissenting). The remarks in the text are directed to the majority's holding: that the tort of negligently inflicted emotional distress is now abolished in Texas. *Id.* at 594. Professor Ellen Pryor has written an insightful article on the practice of underlitigating claims (as by alleging negligence where the conduct was intentional) in order to gain (potential) access to insurance that might otherwise be unavailable. Ellen S. Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 TEX. L. REV. 1721 (1997). She proposes some useful steps to reduce underlitigating claims. *Id.* at 1750-63. She recognizes, however, that these steps, even if followed, are unlikely to eliminate the problem, and notes that "one is hard-pressed to make the argument that underlitigating undermines corrective justice." *Id.* at 1724.

<sup>353</sup> *Boyles*, 855 S.W.2d at 595.

<sup>354</sup> *Id.* at 597.

<sup>355</sup> *Id.* at 595-96.

Even if one were to agree that the tort should be reserved for cases in which an independent duty could be found, there remains the important matter of whether such a duty might exist in this case. One might therefore expect careful, thoughtful discussion of the point, since, again, “duties are not discoverable facts of nature.”<sup>356</sup> But the court said only: “The law has heretofore not sought to impose specific legal duties based solely on a personal relationship, even an intimate one.”<sup>357</sup> *Should* the law recognize such a duty, though? The court never addresses the reasons for doing so, or refraining from doing so. Yet it favorably cites cases in which recovery was granted for the emotional distress caused by mishandling a corpse, by transmitting untimely or erroneous information that a loved one had died, and by negligent misrepresentation.<sup>358</sup> As Justice Doggett points out in dissent, the majority disrespects tort principles in dismissing the chief duty determinant, foreseeability, as having no manageable limits, rather than taking foreseeability as a point of departure.<sup>359</sup> Indeed, the court offers no analysis or support at all for the no-duty rule it imposes.<sup>360</sup>

The court’s unwillingness to carefully engage the question of whether *Boyles* owed Kerr a duty is not surprising; if it had, it would have been hard-pressed to resist concluding that the circumstances dictate that such a duty be recognized. Recovery is permitted in the telegram and corpse cases precisely because the circumstances make it highly likely that the plaintiff will suffer serious emotional distress, and to place the proper incentives on the defendants to act carefully. Is the same not likely here? Should not one have the right, enforceable in law, to expect that one’s most intimate acts will not be “shared” with others? Why is there not a “specific duty” to the other person in an intimate relationship? Why is this case, which involves an intentional misrepresentation through concealment, not *worse* than the negligent misrepresentation case in which Texas does recognize a duty? Why is this not a case of silence in the face of a duty to disclose (the presence of the camera) or to refrain from the act in question?

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<sup>356</sup> *Tarasoff v. Bd. of Regents*, 551 P.2d 334, 342 (Cal. 1976).

<sup>357</sup> *Boyles*, 855 S.W.2d at 600.

<sup>358</sup> *Id.* at 597.

<sup>359</sup> *Id.* at 605-06 (Doggett, J., dissenting).

<sup>360</sup> A similar failure to engage the duty question thoughtfully is evident in a recent loss of consortium case. *Ford Motor Co. v. Miles*, 967 S.W.2d 377 (Tex. 1998). There, the court held that neither a sibling nor a stepparent could state a claim for loss of consortium. The decision was largely based on lack of precedent from other jurisdictions, and on the fact that the state’s wrongful death statute does not permit recovery to either class of plaintiffs. *Id.* at 382-84.



These questions, the court does not trouble itself to even address, and attempts to assuage its critics by noting that the defendants owed Kerr other duties based on their intentional misconduct. Even if true,<sup>361</sup> the statement is irrelevant. Under the majority's reasoning, Kerr would have *no* cause of action had the videotaping and distribution been negligent rather than intentional. But, why? Are the corpse, telegram and negligent misrepresentation cases to be overruled? If not, how is this case different? The decision is so deficient in analysis that one can only speculate. Thus does the court (willfully) fail to understand tort's foundational duty issues.

