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## The Marriage Mirage: The Personal and Social Indentity Implications of Same-Gendered Matrimony

Linda S. Eckols  
*Texas Tech University School of Law*

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THE MARRIAGE MIRAGE: THE PERSONAL AND  
SOCIAL IDENTITY IMPLICATIONS OF  
SAME-GENDER MATRIMONY

*Linda S. Eckols\**

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\* J.D., expected 1999, Texas Tech University School of Law; M.T.S., 1989, Southern Methodist University; B.A., 1987, University of Houston.

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## INTRODUCTION

Marriage<sup>1</sup> is an institution that pervades all aspects of life. Often marriage is considered a foundational unit of civilized society,<sup>2</sup> but it is also an anchor for an individual's identity.<sup>3</sup> One is married when in the office, at a business lunch, or at a conference. One is married at the tennis tournament, at the benefit dinner, or at the church musical. One is married while brushing teeth, driving a car, or writing in a journal. One is married wherever one is, whatever hat one's wearing, and whether one's task is grand or mundane. Marriage is legal, religious, social, vocational, and personal. Marriage goes beyond the shared home and the shared bank account or the anniversary parties. Marriage insists on being everywhere and transcends all of its definitions. Marriage is reified by the people whose lives are marked with its label. Marriage finds its power in the identity which individuals bring to it and the identity individuals find within it. The power of marriage comes not from what it is in the abstract, or how it is defined, or even what it symbolizes, but from how it is transubstantiated by society's focus on marital status as a key element in defining every person.

The issue of same-gender marriage,<sup>4</sup> then, is not about laws or judicial legislation or social opinion; it is much more personal than

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1. Although I use the term "marriage" throughout the paper to encompass many literal and connotative definitions, I attempt to reach beyond the meanings related to civil contract, social institution, status, and personal relationship toward the effect of its label on the individuals included in and excluded from the legal coupling called "marriage."
  2. See *Morris v. Morris*, 220 N.Y.S.2d 590, 591 (Sup. Ct. 1961) ("Marriage is not merely a civil contract, but a foundation upon which society depends for its very survival.").
  3. See MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 4, 9 (1993) (defining relational identity as "a sense of oneself" derived from one's relationships with others and defining status as a "formal expression of the behavior expected" of one who occupies a specific role or has a certain legal identity). Regan's ideas as explicated in his book served as a significant inspiration in the conceptual organization of the thoughts expressed in this Article.
  4. At the expense of variety, I have chosen to use the term "same-gender marriage" over "gay marriage" or "same-sex marriage" (except in direct quotations) because I believe it is more descriptive of the relationships at issue and focuses on the only distinction pertinent to this discussion between those couples now legally allowed to marry and those not. For example, a person of any sexual or affectional orientation is allowed to enter legal marriage, as long as she or he marries someone of the opposite gender. Also, the distinction is not derived from differences in commitment or sexual relations, as society has no accurate way of measuring or monitoring such differences

that. Same-gender marriage is about people searching for integrated identities and others jealously and fearfully guarding their own. Awkwardly rooted in religion, doctrine, tradition, and law, the debate is so personal that every time the subject is broached the parties to the conversation are inevitably led to an encounter with the mirror image of their own identities, regardless of marital status or affectional orientation.<sup>5</sup> The position of this Article is that a simplistic definition of marriage, which insists that only one man and one woman can enter into matrimony, gives the excuse to avoid this uncomfortable self-examination. If the surface image does not match this simplistic definition, then no marriage is possible regardless of commitment and love. If the image does match, then the love and commitment are assumed. This out-of-hand dismissal of same-gender marriage denies society the opportunity for any thoughtful exploration of the meaning of marriage. The opposite-gender couple may be unwilling to explore the reflection of their relationship, but the same-gender couple is faced with three reflections—each partner's public image and their shared private identity. The same-gender couple must understand each and take on the identity suitable to his/her current environment.

Marriage integrates public and private life. For example, if same-gender marriage were legal and socially acceptable, no longer would a lesbian have to appear single at work, church, or public events, and then go home to the woman with whom she secretly shares her love and her private life. Individuals in a same-gender couple, who are forced by society to maintain stoic façades in spite of deep feelings for each other, undoubtedly are susceptible to stress as a result of feeling forced to explain to outsiders their intense responses to events in one another's life or to milestones in their "friendship."

Integration of the public and private lives of gay men and lesbians,<sup>6</sup> not simply integration into society, is a key aspect of the symbolic meaning and of the desired effect of same-gender marriage. Yet, the question for many heterosexuals is whether, by broadening

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between any two couples except that speculation provides fodder for gossip. Likewise, I use "same-gender couples" over "same-sex couples" or "gay couples."

5. I use "affectional orientation" or "sexual orientation" to refer to a person's dominant physical or emotional attraction to one gender or the other.
6. For the sake of consistency, I use "gay men" and "lesbians" to refer to persons attracted to others of the same gender.

the access to marriage, they are robbed of something that holds together their identities.<sup>7</sup>

Even among authors who support same-gender coupling, views differ widely when it comes to the topic of same-gender marriage. Some have addressed the issue in terms of how gay couples are entitled to be fitted for the marriage model, focusing primarily on a rights argument.<sup>8</sup> Others have asserted that marriage is not suitable to gay relationships and is not even something homosexuals should want.<sup>9</sup> Finally, a third group has argued that the inclusion of same-gender couples can improve the institution of marriage.<sup>10</sup> Other authors agree, albeit through very different reasoning, that marriage could not endure this change and remain substantially the same; these authors fear the change would have a deleterious effect on heterosexual marriage and, thereby, society as a whole.<sup>11</sup> I agree that same-gender

7. See Richard D. Mohr, *The Stakes in the Gay-Marriage Wars*, in *SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE* 105, 106–7 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) [hereinafter *THE MORAL AND LEGAL DEBATE*]; see also *Same-Sex Marriage: Hearings on S. 1740 Before the Senate Judiciary Comm.*, 104th Cong. (1996) (statement of Congressman Steve Largent).
8. See, e.g., Otis R. Damslet, Note, *Same-Sex Marriage*, 10 N.Y.L. SCH. J. HUM. RTS. 555, 556 (1993) (asserting that “state constitutional rights require that same-sex marriages receive protection equal to that accorded opposite-sex marriages”); Ed Fallon, *I Have Anguished*, in *THE MORAL AND LEGAL DEBATE*, *supra* note 7, at 182, 185 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) (exhorting his Iowa House of Representatives colleagues to take leadership roles in spite of public opinion and vote down a bill explicitly disallowing same-gender marriage); Cindy Tobisman, *Marriage vs. Domestic Partnership: Will We Ever Protect Lesbians’ Families?*, 12 BERKELEY WOMEN’S L.J. 112 (1997) (focusing on the injustices encountered by lesbian families in the absence of legalized same-gender marriage); *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1603–29 (1989) (opining that fairness dictates changes in the law to eliminate the discrimination against same-gender couples that comes in the form of denying them access to marriage).
9. See, e.g., Frank Browning, *Why Marry?*, in *SAME-SEX MARRIAGE: PRO AND CON: A READER* 132 (Andrew Sullivan ed., 1997) [hereinafter *SAME-SEX MARRIAGE*]; Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, in *SAME-SEX MARRIAGE* *supra* at 118, 120–24.
10. See, e.g., Richard D. Mohr, *The Case for Gay Marriage*, 9 NOTRE DAME J.L. ETHICS & PUB. POL’Y 215, 218 (1995) (asserting, among other things, that a lesser commitment to monogamy and an acceptance that relationships evolve could improve opposite-gender marriages); Andrew Sullivan, *Virtually Normal*, in *THE MORAL AND LEGAL DEBATE*, *supra* note 7, at 126, 130 (suggesting that same-gender couples are “sustained more powerfully by genuine commitment” because they have survived without institutional models).
11. See, e.g., Jeffrey Hart, *Adam and Eve, Not Adam and Henry*, in *THE MORAL AND LEGAL DEBATE*, *supra* note 7, at 30 (emphasizing that “females and males are naturally complementary” and that, along with a “millenia of human experience,” this

couples do not fit the marriage model perfectly, but I disagree with some of these authors as to why that is or how to proceed in providing same-gender couples equal support and recognition.

I am concerned that moving too quickly on legalization of same-gender marriage disregards the feelings of a large segment of the American population and puts same-gender couples at risk. The more prudent and, perhaps, wiser course of action is to acknowledge and accept the fears of opposite-gender couples, to encourage reflective discourse, to increase gradually the visibility of same-gender couples on a local, individual scale, and to foster support within the general public. Then, when same-gender marriage is legalized, the backlash out of fear and resentment will be minimized. American law has proven to be flexible over time, but changes often have come slowly, after many people have brought injustices to the attention of the courts and legislatures. Common law development of torts such as battery, assault, conversion, defamation, invasion of privacy, intentional infliction of emotional distress, and sexual harassment provide examples, although not perfectly analogous, of this long process. Only six suits that have directly challenged the denial of marriage to same-gender couples have made it to the appellate level of our court systems.<sup>12</sup> Same-gender marriage cannot be initiated as fad or test legislation, but requires the commitment of the state, and ultimately the nation, to a joint life for the couple (or until a state-recognized divorce or annulment).<sup>13</sup> Reluctantly, therefore, I suggest that the process take precedence over fairness for now. I advocate for patience, understanding, and tolerance on the part of same-gender couples so society as a whole can move closer to a consensus of support and understanding rather than using our legal system as a weapon to force acceptance.