The Texas Court's ill-conceived approach in tort cases has also led it to do away with a bright-line rule that *did* make sense. In *Keetch v. The Kroger Co.*,<sup>362</sup> the court staked out bold new ground in finding that, even when the employee of the defendant had created the unsafe condition that caused the plaintiff's fall, the employer could not, as a matter of law, be charged with notice of the defective condition. The court casually dismissed the uniform law in Texas and throughout the rest of the country to the contrary—law that was extensively cited by Justice Mauzy in dissent. In citing a host of annotations on the issue, Justice Mauzy pointed out the conclusion that “[n]o case . . . has so much as intimated disagreement with, or possible qualification of, this principle.”<sup>363</sup> Unlike the majority, which simply stated the factually true but legally unpersuasive fact that an employee might create a condition and be unaware of it, Justice Mauzy explored the policy justifications for imposing liability as a matter of law: “Unlike a customer, a store owner or occupier has control over the store and its employees, and is able to adopt policies to protect the public. . . . [T]he traditional rule encourages the adoption of safeguards to prevent injury. Conversely, . . . the majority removes the incentive for store owners . . . to take precautions. . . .”<sup>364</sup> Given the employees' self-interest, too, one might expect a *de facto* policy of “[l]ook the other way.”<sup>365</sup> Is there some countervailing reason of policy or fairness that supports the court's unprecedented conclusion? Perhaps, but the court offers none, preferring instead to spend several pages explaining why the unbroken string of cases to the contrary do not mean what they say.

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<sup>361</sup> As Justice Doggett points out, one reading the case can be forgiven for skepticism as to whether the plaintiff actually has another cause of action. *Id.* at 606-07.

<sup>362</sup> *Keetch v. Kroger Co.*, 845 S.W.2d 262 (Tex. 1992).

<sup>363</sup> *Id.* at 269 (Mauzy, J., dissenting) (citing 62 A.L.R.2d 31; 61 A.L.R.2d 24, 124 (1958)).

<sup>364</sup> *Id.*

<sup>365</sup> *Id.* at 268.

Texas is but one (particularly egregious example) of judicial failure to come to grips with the difficult duty questions that litigants summon courts to decide.<sup>366</sup> Until there is a change in membership of hostile courts, plaintiffs suffering a wrongful loss to their same-sex relationships should not sue in these states. In deciding whether a state might be receptive to recognizing relational injuries to same-sex couples, it is wise to look to the court's recent methodology in torts cases. Does the court engage in thoughtful consideration of the policies that support, or do not support, imposition of a duty, or does it prefer the uncritical path of stating defendant-friendly, bright-line rules that sweep too broadly?

These observations should not be read to suggest that courts can, or should, allow every claim to proceed. Indeed, the New Jersey Supreme Court's recent history shows that it is possible to use foreseeability as the principal determinant of liability while respecting both judicial limitations and fairness to defendants. In *Dunphy v. Gregor*,<sup>367</sup> the court squarely confronted the difficulty of a duty analysis: "The imposition of a duty is the conclusion of a rather complex analysis that considers the relationship of the parties, the nature of the risk—that is, its foreseeability and severity—and the impact the imposition of a duty would have on public policy." The difficulty of the task, however, is no excuse for avoiding it; indeed, "traditional principles of tort liability can be adapted to address areas in which recognition of a cause of action and the imposition of a duty of care are both *novel and controversial*."<sup>368</sup>

In *Dunphy*, as noted earlier, the court's " 'sedulous application' of the principles of tort law"<sup>369</sup> led it to extend recovery to the surviving female intimate of a young man whose negligently caused death she had witnessed. The intimacy of the relationship, the court recognized, would make more likely the kind of serious emotional distress that the tort required. Succinctly put, "[t]he quality of the relationship creates the severity of the loss."<sup>370</sup> Further, allowing such recovery would impose no "additional,

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<sup>366</sup> Contrary to the position taken by Professor Powers, *supra* note 346, I do not believe that "particularizing" a duty so as to leave injured plaintiffs outside of its scope properly discharges the court's responsibility in the field of torts. His own discussion of the cases makes inescapable the conclusion that the court is using a "no duty" rule in these cases as a subterfuge for removing them from the jury's consideration, despite his argument to the contrary. *Id.* at 1704-10.

<sup>367</sup> *Dunphy v. Gregor*, 642 A.2d 372, 376 (N.J. 1994).

<sup>368</sup> *Id.* (emphasis added).

<sup>369</sup> *Id.* (quoting *People Express Airlines, Inc. v. Consolidated Rail Corp.*, 495 A.2d 107, 111 (N.J. 1985)).

<sup>370</sup> *Id.* at 377-78.

unfair burden . . . on potential wrongdoers.”<sup>371</sup> The duty (here, to drive carefully) is not heightened, or changed in any way. Nor is the class of potential plaintiffs appreciably expanded; rather, the unmarried cohabitant is “substituted in” for the married partner to whom a duty is already owed. On the other hand, considerations of fairness and of confining liability to manageable limits has led the New Jersey Supreme Court, in other bystander cases, to take seriously the requirement of contemporaneous observation. Although, in a given circumstance, emotional injury to a third party might be quite severe even absent observation, the much larger class of potential plaintiffs might suggest liability to defendants out of proportion to fault, especially where the injury-causing act was no worse than negligent.<sup>372</sup> One might disagree with the court’s conclusion, on balance, but the central lesson is that the court does not shrink from the admittedly arduous task of grappling with tort’s intrinsically troublesome cases. Instead, it welcomes the challenges these cases present, engaging in thoughtful discussion of the issues and implications of extending duties to cover novel situations.

A recent example that shows the New Jersey court’s willingness to confront the intractable difficulty of the duty issue in torts is *Kuzmicz v. Ivy Hill Park Apartments, Inc.*<sup>373</sup> There, plaintiff was a tenant of the defendant’s who had been seriously injured on a vacant lot between his apartment complex and a grocery store, from which he had been returning. The defendant was concededly aware of the danger of such an assault on the lot. Its administrator had complained to the Newark Board of Education (also a defendant), which owned the vacant lot, about criminal activity on the lot and of vandalism to defendant’s fence separating its property from the lot. The plaintiff had followed the tenants’ “standard practice” of walking through a large gap in the fence, thereby shaving an economical six minutes from the walk time to and from the supermarket.

The issue presented was whether the apartment owner owed tenants a duty, which could only have been either to keep the fence in good repair, or to warn the tenants of the danger of criminal activity in the neighboring lot. Splitting 4-3, the court held that no such duty should be imposed on the landlord. The majority was careful to affirm its earlier, consistent holdings

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<sup>371</sup> *Id.* at 377.

<sup>372</sup> See cases discussed in *Dunphy, id.* at 376. The court also cited favorably to a case from the New Jersey Superior Court in which the plaintiff had witnessed the death of a close friend’s child. *Id.* (citing *Eyrich ex rel. Eyrich v. Dam*, 473 A.2d 539 (N.J. Super. Ct. App. Div. 1984)).

<sup>373</sup> *Kuzmicz v. Ivy Hill Park Apts. Inc.*, 688 A.2d 1018 (N.J. 1997).

that a landlord did owe tenants a duty to exercise reasonable care to protect them from injuries by third parties. The duty, however, generally extends only to the premises, *not* to activities taking place off-site. The court also affirmed the exception to that rule for off-premises cases: liability is appropriate where the defendant realizes an economic benefit from “activities that directly benefit the landowner.”<sup>374</sup> In *Kuzmicz*, despite plaintiff’s inferences to the contrary,<sup>375</sup> the defendant received no such benefit.