This Article will examine why so much is at stake in the political, social, and legal debate over same-gender marriage. It will not address

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demonstrates the inability to use "marriage" in reference to same-gender couples); Robert H. Knight, *How Domestic Partnerships and "Gay Marriage" Threaten the Family*, in THE MORAL AND LEGAL DEBATE, *supra* note 7, at 108 (listing the legitimization of "same-sex activity," injury to the "crucial kinship structure," and violation of religious freedom among his reasons to oppose same-gender partner benefits or marriage); Cal Thomas, *Marriage from God, Not Courts*, in THE MORAL AND LEGAL DEBATE, *supra* note 7, at 42 (claiming that same-gender marriage "goes against the author of marriage, legal precedent," and common sense).

12. See *infra* note 162 and accompanying text.

13. See 52 AM. JUR. 2D *Marriage* § 6 (1970) (stating that "[a] central characteristic of the contract of marriage is its permanence").

the constitutional questions of whether there is a fundamental right to marry, although persuasive arguments have been advanced from both sides of the debate.<sup>14</sup> This Article will focus on a more introspective view of the potential effects of legalizing same-gender marriage on the identities of gay men and lesbians in committed relationships and on the interaction between same-gender couples and society. Marriage would provide the integration sought by gay men and lesbians, but at the expense of significant social quandary. In Part I, this paper will dissect the meaning of marriage into its relational, traditional, and Christian aspects.<sup>15</sup> Part II will explore the legal and constitutive qualities of same-gender marriage. Part III will discuss the impact of the law of marriage in its present form on the identities of gay men and lesbians, as they see themselves and as society views them. Part IV will look at how legalization of same-gender marriages might change the self-perception of gay couples, what legal benefits it would confer, and how the heterosexual majority might respond. This Article will conclude that the legalization of same-gender marriage is too big of a step and will suggest, instead, enactment of smaller benefits packages to mitigate economic and legal discrimination against same-gender couples, while society prepares for same-gender "marriage."

## I. THE MEANING OF MARRIAGE

*"Marriage, n. [a] community consisting of a master, a mistress and two slaves, making in all, two."*<sup>16</sup>

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14. See, e.g., Damslet, *supra* note 8 (surveying the history of same-gender marriage and recent case law, and concluding that prohibiting same-gender marriage is a denial of equal protection); Jennifer L. Heeb, Comment, *Homosexual Marriage, the Changing American Family, and the Heterosexual Right to Privacy*, 24 SETON HALL L. REV. 347 (1993)(discussing the rights and privileges of married couples and the inadequacy of alternatives available to same-gender couples, concluding that only recognizing same-gender marriage will give gay men and lesbians equal protection under the law). But see Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1 (1996) (arguing that there is no constitutional basis for recognizing same-gender marriage because it is not protected by the privacy right doctrine and because sexual orientation is distinguishable from the protected categories of race and gender).
  15. Although all religious faiths recognize marriage or a marriage-like relationship, this Article focuses on the Christian roots of marriage because the United States is a predominantly Christian country.
  16. AMBROSE BIERCE, *THE DEVIL'S DICTIONARY* 118 (1906).

*A. Marriage As Relational*

A dictionary provides very little assistance in uncovering what marriage means to society. The first definition listed in one commonly used dictionary is "the state of being married; relation between husband and wife. . . ."<sup>17</sup> The dictionary does have a secondary meaning often forgotten: "any close or intimate union. . . ."<sup>18</sup> Regardless of this oversight, the personal relationship between two people, not simply their status as married persons, is the lifeblood of marriage. For greater insight into marriage, one must turn to marriage's connotative components and its assumed, but definitionally absent, requirement of love. This Article offers the following definition of marriage: A committed relationship between two persons, formalized by society, and with traditional, religious, and legal roots.

First and foremost, marriage requires a commitment to a relationship. The key is to be committed to the *process* of loving one another, not to the other person him/herself.<sup>19</sup> Because relationships are abstract and people are tangible, this is very difficult for a concrete-thinking society.<sup>20</sup> The view that relationships are external to the concrete, warm-bodied individuals who have them ignores the social or relational self.<sup>21</sup> The rational self is the part of an individual's identity that internalizes society and influences society.<sup>22</sup> Any relationship can be as real and alive as the individuals, but it is not a separate entity outside of them.<sup>23</sup> It is the ongoing, everchanging experience of one another. The expression "the two shall become one" does not mean that they will ever "be" one, but that they will be committed to the process of "becoming" one. To be committed to the relationship is a willingness to share oneself with and to open oneself to the other, a willingness to effect change and to be changed.<sup>24</sup> When an individual commits oneself to another individual rather than to the process, the relationship is at risk, because a person changes over time and the

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17. WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 829 (3d College ed. 1994) [hereinafter WEBSTER'S].

18. WEBSTER'S, *supra* note 17, at 829.

19. See Bernard M. Loomer, *On Committing Yourself to a Relationship*, 16 PROCESS STUD. 255 (1987).

20. See Loomer, *supra* note 19, at 255.

21. See Loomer, *supra* note 19, at 255.

22. See Loomer, *supra* note 19, at 255.

23. See Loomer, *supra* note 19, at 255-56.

24. See Loomer, *supra* note 19, at 260.



person to whom one initially committed will disappear over time.<sup>25</sup> The commitment to the relationship is what allows the couple to learn to grow together by placing trust in something which is not expected to remain static.<sup>26</sup> In fact, the relationship is the very means for adjusting to change in each other and in the world. In theory, marriage is the social acknowledgement of and support for two people's commitment to a relationship.

In practice, legal and religious recognition has not required that the two parties to the marriage be in love or even that they be more than representatives of the actual parties to the relationship.<sup>27</sup> History is replete with marriages of convenience, arranged marriages, marriages as business mergers, and marriages for property.<sup>28</sup> Nonetheless, some relationship between two persons, whether romantic, familial, class-based, or business, is the cornerstone of the marriage definition. Americans are most familiar with the ideal of marriage for love, and proponents of same-gender marriage focus on the similarity between homosexual love and heterosexual love.<sup>29</sup> As difficult as it may be for persons of differing sexual orientations to imagine, the attraction between the two involved in a homosexual relationship is fundamentally

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25. See Loomer, *supra* note 19, at 261.

26. See Loomer, *supra* note 19, at 261.

27. See, e.g., UNIF. MARRIAGE AND DIVORCE ACT § 207 (listing prohibited marriages, without including marriages entered into in the absence of deep sentiment between the parties); UNIF. MARRIAGE AND DIVORCE ACT § 208(a) (listing the circumstances which invalidate a marriage, again without including those entered into in the absence of mutual love). Consent, a qualification for licensing in most states, comes the closest to requiring any sentiment whatsoever. See e.g., CAL. FAM. CODE ANN. § 300 (West 1994); N.Y. DOM. REL. L. § 10 (McKinney 1988); UNIF. MARRIAGE AND DIVORCE ACT § 201 (1973).

28. See, e.g., *Onyeme v. INS*, No. 96-2257, 1998 WL 290223 (4th Cir. June 5, 1998) (denying review of deportation issued to a Nigerian who submitted a fraudulent divorce decree to the immigration service so that he could marry a U.S. citizen); *United States v. Sprei*, No. 97-1206, 1998 WL 272629 (2d Cir. May 28, 1998) (vacating a lesser sentence handed down by the lower court, which had based its decision on the defendant's responsibility as an Orthodox Jew to arrange his children's marriages and how his imprisonment would harm their marital options); *In re Marriage of Nnebedum*, No. CO-97-1884, 1998 WL 279215 (Minn. Ct. App. June 2, 1998) (ruling on dissolution petition in case involving a marriage for immigration purposes); *United States v. Owen*, 47 M.J. 501 (C.M.A. 1997) (finding, in a murder trial, the marriage between defendant and another soldier to be one of convenience to improve and increase service benefits).

29. See, e.g., Joseph Landau, *Marriage as Integration*, in *SAME-SEX MARRIAGE*, *supra* note 9, at 323 (assuming the common sentiment of love in arguing that the institution of marriage could integrate gay men and lesbians into society at large).

the same as the attraction between the two involved in a heterosexual relationship.

For an understanding of why humans are relational, people have looked to religious texts such as the Old Testament. Interpretations of the creation of Eve as a partner for Adam<sup>30</sup> have long purported to answer why women and men are attracted to one another and to justify the belief that homosexuality is not natural.<sup>31</sup> Another interpretation of that scripture focuses on the general truth, rather than the specific truth, which it conveys.<sup>32</sup> According to one speaker, "[t]his story tells me that, as a human being, I am constituted by my relationships of mutuality and intimacy with other persons."<sup>33</sup> We are not intended to be alone because "[t]o be human is to be sociable."<sup>34</sup> Through "relationship[s] of passion and permanence" with others, we are able to recognize the reflection of ourselves.<sup>35</sup> The formation of a romantic relationship is built on universal characteristics—love, commitment, support, communication and intimacy. A relationship of love can exist between two persons with or without society's consent. Relationships without the support of society have achieved, in the public eye and through artistic interpretations, a level of notoriety. As a practical matter, however, these often have required a great degree of secrecy. Through trust and personal commitment, some clandestine relationships have survived social ridicule.<sup>36</sup> These clandestine relationships will continue to nourish the lives of their participants in spite of the difficulties the participants face over and above those whose relationships are accepted by society.