Thus, recognizing a duty here would have expanded liability to off-premises cases in which the defendant failed to take some precaution that might have dissuaded plaintiff from encountering a known danger. Under the facts of this case, the question was close and difficult. On the one hand, the principal duty lay with the Board, as lot owner; the court noted that Ivy Hill had repeatedly told the Board of its concern about the condition and danger of the lot, and had even offered to purchase the lot so that Ivy Hill might take control of the situation.<sup>376</sup> Thus, the fault of the Board, not of Ivy Hill, seemed primary. Further, extending the duty past the owner of the premises on which the crime took place creates a risk that should not be disregarded, particularly in economically troubled areas: “[The] duty carries costs, which provide a disincentive to own rental property in urban areas.”<sup>377</sup> Finally, if such a duty were recognized here, why not as to other places to which the tenants might travel?

On the other hand, Ivy Hill was obviously aware of the danger, had in the past repaired the fence (but had not exercised reasonable care in maintaining it), and its security staff had informally warned *some* of the tenants against taking the shortcut. The court in *Ivy Hill* could have established a *limited* duty to protect tenants against a *known* danger where defendant might greatly reduce the danger by taking a precaution (fixing the fence) *within its control*.<sup>378</sup>

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<sup>374</sup> *Id.* at 1022. Examples included cases where a customer was struck by a car while crossing a road separating defendant’s restaurant from its parking lot, *Warrington v. Bird*, 499 A.2d 1026 (N.J. Super. Ct. App. Div. 1985), and where a caterer’s invitee was killed while crossing a highway to reach a parking lot that the defendant knew the plaintiff would be likely to use. *Mulraney v. Auletto’s Catering*, 680 A.2d 793 (N.J. Super. Ct. App. Div. 1996).

<sup>375</sup> The contention was that, since the apartment and the shopping center had the same manager, it was in their mutual economic interest to facilitate movement between these two locations.

<sup>376</sup> *Kuzmicz*, 688 A.2d at 1018-19.

<sup>377</sup> *Id.* at 1023.

<sup>378</sup> This argument works only as to a possible duty to fix the fence. If it were used to impose a duty to warn, it is very difficult to see why such a duty would then not be imposed to warn of any number of dangers that a tenant in a high-crime area,

The court's decision not to extend the duty to such a case is at least defensible. If the question is who can best take the precautions that might have averted the injury in this case, it is reasonable to answer that the property owner is in that position. Here, had the Board of Education cleared out the debris and posted security in the area, the incident might have been avoided even if the shortcut had been used. Alternatively, the security force might have (justifiably) prevented the tenants from using the shortcut. When a court has carefully considered the cost of imposing a new duty, and decided on balance that it should not do so, tort's imperatives have been respected. Those representing parties injured in relation to their same-sex partners should ask: Does this jurisdiction respect the mission of tort law, or does it not?

*B. The Practical Side of Litigation: Questions and Answers*

Even where courts may seem willing to take same-sex plaintiffs' ground-breaking relational injury claims seriously, one might ask what reasonably should be done. First, this Article is intended as an invitation for advocacy groups to become alerted to the possibility of bringing such cases, either on their own or in cooperation with personal injury attorneys. Organizations with large numbers of lawyers as members or contributors, such as the Human Right Campaign and Lambda Legal Defense and Education Fund could consider possible advantages to bringing suit.<sup>379</sup> Attorneys working for, or supporting, such organizations will naturally be less likely to be dismissive of the intimate lives of the couples before them than would ordinarily be the case. Once a few promising cases (again, in the states that take tort principles seriously) have been brought, momentum might develop: organizations could share information, and victories in one case could engender further successes. Vermont would obviously be a good place to start, but the presence of a marriage-like relationship there, in addition to a specific statute, might make translating success to other jurisdictions elusive. As this Article's discussions of New Jersey cases and methodology have made clear, that jurisdiction would also be a good choice for advocates. In general, one might hope that courts with sympathy to injured torts plaintiffs in other contexts will be able to overcome the more

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or perhaps any tenant at all, might face.