Marriages for reasons other than love, as described above, may seem absurd when applied to same-gender couples. Although less likely than with opposite-gender couples, the establishment of a same-gender relationship might result in increased business or the merger of two successful companies. Perhaps even more unlikely is the concept of an arranged marriage to preserve the bloodline or to improve family

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30. See *Genesis* 2:18-25.

31. See, e.g., *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971); Hart, *supra* note 11, at 31; Thomas, *supra* note 11, at 42.

32. See David Bromell, Sermon on *Genesis* 2:18-25, 1, 2 (1988) (copy on file with author of this paper).

33. Bromell, *supra* note 32, at 3.

34. Bromell, *supra* note 32, at 3.

35. Bromell, *supra* note 32, at 3.

36. See SAME-SEX MARRIAGE, *supra* note 9, at 3-45 (a collection of writings about same-sex marriage in history).

standing. Although one of the many advantages of legal marriage may be this opportunity to masquerade business or other relationships as covenants of love for contractual benefits, the essence of marriage is found in the lasting and fulfilling commitment to be in a loving relationship with another human being.

### *B. Marriage As Traditional*

Tradition is another important aspect of marriage. The role of marriage, as an institution in our society, has acquired greater meaning through its long history as an established practice.

A story is told among United Methodist seminary students of a young minister who went to his first assignment at a small country church. He visited for one Sunday before becoming leader of the congregation. In the middle of the service, he was surprised when all the members turned to face the back of the sanctuary during the recitation of the Apostles' Creed. Intrigued by this, he asked the current pastor for the reason behind this practice. The pastor responded that he did not know—in fact, he had never thought to inquire about that. He felt it had meaning for the people in the congregation and was afraid to rock the boat. The young minister thought perhaps he, too, should at least get to know the church family before he started questioning parts of its service. After several months, he was overcome with curiosity and asked the leaders in the church. No one seemed to know why they had that practice. Finally, he found a charter member of the church who told him, "When we built the church, we could not afford hymnals or bulletins. Most of us knew quite a few hymns, but many did not know the words of the Apostles' Creed. So, we painted them on the back wall and turned around as a congregation, so as not to embarrass anyone who did not know it by heart, you know. We repainted 30 years ago, after buying hymnals. I guess it's just become a tradition."

Some "traditions," like this church's habit, are devoid of contemporary meaning but followed without question. The significance of an institution may become watered down or forgotten as its practice becomes ritualistic or legalistic. To prevent this, a member of a society must know and honor its practices while holding the society accountable, calling it on its wrongs. This involves challenging its interpretations of legal and religious doctrine and tradition, bringing it to task on current issues and new philosophies, ever remaining

devoted and steadfast in all the commitments of membership. As Justice Blackmun said in *Bates v. State Bar of Arizona*,<sup>37</sup> "habit and tradition are not in themselves an adequate answer to a constitutional challenge."<sup>38</sup>

To the extent that marriage is rooted in tradition, it provides stability and consistency. To the extent that marriage remains a social institution with vitality and meaning today, it is evolutionary. Society must be wary of losing the richness of the tradition of marriage by focusing on gender composition as the defining characteristic of marriage.

### C. *Marriage As Social*

Naturally, marriage has not been conceptualized in the same way over all of time.<sup>39</sup> Marriage has evolved from roots in a period well before its modern development began in the European Middle Ages.<sup>40</sup> Some have traced the origin of the institution to an instinctual habit of the "human animal" to preserve the species.<sup>41</sup> This thinking imagines first a habit, then a custom, then a legal institution.<sup>42</sup> Prior to the eighteenth century, the Latin ancestor of the word "family" referred to a group of persons who lived together, including servants and slaves.<sup>43</sup> The boundaries of a family extended well beyond the marital unit and served functions such as defense, politics, education, justice, and economic productivity.<sup>44</sup> Additionally, the procedures for entering into marriage have varied. Marriage has been by capture, by purchase, by concubinage, or by choice.<sup>45</sup> Some customs, such as animal sacrifice, have been dropped from the wedding ceremony.<sup>46</sup> Others, such as the

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37. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

38. *Bates*, 433 U.S. at 371 (discussing the changes in attitude toward attorney advertising).

39. See FRANCES AND JOSEPH GIES, *MARRIAGE AND THE FAMILY IN THE MIDDLE AGES* 4 (1987).

40. See GIES, *supra* note 39, at 16.

41. See Catherine M. Cullem, Note, *Fundamental Interests and the Question of Same-Sex Marriage*, 15 *TULSA L.J.* 141, 146 (1979) (quoting E. WESTERMARCK, *THE HISTORY OF HUMAN MARRIAGE* (1921)).

42. See Cullem, *supra* note 41, at 147.

43. See GIES, *supra* note 39, at 4.

44. See GIES, *supra* note 39, at 4, 7.

45. See JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE 170-72* (1994) [hereinafter BOSWELL, *SAME-SEX UNIONS*].

46. See JAMES F. WHITE, *INTRODUCTION TO CHRISTIAN WORSHIP* 239-42 (1980).

exchange of rings, have come in and out of fashion.<sup>47</sup> Still others, such as acts of worship, have developed in more recent years.<sup>48</sup>

In addition to the changes endured in configuration, method, and conventionalities, marriage has faced shifts in opinion as to its social purpose. Three major purposes of marriage have historically been procreation, social stability, and gender complementarity.<sup>49</sup> Procreation is no longer an urgent need in modern society, and currently no state requires fertility or reproductive capability in order to obtain a marriage license.<sup>50</sup>

Because the family is the smallest unit of government for any form of social organization, marriage provides stabilization and embodies cultural values.<sup>51</sup> If heterosexuality is viewed as necessary for the success of a democracy, then heterosexual marriage is the logical subunit within which to promote this value in the United States. However, if the values necessary to democratic society are commitment, loyalty, and cooperation, a requirement of heterosexuality is unfounded.

Although some authors suggest that same-gender marriage is not something new, but has roots in ancient history,<sup>52</sup> legal recognition in the United States has been exclusively of opposite-gender relationships.<sup>53</sup> Arguably, one purpose of legal marriage has been to place behavioral restrictions on those who marry. These restrictions were intended to bring out the best in each gender and put restraints on the worst characteristics.<sup>54</sup>

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47. See WHITE, *supra* note 46, at 239–42.

48. See WHITE, *supra* note 46, at 239–42.

49. See Laura M. Raisty, *Bystander Distress and Loss of Consortium: An Examination of the Relationship Requirements in Light of Romer v. Evans*, 65 FORDHAM L. REV. 2647, 2660 (1997) (listing “procreation, promotion of individual happiness and stability, and promotion of societal stability” as important functions of marriage).

50. See WHITE, *supra* note 48, at 245; Tobisman, *supra* note 8, at 114–15.

51. See, e.g., Heeb, *supra* note 14, at 350–51; *Maynard v. Hill*, 125 U.S. 190, 205 (1888); *Morris v. Morris*, 220 N.Y.S.2d 590, 591 (Sup. Ct. 1961).

52. See, e.g., JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY* 26 (1980) (arguing that, although homosexual marriages of the past did not look like modern day marriages, neither did heterosexual marriages, and gay relationships were recognized and described by contemporaries as marriages); BOSWELL, *SAME-SEX UNIONS*, *supra* note 45 (providing a comprehensive description of same-sex unions in pre-modern Europe); Damsler, *supra* note 8, at 558–60.

53. See Damsler, *supra* note 8, at 563–65.

54. See REGAN, *supra* note 3, at 28–31 (describing the basic principles of nineteenth-century married life).

A husband, for instance, was admonished to temper his sexual drive to accommodate his wife's desires, to pay heed to his wife's more refined sensibilities, and to accept her instruction on matters of moral improvement. A wife was directed to be solicitous of her husband's needs, to be a constant source of emotional succor to him, and to help him attain a state of 'higher' moral development.<sup>55</sup>

In other words, one image of marriage is that it was created to ensure that all opposite-gender unions would be successful. In order to achieve this goal, the delineation of marital roles designed to superimpose a structure applicable to all couples necessarily relied on and perpetuated stereotypes of the genders.<sup>56</sup> This view has faced ridicule, however, as the much maligned gender roles once considered an integral part of marriage have given way to a more equitable and flexible apportionment of the responsibilities and duties of each party.<sup>57</sup>

#### *D. Marriage As Christian*

Despite myths of religious freedom in the United States, this is a religious, and predominantly Christian, country.<sup>58</sup> The country was in its earliest stage of settlement during the time following the English reformation and the development of several new Christian denominations in England including Presbyterian, Baptist, Methodist, Congregationalist, and Quaker sects.<sup>59</sup> Even though the Puritan dissenters moved away from the ecclesiastical courts and recognized secular forms of marriage, Christian theology influenced the way in which marriage came to be understood as an institution in the United

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55. REGAN, *supra* note 3, at 30-31 (describing marital roles during the Victorian era when family law first developed).

56. See Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1532 (1992) (discussing the disadvantages of the traditional system of public ordering in family law).

57. See REGAN, *supra* note 3, at 30; Singer, *supra* note 56, at 1517-22; WHITE *supra* note 48, at 242.

58. See S.I. STRONG, *Christian Constitutions: Do They Protect Internationally Recognized Human Rights and Minimize the Potential for Violence Within a Society?*, 29 CASE W. RES. J. INT'L L. 1, 2 (1997).

59. See DOCUMENTS OF THE CHRISTIAN CHURCH 244-58 (Henry Bettenson ed., Oxford University Press 2d ed. 1963).

States.<sup>60</sup> This conflating of religious ideas and the voice of government continues today.<sup>61</sup> Understanding the Christian roots, then, is significant to the picture of marriage in the United States. The topic is immense, but a brief look will suffice to emphasize the connection between the Church and the institution of marriage. The early undivided Christian Church would not perform marriages, but would bless the marriage of a couple or offer Eucharist in honor of the couple.<sup>62</sup> The marriage ritual followed a traditional Roman pagan style, but as long as the couple announced publicly they were married, no service or document was required.<sup>63</sup> As legal systems developed, a written record became crucial to avoid disputes on issues such as offspring legitimacy and inheritance.<sup>64</sup> The village priest was often the only literate person available to witness and record the nuptials for legal purposes.<sup>65</sup> This began the process that led to a more involved role for the Church in the marriage ritual.<sup>66</sup> Starting in the twelfth century, marriage ceremonies began to develop all over the Christian world.<sup>67</sup> The Fourth Lateran Council declared marriage a sacrament in 1215.<sup>68</sup> As the Church took over the marriage rites, it made relatively few changes in the civic and pagan traditions.<sup>69</sup> During the sixteenth century, the Protestant Reformers continued this absorption of the

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60. Cf. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 202–04 (1985) (describing anti-Christian conception of colonial marriage); WHITE, *supra* note 48, at 238–49.

61. See generally E. Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. ST. U. L. REV. 1183 (1994) (discussing the many religious symbols present in American civic traditions, such as the words of the pledge of allegiance, the observance of a “National Prayer Day,” and the use of Bible verses in the decor of government buildings, official seals, and monuments).

62. See BOSWELL, *SAME-SEX UNIONS*, *supra* note 45, at 162–65; WHITE, *supra* note 48, at 239–40.

63. See BOSWELL, *SAME-SEX UNIONS*, *supra* note 45, at 167–68; WHITE *supra* note 48, at 239.

64. See WHITE, *supra* note 48, at 239.

65. See WHITE, *supra* note 48, at 240.

66. See WHITE, *supra* note 48, at 240.

67. See BOSWELL, *SAME-SEX UNIONS*, *supra* note 45, at 178–85 (describing the various ceremonies).

68. See BOSWELL, *SAME-SEX UNIONS*, *supra* note 45, at 178.

69. See BOSWELL, *SAME-SEX UNIONS*, *supra* note 45 at 199; WHITE, *supra* note 48 at 239 (listing rice as a fertility symbol and “bridesmaids dressed to confuse spirits” as examples of retained pagan traditions).

legal and cultural rite into the liturgical tradition of the Christian Church, even though they did not view it as sacramental.<sup>70</sup>

Upon these medieval origins of an "ecclesiastical solemnization of the marriage contract," the modern Protestant theology was built.<sup>71</sup> The religious ceremony is based on the order of creation and is a sign of a lifelong covenant between a man and a woman.<sup>72</sup> According to Augustine, the Decree for the Armenians, and the Book of Common Prayer, the purpose of marriage included three positive products: children, mutual faithfulness, and God's gift of a special permanent bond,<sup>73</sup> granted by God's grace. The United Methodist theological understanding is representative of current mainstream Protestant thinking, acknowledging that marriage may not result in a commitment to bear children and that sexual union is a gift of God to be enjoyed in marriage, even if children do not result.<sup>74</sup> Through their union, the couple is both asking for and expressing daily graces granted by God.<sup>75</sup> The couple's life is a reflection of God's love for the Church, and their fidelity emphasizes the possibility of Christian life

70. "The Protestant Reformers of the sixteenth century were unwilling to call marriage a sacrament because they did not regard matrimony as a *necessary* means of grace for salvation." THE UNITED METHODIST CHURCH, COMPANION TO THE BOOK OF SERVICES 99 (1988) [hereinafter COMPANION]; see WHITE, *supra* note 48, at 242–43.

71. See COMPANION, *supra* note 70, at 97.

72. See COMPANION, *supra* note 70, at 98–99. The following verses are commonly considered part of the "Creation Story":

The Lord God said, "It is not good that the man should be alone; I will make him a helper fit for him." So out of the ground the Lord God formed every beast of the field and every bird of the air, and brought them to the man to see what he would call them; and whatever the man called every living creature, that was its name. The man gave names to all cattle, and to the birds of the air, and to every beast of the field; but for the man there was not found a helper fit for him. So the Lord God caused a deep sleep to fall upon the man, and while he slept took one of his ribs and closed up its place with flesh; and the rib which the Lord God had taken from the man he made into a woman and brought her to the man. Then the man said, "This at last is bone of my bones and flesh of my flesh; she shall be called Woman, because she was taken out of Man." Therefore a man leaves his father and his mother and cleaves to his wife, and they become one flesh. And the man and his wife were both naked, and were not ashamed.

*Genesis* 2:18–25 (Revised Standard Version).

73. See ST. AUGUSTINE, THE CITY OF GOD 469–70 (Marcus Dods trans. 1950); WHITE, *supra* note 48, at 244–45; David Orgon Coolidge, *Same-Sex Marriage?* Baehr v. Milke and the Meaning of Marriage, 38 S. TEX. L. REV. 1, 31 (1997).

74. See, e.g., COMPANION, *supra* note 70 at 100; WHITE, *supra* note 48, at 241–42.

75. See COMPANION, *supra* note 70 at 99.



in the earthly world.<sup>76</sup> The new couple makes “a little family within the household of God, a ‘little church’ in the Body of Christ.”<sup>77</sup> Marriage is not a private matter in this context. “Marriage is the business of two individuals, but it is undertaken within a greater company of witnesses, supporters, and friends.”<sup>78</sup> The rest of the church community is witness to the exchange of vows and is directed, having heard the proclamation and been given the opportunity to object, to avoid intrusion or interference with the couple.<sup>79</sup> The vows, as the most ancient part of the service, are derived from legal language and not religious language.<sup>80</sup> Recent revisions of the marriage services have incorporated more covenant language over contract language and have expressed modern insights into the relationship between the sexes.<sup>81</sup> The Christian understanding of these promises and claims is that they “are something more than, and different from, the claims of the legal contract that marriage is in the eyes of the state.”<sup>82</sup> They are viewed as transcending the law and are genuine expectations of those wedded, enabled by God’s unconditional love and mercy.<sup>83</sup>

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76. See THE UNITED METHODIST CHURCH, THE BOOK OF SERVICES 67–68 (1988) (Explaining in the service that the rings are the “outward and visible sign of an inward and spiritual grace, signifying to us the union between Jesus Christ and his Church.”); COMPANION, *supra* note 70, at 99; Daniel Maguire, *The Morality of Homosexual Marriage*, in THE MORAL AND LEGAL DEBATE, *supra* note 7, at 57, 63 (stating that married love should be constant and entered into with a willingness to sacrifice which will lead to the holy purification of both parties).

77. COMPANION, *supra* note 70, at 99.

78. EDWARD S. GLEASON, REDEEMING MARRIAGE 11 (1988); see also WHITE, *supra* note 48, at 241–42.

79. See GLEASON, *supra* note 77, at 24–25 (explaining the history and meaning of the bann, a formal announcement at a public service which existed in the days before a marriage license and now is found in the service as a final opportunity for anyone who can show just cause why the couple should not be married to speak).

80. See COMPANION, *supra* note 70, at 97; WHITE, *supra* note 48, at 240 (making reference to liturgical phrases such as “to have and to hold” from the legal conveyance of property and “from this day forward” from the dating of a legal contract).

81. See COMPANION, *supra* note 70, at 98 (“All the major traditions and churches have revised or newly written marriage services in recent years.”); WHITE, *supra* note 48, at 241–42.

82. See COMPANION, *supra* note 70, at 101.

83. See COMPANION, *supra* note 70, at 101.

## II. THE LAW OF MARRIAGE

*A. Marriage As Regulative*

With such a prominent place in social and religious history, marriage is considered favored by the law. The law brings society in as the third party to the marriage, regulating the creation and dissolution of the private contract. Once the medieval Christian Church formulated a definition of the traditional model of marriage, based on the theological underpinnings discussed above, it became part of the corpus of canon law.<sup>84</sup> During the latter two-thirds of the nineteenth century, "family law first emerged as a distinct body of law."<sup>85</sup> During the Victorian Age, "a fear that rising individualism would dissolve any sense of self that was rooted in communal responsibility" gave birth to the view of "family as a network of interdependent roles" that needed reinforcement through legal status.<sup>86</sup> Ecclesiastical courts, rooted in the ancient canon law, had jurisdiction over marriage in England, and the Church continued to play a significant role in the administration of matrimonial law.<sup>87</sup> Family law in the United States took on a decidedly secular vestment, rejecting what was regarded by the Puritan colonists as the oppressive nature of the Anglican church.<sup>88</sup> No doubt exists, despite this separation of marriage from the domain of the Church, that the Judeo-Christian religious roots run deep and continue to affect legal thinking on the subject. The early secular emphasis in United States marriage law allowed for the emergence of two new doctrines: common-law marriage and divorce by the courts.<sup>89</sup> Common-law marriage was also an accommodation to the geographical dispersion of the population.<sup>90</sup> Both were modifications of traditional marriage law tolerated during the nascent nation's efforts to develop its own organizational identity.