<sup>379</sup> Such advocacy has already begun. Sharon Smith's claim is being pursued by the National Center for Lesbian Rights, and by the Center's Executive Director, Kate Kendall. See <http://www.nclrights.org/cases/html> (last visited May 30, 2001).

general judicial aversion to confronting the intimate lives of same-sex couples discussed earlier in this Article.

How, though, might attorneys avoid the real problem that an unsympathetic jury might end up torpedoing the primary, personal injury claim because of the revelation concerning sexual orientation that a loss of consortium claim requires? One solution is to request that the court split off the loss of consortium claim, trying it separately. Judges of course have authority to do so,<sup>380</sup> and might be persuaded of the desirability of such bifurcation, provided, first, that they are sympathetic to the claim; and second, that the advocate can demonstrate (as through the polling data referenced earlier)<sup>381</sup> that the possibility of jury prejudice is sufficiently great that the sacrifice of judicial economy is worth the gain in justice. Cases involving relational losses to same-sex couples might be ideal candidates for separate trials of those claims. As the court stated in *Monaghan v. SZS 33 Assocs.*<sup>382</sup>: "A district court may order separate trials to prevent the factfinder from being exposed to evidence admitted for the purpose of addressing one claim that would contaminate his mind regarding a different claim."

As for wrongful death claims outside of Vermont and Hawaii, the lack of likelihood of success may mean that a personal injury lawyer is less likely to take the case. Advocacy groups might consider financing such cases, but only in jurisdictions where the language of the statute is sufficiently ambiguous that some prospect of success can be imagined. Otherwise, the better strategy here would be to pursue legislative reform. Hawaii's recent innovations in this area, and Vermont's emerging "civil union" status, have been discussed earlier.<sup>383</sup> Changes in wrongful death statutes might also precipitate judicial recognition of loss of consortium and negligent infliction of emotional distress cases brought by same-sex couples.

### CONCLUSION

Through a paradoxical effort of willful denial, courts have shown remarkable consistency in granting only those rights to same-sex couples that do not require focusing on the sexual intimacy of such couples. Where,

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<sup>380</sup> Under the Federal Rules of Civil Procedure, by way of influential example, Rule 42(b) states that a court, "in furtherance of convenience or to avoid prejudice . . . may order a separate trial of any claim."

<sup>381</sup> See *supra* note 305 and accompanying text.

<sup>382</sup> *Monaghan v. SZS 33 Assocs.*, 827 F. Supp. 233, 244 (S.D.N.Y. 1993).

<sup>383</sup> See *supra* notes 281-86 (Hawaii) and 114-17 (Vermont).

as in the case of same-sex marriage, such avoidance is impossible, the couples have been spectacularly unsuccessful.

Tortious injuries to relations are, to a greater or lesser extent, *about* intimacy, and we should therefore not be surprised that same-sex couples have been unsuccessful in this arena, too. The lack of success, however, cannot be satisfactorily explained by judicial disapproval: there are simply very few decided cases. This Article has explored several sources of this “clanging silence,” and, through consideration of judicial fidelity to the basic tenets of tort, suggests some strategies for breaking through the barriers that have, by and large, kept these cases out of court.

It might be argued that there are scores of issues of importance to gay and lesbian people, and that these tort claims should not engage the limited energy of advocacy. As Sharon Smith’s tragic case illustrates, however, this response underestimates the transformative power of the tort law, which is a powerful instrument for recognition of duties and vindication of rights of all citizens. Because these rights and duties are created under the broad sweep of liability for foreseeable risk, their impact is felt more broadly than that of laws designed to address more specific issues. Judicial recognition that the duty to avoid interfering with relations extends to gay people both creates a specific right and announces a general principle: Same-sex couples enjoy healthy lives of committed intimacy.