The translation of family values into legal norms is not a simple nor precise activity. The legal system in this country established its own definition of marriage by delineating rights and requirements,

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84. See Coolidge, *supra* note 73, at 31.

85. REGAN, *supra* note 3, at 3-4.

86. REGAN, *supra* note 3, at 4.

87. See FRIEDMAN, *supra* note 60, at 202.

88. See FRIEDMAN, *supra* note 60, at 202-03.

89. See FRIEDMAN, *supra* note 60, at 202-08.

90. See FRIEDMAN, *supra* note 60, at 203.

while retaining much of its traditional meaning. The right to marry has since been linked to the constitutional guarantee of the right to privacy.<sup>91</sup> Subject to this and other constitutional restraints, statutory regulation has been delegated primarily to the individual states.<sup>92</sup> Statutes regulate only the qualifications and mode of entering into marriage, duties and obligations, effects on property rights and grounds for dissolution.<sup>93</sup> The requirements for entering into ceremonial marriage vary, but generally include solemnization, consent, capacity, and licensing formalities.<sup>94</sup> Solemnization can be performed by a religious or civil official to formally celebrate the contract.<sup>95</sup> Consent must be freely given and not the product of fraudulent representation.<sup>96</sup> Capacity to marry refers to a wide variety of matters including mental or physical capacity, existing marital status, consanguinity, and age sufficiency.<sup>97</sup> Licensing requirements may include blood tests and medical examinations.<sup>98</sup> The status granted in one state is recognized in all states, even if the second state has different statutory requirements.<sup>99</sup> So, once the status is attained, it receives a presumption of validity and permanence across state lines. This presumption is derived from the Full Faith and Credit Clause of the United States Constitution, which reads "Full Faith and Credit shall

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91. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (defending the freedom to marry as the court struck down antimiscegenation laws on the grounds that they violated equal protection); *Griswold v. Connecticut* 381 U.S. 479, 485 (1965) (protecting the use of contraceptives as falling under an individual's right to privacy and emphasizing the right to marry as predating the Bill of Rights).
  92. See Curt Pham, *Let's Get Married in Hawaii: A Story of Conflicting Laws, Same-Sex Couples, and Marriage*, 10 FAM. L. Q. 727, 729 (1996).
  93. See, e.g., CAL. FAM. CODE ANN. §§ 310, 700 et. seq., 752, 760 (West 1994); N.Y. DOM. REL. LAW §§ 50, 140, 170 (McKinney 1988); TEX. FAM. CODE ANN. §§ 7.001, 7.002 (West 1998); UNIF. MARRIAGE AND DIVORCE ACT §§ 201, 208, 301, 302 (1973); *Maynard v. Hill*, 125 U.S. 190, 204 (1888).
  94. See, e.g., CAL. FAM. CODE ANN. §§ 300, 350, 352 (West 1994); N.Y. DOM. REL. LAW §§ 7, 10, 12, 13 (McKinney 1988); TEX. FAM. CODE ANN. § 1.07 (West 1998); UNIF. MARRIAGE AND DIVORCE ACT §§ 201-203, 206 (1973).
  95. See, e.g., N.Y. DOM. REL. LAW §§ 11, 13 (McKinney 1988); UNIF. MARRIAGE AND DIVORCE ACT § 206 (1973).
  96. See, e.g., N.Y. DOM. REL. LAW § 7 (McKinney 1988); UNIF. MARRIAGE AND DIVORCE ACT § 208(a)(1)(1973).
  97. See *In re Estate of Hendrickson*, 805 P.2d 20 (1991) (finding husband mentally competent to enter into common-law marriage). See, e.g., CAL. FAM. CODE ANN. § 301 (West 1994); N.Y. DOM. REL. LAW § 15-a (McKinney 1988); UNIF. MARRIAGE AND DIVORCE ACT §§ 203, 207, 208 (1973).
  98. See, e.g., N.Y. DOM. REL. LAW §§ 13-aa (McKinney 1988); UNIF. MARRIAGE AND DIVORCE ACT § 203 (1973).
  99. See Pham, *supra* note 92, at 729.

be given in each State to the public Acts, Records, and Judicial Proceedings of every other State."<sup>100</sup> Congress has acted to undermine this provision in the context of same-gender marriage by creating a law that expressly permits a state to refuse to honor a same-gender union solemnized outside its borders.<sup>101</sup> This statute is now commonly referred to as the Defense of Marriage Act ("DOMA"). A full discussion of the constitutional implications of enacting a law that appears, by its very language, to violate the Full Faith and Credit Clause is beyond the scope of this Article.<sup>102</sup>

Historically, the Puritan desire to distance matrimony from the Anglican Church provided sufficient reason to focus on its contractual characteristics. As family law has moved in the direction of private contract law,<sup>103</sup> judicial opinion of contract law has shifted from the acontextual, free contracting of the *Lochner*<sup>104</sup> era to a more active judicial analysis of the relational status of the parties.<sup>105</sup> The movement by contract law toward status has intercepted the movement of family law toward contract (and away from status).<sup>106</sup> This is to say, the focus on private contracting has not made manifest an honoring of family contracts without judicial examination of the people involved and the subject matter and nature of the arrangements agreed to by the parties.<sup>107</sup> Instead, the review of the terms of a marital contract and intrusive inquiry into the relationship itself actually means more intensive court scrutiny.<sup>108</sup> Still, in response to the "modern insistence on personal choice in intimate matters," the courts have shown some

100. U.S. CONST. art. IV, § 1.

101. The law grants the states permission to ignore "any public act, record, or judicial proceeding of any other state, territory, possession, or tribe" that validates a same-gender marriage within the borders of the other state. 28 U.S.C.A. § 1738C (1996).

102. For views on either side of the constitutionality of DOMA, see Mark Strasser, *Loving the Romer Out of Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279 (1997) [hereinafter, Strasser, *Loving the Romer Out of Baehr*] (finding DOMA unconstitutional); Same-Sex Marriage: Hearing on S. 1740 Before the Senate Judiciary Comm., 104th Cong. (1996) (statement of Lynn Wardle, Professor of Law at B.Y.U.) (supporting the passage of DOMA).

103. See REGAN, *supra* note 3, at 35–36; Singer, *supra* note 56 at 1444 (indicating a trend over the last 25 years of privatization supplanting public ordering of family relations).

104. *Lochner v. New York*, 198 U.S. 45 (1905) (disallowing state law interference with the number of working hours contracted between bakers and their employers).

105. See REGAN, *supra* note 3, at 90–93 (focusing on the changed views regarding employer/employee and landlord/tenant contractual relations).

106. See REGAN, *supra* note 3, at 36, 90, 93.

107. See REGAN, *supra* note 3, at 90.

108. See REGAN, *supra* note 3, at 90.

willingness to look beyond formality,<sup>109</sup> finding status in the absence of legal marriage<sup>110</sup> or allowing private contract to overcome obligations imported into the relationship by law.<sup>111</sup>

The legal presumptions attendant to the status of marriage follow it into all areas of law, such as tax, tort, health care, immigration, criminal, employment, and property. Benefits are granted by the powers of federal and state legislatures, the development of common law, and private companies or organizations. For example, federal laws bestow tax exemptions and family or medical leave entitlement.<sup>112</sup> Only legal spouses can agree to have property held with right of survivorship in various states.<sup>113</sup> The test used by courts to determine whether a person has standing to bring a loss of consortium action precludes a same-gender partner from having a day in court.<sup>114</sup> The list of ways in which the legal status of "married" creates financial benefits extends into the private realm where a husband and wife can save on the cost of benefit dinners, travel accommodations, and social organizations.

All judicial decisions to tighten or loosen the application of marriage benefits based on finding legal status send shock waves throughout our legal system. To require strict compliance with statutory requirements limits contractual recovery for those who are all but

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109. REGAN, *supra* note 3, at 41.

110. *See, e.g.*, Dunphy v. Gregor, 642 A.2d 372 (N.J. 1994) (holding that someone other than a spouse or blood relative could recover for emotional distress resulting from injury to a car accident victim); Levar v. Elkins, 604 P.2d 602 (Alaska 1980) (affirming monetary award from assets acquired during the relationship to a woman after the dissolution of a longterm nonmarital union); Marvin v. Marvin, 557 P.2d 106 (Cal. 1976) (holding that express contracts between nonmarital partners are enforceable and, beyond that, the conduct of the parties should be explored to determine if they had an implied contract).

111. *See, e.g.*, Dawley v. Dawley, 551 P.2d 323 (Cal. 1976) (explaining that the antenuptial contract in which the parties agreed that the "property acquired during the marriage would be held as separate property" did not violate public policy); Hill v. Hill, 356 N.W.2d 49 (Minn. Ct. App. 1984) (finding the provision of an antenuptial agreement which set out the disposition of marital property in the event of dissolution to be valid and enforceable).

112. *See* I.R.C. § 2056(a) (providing for an unlimited marital deduction in transfer taxation); 29 U.S.C.A. § 2612 (West Supp. 1998) (granting eligible employees entitlement to up to twelve weeks of leave without negative effects on work status for the birth of children, for caregiving to a seriously ill spouse, son, daughter, or parent, for own serious illness, but not for caregiving to a seriously ill same-gender life partner).

113. *See, e.g.*, TEX. PROB. CODE ANN. § 451 (West Supp. 1998) (allowing property "to pass" outside of probate proceedings because decedent's interest ceases to exist at death).

114. *See infra* notes 267-72 and accompanying text.

legally married.<sup>115</sup> To require some lesser standard, like a good faith effort to meet the requirements, perverts the social desire to provide favored status to those conforming to social norms. To require substantial compliance, as most courts have done,<sup>116</sup> is to provide no clear standard at all and to leave the case law open to convoluted rhetoric, such as: “[t]he validity of a marriage is governed by statutes which are to be construed in favor of validation even when the marriage was not entered into according to statutory requirements, unless the statutes cannot fairly be so construed.”<sup>117</sup>

Realists can point to such opinions as evidence that the definition of marriage is what a particular court says it is and that there is no “fixed” definition of marriage. The legal construct of marriage changes depending on who is sitting on the bench. Under a formalist view, conventional conceptions are used to determine what relationships constitute a family or a marriage.<sup>118</sup> Therefore, in the absence of statutory definitions, terms like wife and husband mean what they have always meant.<sup>119</sup> The problem with this circular argument is that it relies on an assumption that words defined in relation to one another all have inherent gender connotations.<sup>120</sup> Husband and wife are as much terms describing roles as they are terms corresponding to gender.<sup>121</sup> Feminists have alerted society to the danger of using these gender-based role descriptions as methods of oppression.<sup>122</sup> The duties of “wife” or “husband” as historically propagandized may be performed by either gender. In a prolix refutation of the accusation that marriage as exclusively heterosexual is merely a tautological argument, one author came full circle to the conclusion that “the definition of

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115. See *Weaver v. Searle*, 558 F. Supp. 720 (N.D. Ala. 1983) (disallowing action by husband for loss of consortium because the injury to his wife occurred before they were legally married, even though it was after they moved in together).

116. See *Starrett v. Tyon*, 392 N.W.2d 94 (S.D. 1986) (holding valid a marriage solemnized beyond the time limit after the issuance of a license).

117. *Starrett*, 392 N.W.2d at 95.

118. See *Raisty*, *supra* note 49, at 2659.

119. See *Roe v. Ludtke Trucking*, 732 P.2d 1021, 1023 (Wash. Ct. App. 1987) (stating that since the term “wife” was not defined as used in the statute, “it should be given its plain and ordinary meaning . . .”).

120. See *Mohr*, *supra* note 10, at 219–23 (arguing that dictionary definitions “define marriage in terms of spouses, spouses in terms of husband and wife, and husband and wife in terms of marriage” and legal definitions do not clarify these meanings, but rather use them to support gender discrimination).

121. See *REGAN*, *supra* note 3, at 116 (indicating a new commitment on the part of society to refrain from assigning family roles based solely on gender).

122. See *Singer*, *supra* note 56, at 1532.

marriage as a cross-gender union is not merely a matter of arbitrary definition or semantic word-play; it is fundamental to the concept and nature of marriage itself."<sup>123</sup> The author adds, "[a] same-sex relationship *is* something else," even if it resembles marriage in other ways besides the union of persons of opposite gender.<sup>124</sup> Both extremes of this argument are weak. The traditional approach to the definition denies the fluid quality of marriage. Relationships are not static. Arguments on the other side simply deny that certain words ever had a definite meaning and advocate free reclaiming and redefining of gender in marriage. The response of Congress to this debate is to enter waters not generally considered within federal purview<sup>125</sup> and to create a statutory definition that allows only opposite genders to marry one another for the purpose of qualifying for federal benefits.<sup>126</sup>

This esoteric manipulation of the definition is accompanied by other, equally nimble, academic gymnastics on the topic of legalization of same-gender marriage. Whether the argument is that same-gender persons may not marry because of an absence in the law of such a provision or that the law by definition prohibits same-gender unions, the effects are the same. One argument advanced by proponents of same-gender marriage is that the erosion by courts of the importance of the other requirements for marriage opens the door to further ignore any provisions that expressly or implicitly limit marriage to opposite-gender persons. Neither the deconstructionist, who seems to want to throw the baby out with the bath water, nor the formalist, who believes words somehow capture reality, stand on solid ground.

A legal system has the power to grant privileges without regard for the rights of those unable to attain the preferential status. This is justified by society's need to set standards for its survival. In determining standards for marriage, society must decide what its preferences are as to what values must be embodied in the family relationship. Society should not blindly implement traditional views and rely on empty platitudes like "family values" as if they embody universal themes. Where the legislature must be most conscientious is in

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123. Wardle, *supra* note 14, at 39.

124. Wardle, *supra* note 14, at 39.

125. See e.g., Pham, *supra* note 92 at 728-30 (using the example of Hawaii to introduce choice of laws concerns in addressing same-sex marriage).

126. See 1 U.S.C.A. § 7 (1997) (defining "marriage" as the "legal union between one man and one woman" for the interpretation of Congressional acts and administrative rulings).

keeping up with the opinions of society so that the definition reflects the most favored set of values and grants benefits to all who can manifest those ideals.

When *Loving v. Virginia* was decided in 1967, society may not have been ready for the expanded access to marriage by interracial couples. In that case, the Court denounced antimiscegenation statutes as unconstitutional.<sup>127</sup> The temptation to compare the court's overturning of state laws that made interracial marriage illegal with the current opportunity facing the court system to legalize same-gender marriage is great. However, in *Loving*, the Court was working with clear legal precedent that characterized race as a suspect class.<sup>128</sup> Here, the courts have a difficult time determining whether the proper classifications for the equal protection arguments are based on gender or sexual orientation.<sup>129</sup> Gender would implicate the stronger test for the state, and, yet, it is only one of intermediate scrutiny, less than that required for classification by race. The state may not be able to meet its burden in the case of same-gender marriage regardless of classification. Still, the legal precedent coupled with the compelling interest test made the *Loving* case an "easier" one. No doubt I look on that decision with thirty years of social adjustment to its ramifications. The law did act first and social opinion has changed. The newer approach to the issue, as demonstrated in *Brause v. Bureau of Vital Statistics*,<sup>130</sup> which analyzes the problem as a violation of the right to choose one's own life partner, makes same-gender marriage an easier legal mountain to climb.<sup>131</sup> However, more than one court will have to accept that phrasing of the issue of right to privacy before legalization of same-gender marriage necessarily follows.

When a privilege is universal to the needs of the individuals of the society, it becomes fundamental. When the connection between the privilege and what it is said to promote is so attenuated as to be nonexistent, it must be revised by law. In addition, the lawmakers must make sure that the laws actually promote these values. Laws that serve to shape attitudes about marriage and foster its image as an

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127. See *Loving*, 388 U.S. at 2.

128. See *Loving*, 388 U.S. at 11.

129. Compare, e.g. *Dean v. Dist. of Columbia*, 653 A.2d 307 (D.C. 1993), with *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

130. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. 1998).

131. See *infra* notes 221–30 and accompanying text.



enduring and stable relationship need to reflect current social values.<sup>132</sup> Accordingly, Elizabeth Scott suggests that the law “impose a mandatory delay before moving for divorce” or “disfavor the moving party in the divorce settlement” or impose higher costs for divorcing couples with minor children by requiring counseling and evaluation of the children before allowing the divorce.<sup>133</sup> The social view of what is valued in a family must be capable of including the family headed by a same-gender couple before the law changes to allow same-gender marriage.

Our legal system has deemphasized reciprocal duties and obligations between spouses by focusing on private rights in personal life.<sup>134</sup> Accountability shrinks even as we increase the bundle of rights offered to those who enter into the legal union.<sup>135</sup> This lessening of obligation suits a strongly individualist society, but does not increase the strength and stability of our country. Society’s sense of entitlement is reflected in modern rights arguments that downplay the necessity of concomitant responsibility. Some same-gender couples also may be susceptible to this desire for benefits over a willingness to be accountable to one another and to society by providing a stable family in exchange for marital status. Certainly, in my estimation, opposite-gender couples have proven susceptible, leading to instability in the institution of marriage.

Because of the long history of marriage and its relational, traditional, social, religious, and legal aspects, same-gender marriage cannot be thrust into our legal system solely based on the rights argument or contractual similarities or definitional ambiguities. The United States is a collectivist society of individuals. The law and social opinion are dependent on one another, and neither should lead further than the other is willing to go. That is not to say same-gender marriage is inappropriate for the United States. Rather, the granting of legal rights should move slowly on such a pervasive and emotive issue, in order to facilitate and accommodate change in social opinion.

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132. See REGAN, *supra* note 3, at 175.

133. Elizabeth Scott, *Rational Decisionmaking about Marriage and Divorce*, 76 VA. L. REV. 9, 58 (1990).

134. See REGAN, *supra* note 3, at 39.

135. See *supra* notes 111–13 and accompanying text; *infra* note 316 and accompanying text.

*B. Marriage As Constitutive*

The above discussion of the varied, but interrelated, sources of the meaning of marriage emphasizes that family law is not self-contained, nor should it be. Among the various attempts to understand and explain the descriptive and normative aspects of law are the dual theories of law as regulative and law as constitutive.<sup>136</sup> The regulative perspective views law as reflective of social morality, but separate from it.<sup>137</sup> By providing incentives and deterrents, rules proclaim values and effectuate conformity. Thus, regulative theory holds that law molds *behavior* within society through a set of precise rules that govern daily activity and interaction.

In contrast, the theory that law is constitutive focuses on how law determines *identity* within society. Marital relationships are among the many legally recognized "social relationships that are fundamental to our identity."<sup>138</sup> Family law, then, provides the language for understanding oneself through one's roles.<sup>139</sup>

Constitutive legal concepts do affect ordinary language and influence the manner in which those who are married and those who are not married perceive reality.<sup>140</sup> Ruth Margaret Buchanan explains, "[w]e cannot escape the myriad ways in which legal norms and institutions have figured in our discourse and our practices, even and especially when we are trying to transform that discourse and those practices."<sup>141</sup> The "socially constructed interpretation of law" provides a symbolic paradigm for comprehending social relations.<sup>142</sup> The law becomes transformative when, relying on the legal system's facade of "objectivity, universality, and neutrality," society institutionalizes "emerging social conventions" through legal reformation.<sup>143</sup> This

136. For a full discussion, see REGAN, *supra* note 3, at 176-83 (arguing that family law fails to impact regulative law, but helps shape a culture within a constitutive understanding).

137. See REGAN, *supra*, note 3, at 177.

138. Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 733 (1992).

139. See REGAN, *supra*, note 3, at 181.

140. See MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 9 (1987).

141. Ruth Margaret Buchanan, *Context, Continuity, and Difference in Poverty Law Scholarship*, 48 U. MIAMI L. REV. 999, 1002 (1994) (discussing law as constitutive in the context of different approaches to poverty lawyering).

142. Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Social Tradition*, 1 LAW & SOC. INQUIRY 903, 937 (1996).

143. Suchman & Edelman, *supra* note 142, at 937.

transformative quality is the aspect of law's dialogue with society that is downplayed in the regulative and constitutive models, but is relevant to the debate of same-gender marriage. Within this framework, the stakes involved in the legalization of same-gender marriage become ever clearer.

Changing the law to allow for same-gender marriages invokes the transformative power of the law. The laws of the United States are not authoritarian. Society may use law, religion, and other stalwart establishments to exert pressure (or oppression) that encourages conformity, but it cannot demand compliance, at least not within a system founded on individual freedom and diversity. Even its most forceful form of retribution for what society deems to be wrong, criminal punishment, does not guarantee reformed behavior by all of its members, as evidenced by the ongoing need for law enforcement. Without legal same-gender marriage, gays and lesbians will continue to live in covenantal unions, creating a strong, but unrecognized, piece of the substructure of this country. If society's negative reinforcers such as ostracism, prejudice, discrimination, or criminal punishment cannot prevent this, the deprivation of legal marriage, which is simply no reinforcement at all, cannot keep persons from living out their affinities in familial units.

Unlike opposite-gender cohabitators, those married at common law, and barren heterosexual couples, gays and lesbians are unable to achieve symbolic conformity with the law because their nonconformity as couples is apparent. Ironically, same-gender couples can access the right to the public institution of marriage in spite of this nonconformity, only if the legal system honors their right to privacy. For this reason, the "private" right of same-gender marriage may offend the majority, because, if exercised, these private relationships would be more visible. Interpreters of the law are less open to applying substantial compliance standards to those who ask for transformation of symbols. If this were an issue like changing the minimum age for marriage, then the legislature would be more likely to experiment because it would not disturb the transcendental meaning of marriage, nor would it be an indefinite commitment. Minimum age is set arbitrarily along a continuum of social prudence, but is not entrenched with the same symbolic meaning as are gender qualifications. All arguments that same-gender couples are entitled to the same loosening of regulative standards as others who have benefited from exceptions to the statutory and common law requirements are not admitting the fun-

damental difference. Without discussing the immutability of homosexuality, once a same-gender couple is married, homosexuality is an immutable aspect of their relationship. The status granted by marriage is permanent.

### III. IMPACT OF CURRENT LAW ON IDENTITY OF HOMOSEXUALS

#### *A. Gay and Lesbian Views of Their Relationships*

*"I have also been called one thing and then another while no one really wished to hear what I called myself."<sup>144</sup>*

This section will discuss some of the ways in which gay couples may be affected by the unavailability of legal marriage and efforts to legally compensate for this. By no means is this section intended to attribute all of these effects to all couples. Essentialism is dangerous whether in reference to homosexual couples, women, or any group with one or more identifying traits. However, in order to theorize, I rely on generalization.

Gender differences, though highly stereotyped, carry some validity and may be more apparent when amplified in gay couples.<sup>145</sup> For example, according to lesbian folklore, women are likely to move in with one another after just a few dates.<sup>146</sup> This stereotype has become a shorthand for observable behavior. It can be embraced as positive and humorous by lesbians or used to belittle and patronize lesbians by society at large. The behavior pattern that gives rise to the stereotype is a coping skill developed in response to the hostility of society. Opposite-gender couples can celebrate their love in the open air without the danger of negative repercussions due to social attitudes regarding their affectional orientation. Lesbians who wish to avoid the possible conflict with family, friends, co-workers and neighbors, must cocoon to nurture their relationships.<sup>147</sup> When one internalizes the perceptions of others, those perceptions and the coping skills developed to deal with them become a part of that person's identity.

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144. RALPH ELLISON, *INVISIBLE MAN* 433 (30th anniversary ed., 1981).

145. See Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism*, 2 VA. J. SOC. POL'Y & L. 43, 62 (1994).

146. See LINDSEY VAN GELDNER & PAMELA ROBIN BRANDT, *THE GIRLS NEXT DOOR* 160 (1996).

147. See generally Cain, *supra* note 145, at 63-69.

Also, in the absence of socially recognized same-gender marriages, most gay men and lesbians were raised with the heterosexual relationship as the predominant role model for the intimate partnership.<sup>148</sup> As couples discover that same-gender affectional preference and role complementarity *as learned throughout childhood* does not always provide easy answers for setting up an intimate relationship, they are forced to explore their own identity as a couple and redefine family roles for their relationship.<sup>149</sup> The division of duties in some gay relationships is based on who is better at different tasks, who enjoys doing certain things, and how they can balance time and responsibilities between the two parties.<sup>150</sup> Through the negotiation and compromise of finding what role delineations will work for them, a couple carves out its own identity.

Whatever the actual duties assumed by a heterosexual couple, the law provides terms for their association. "Husband," "wife," and "spouse" are more than descriptions of roles, they are words of status. Without the legal recognition, gays and lesbians have the shared experience of grappling for an equivalent name for the other in their intimate relationships. Terms like "life partner," "lover," "friend," and "roommate" have been used to describe the one loved. When "significant other" began in common use, it was quickly taken on to be affectional-preference-neutral, and now applies to any person with whom one is intimate, even a legal spouse. The process of naming one's self and those in one's life is transformational<sup>151</sup> and can diminish the negative effects of being nameless by focusing on positive characteristics of those who share that name.<sup>152</sup> Words are powerful because of this force. Yet, lesbians and gay men are still without a common term for their relationships or terms for each other. By denying recognition of same-gender marriage, the law has allowed any

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148. See Douglas Carl, *Counseling Same-Sex Couples*, in *THE MORAL AND LEGAL DEBATE*, *supra* note 7, at 44, 48 (commenting that same-gender couples may have to negotiate roles and, therefore, can be more creative).

149. See Carl, *supra* note 148, at 48; Mohr, *supra* note 10, at 235-36 (supporting the statement that "[a]ll long-term gay male relationships . . . devise their own special ways of making the relations satisfying" by quoting DAVID P. McWHIRTER & ANDREW M. MATTISON, *THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP* (1984), on the development by gay men of styles of relationship "without the aid of visible role models available to heterosexual couples").

150. See Mohr, *supra* note 10, at 229.

151. See Barbara J. Cox, *A (Personal) Essay on Same-Sex Marriage*, in *THE MORAL AND LEGAL DEBATE*, *supra* note 7, at 27, 29.

152. See Cain, *supra* note 145, at 57-59.

language adopted by the homosexual community to be inferior to words used by opposite-gender couples. Society, as a whole, has failed to honor or to give any weight to words used by the gay community for their loved ones.

Same-gender couples also share the experience of discovering personal affections in a world that is hostile to them. Sexual awareness generally coincides with adolescence, perhaps the most vulnerable and stressful time in life. To realize at that time "that one is a 'queer,' a 'faggot,' and a 'pervert' is terrifying news to the delicate emergent ego."<sup>153</sup> The retelling of this survival story becomes part of the ritualistic sharing among homosexual affiliates, because they must continue to affirm their own and each other's identity.<sup>154</sup> The denial and shame that results from social pressure to remain silent, to be invisible, is something gay men and lesbians must address as they form intimate associations.<sup>155</sup> They must discuss during the initial dating phase how open they want to be as a couple.<sup>156</sup> If they avoid that topic, couples may find themselves facing a dilemma during the holiday season or other occasion when they must decide whether to take their significant other to office parties, family social events, or funerals.<sup>157</sup> Families of origin do not always honor gay couples or recognize the attendant responsibilities and commitments. Homosexual siblings who are in committed relationships may be the first expected to return home to care for an ill parent or to handle the deceased parent's estate, because they are perceived as being more available than their married heterosexual counterparts who must tend to their own families.<sup>158</sup> The absence of status creates invisibility and causes devaluation of the unrecognized bond. Some gay men and lesbians are abandoned by their families of origin, others reject those who raised them, and many adopt a new use for the word "family." The gay community, friends,

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153. Maguire, *supra* note 76, at 65 (suggesting that gay men and lesbians have passed more tests of psychological adjustment than most heterosexuals are ever required to face).

154. See Cain, *supra* note 145, at 65–67 (discussing how lesbians use the lesbian community to develop identities by telling "coming out" stories and claiming the shared experience of being gay).

155. See Cain, *supra* note 145, at 69 (asserting that, at the moment when a lesbian understands her attractions, she also understands that "she had better not say a word about [them]," and some never feel able to speak).

156. See Ta'Shia Asanti, *Lesbian Couples: Defining Family for Ourselves*, THE LESBIAN NEWS, Dec. 1996, at 35.

157. See Asanti, *supra* note 156, at 35.

158. See Carl, *supra* note 148, at 48.

and lovers become their new family.<sup>159</sup> "We gay folk tend to organize our lives more like extended families than nuclear ones. We may love our mates one at a time, but our 'primary families' are often our ex-lovers and our ex-lovers' ex-lovers."<sup>160</sup> These families develop their own rites of passage for the moment of transition from single to committed relationship to replace the legal rite of marriage.<sup>161</sup>

Although these are patterns in same-gender relationships that effect and reflect the couple's identity, they are neither absolute nor exclusive. Avoiding essentialism is nearly impossible when exploring effects of public actions on a minority. The public actions, themselves, as avenues to self-understanding are often dismissed without being exposed as the messengers of prejudice. The loudest broadcasts of public thought with both immediate and long-lasting ramifications are court opinions.

### *B. Case Law View of Homosexual Relationships*

Messages that inform identity are encoded (often in less than subtle language) in every case decision. Patterns that run through case law emphasize and re-emphasize aspects of judicial and, presumably, public views on the legal topic at issue. The body of cases on same-gender couples and gay and lesbian family law is definitely growing, and at a faster rate than in the past. However, the more gay men and lesbians shout across the chasm between legal rights and responsibilities afforded the sexual orientations, the louder the echo returns that there is no legal recognition of gay and lesbian families. Some believe the growing number of opinions is sufficient to identify a body of "family law" which addresses the distinct problems of same-gender couples and related parent-child relationships.<sup>162</sup> As discussed below, the opinions within this growing body of law may provide some exposure, but are still unwilling to appreciate these associations as fully within the meaning of family.

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159. See Asanti, *supra* note 156, at 35.

160. Browning, *supra* note 9, at 133.

161. Cf. Asanti, *supra* note 156, at 35; Cain, *supra* note 145, at 72-73 (supporting lesbian marriage as a validation of lesbian relationships while accepting some theorists' view that marriage, rooted in patriarchy, is undesirable).

162. See Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299, 1414 (1997).

### C. Case Law on Same-Gender Marriage

The entire body of case law on direct challenges to the denial of marriage licenses to same-gender couples spans more than twenty-six years, but includes only six appellate cases.<sup>163</sup> At least four others have been initiated since 1993, but have not yet proceeded further than lower state courts.<sup>164</sup>

The first appellate decision in this series, *Baker v. Nelson*,<sup>165</sup> concerned the application for a marriage license by two men in Minnesota. The court relied on the common usage of the word "marriage" as referring only to the relationship between a man and a woman to counter the petitioners' contention that "the absence of an express statutory prohibition against [same-gender] marriages" indicated a contrary legislative intent.<sup>166</sup> The court then addressed the claim that such a restriction violated petitioners' rights.<sup>167</sup> Justice Peterson's answer was simply that the court was not "independently persuaded" by the constitutional arguments and found no support in

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163. Several cases are frequently associated with these six because they also address the opposite-gender requirement read into the marriage statute, but involve gender identity misrepresentation or transgender issues. Although these cases add to the legal cacophony condemning same-gender marriages, they are excluded from this discussion because of the absence of the fundamental issue of relationships between persons of same-gender affectional preference. The courts, other authors, and society as a whole tend to confuse these issues. See, e.g., *In re Declaratory Relief for Ladrach*, 513 N.E.2d 828 (Ohio Prob. Ct. 1987), *no appeal filed*; *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (Sup. Ct. 1971). The six appellate cases that do address the legal right of same-gender couples to marry are: *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *cert. dismissed*, 409 U.S. 810 (1972); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974), *cert. denied*, 84 Wash. 2d 1008 (1974); *Dean v. Dist. of Columbia*, 653 A.2d 307 (D.C. 1995); *Baehr v. Miike*, No. Civ. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996); *Storrs v. Holcomb*, 666 N.Y.S.2d. 835 (N.Y. App. Div. 1997).

164. See Coolidge, *supra* note 73, at 9. Additionally, three couples in Vermont filed a "freedom-to-marry" lawsuit on July 22, 1997, which was heard by the Vermont Supreme Court in November 1998. See *Hawaii, Alaska Election Results Don't Stop Freedom to Marry Movement*, NEWS RELEASE (Lambda Legal Defense and Education Fund, New York, NY) Nov. 4, 1998 <<http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=302>> [hereinafter, *Election Results*]; E.J. Graff, *Love and Dockets*, OUT, Dec.-Jan. 1998, at 96, 98.

165. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *cert. dismissed*, 409 U.S. 810 (1972).

166. *Baker*, 191 N.W.2d at 185-86.

167. See *Baker*, 191 N.W.2d at 186.



any decisions of the United States Supreme Court.<sup>168</sup> The opinion was rounded out by distinguishing this case from the major cases commonly considered as granting preferred status to the right to marry.<sup>169</sup> The court explained *Skinner v. Oklahoma ex rel. Williamson*<sup>170</sup> as highlighting the procreation aspect of marriage.<sup>171</sup> *Griswold v. Connecticut*<sup>172</sup> was said to limit the state power to interfere with the right of privacy implicit within a state grant of the authorization of marriage;<sup>173</sup> and *Loving v. Virginia*<sup>174</sup> was said to preclude antimiscegenation statutes solely because they are racially discriminatory, not because the court redefined marriage to include couples of different races.<sup>175</sup> This brief opinion would serve as the basis for the future rejections of challenges to such statutes in other states.

Further south, a couple of years later, two women challenged the denial of a marriage license. The Kentucky Court of Appeals, then the state's highest court, in *Jones v. Hallahan*,<sup>176</sup> relied on several dictionary authorities to define marriage and pointed out that marriage has always been between a man and a woman.<sup>177</sup> The two women were to blame, not the state, because they were incapable of meeting this definition, the court said.<sup>178</sup> What they proposed simply was not marriage, the judge ruled, and so no constitutional rights were implicated.<sup>179</sup> Acknowledging that Kentucky statutes did not specifically prohibit such a marriage, but simply left out any reference to it, the court opined that the legislature was relying on the centuries-old definition of marriage as between one woman and one man.<sup>180</sup> In essence, the court believed there was no mention because such a situation was unfathomable to the enactors. Because of the court's denial of the role of the judicial branch in the development of the definition of marriage and of any power to change it, this opinion presented a thinly dis-

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168. See *Baker*, 191 N.W.2d at 186.

169. See *Baker*, 191 N.W.2d at 186-87.

170. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

171. See *Baker*, 191 N.W.2d. at 186.

172. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

173. See *Baker*, 191 N.W.2d at 186.

174. *Loving v. Virginia*, 388 U.S. 1 (1967).

175. See *Baker*, 191 N.W.2d. at 187.

176. *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973).

177. See *Jones*, 501 S.W.2d 588 at 589.

178. See *Jones*, 501 S.W.2d 588 at 589.

179. See *Jones*, 501 S.W.2d 588 at 590.

180. See *Jones*, 501 S.W.2d 588 at 589.

guised circular argument: *marriage is what we say and have always said marriage is because that is what we say and have always said.*

In this same grouping of early challenges was *Singer v. Hara*.<sup>181</sup> Within a year of the Kentucky case, a Washington appellate court faced two men who wanted to marry each other and who asserted many of the same challenges to the law, as well as two new arguments. This court could look to the nonbinding authority of the previous cases to help with the challenges to the definition of marriage and the arguments based on the federal constitution. In its very casual assertion that no outside authority was needed to define marriage in its ordinary sense, as required by the rules of statutory construction, this court turned what had been the focus of previous opinions into a matter of judicial notice. The court confidently asserted, “[w]e need not resort to the quotation of dictionary definitions to establish that ‘marriage’ in the usual and ordinary sense refers to the legal union of one man and one woman.”<sup>182</sup> The opinion was also certain that the state’s purpose in prohibiting gay marriages was to support procreation, despite its acknowledgment that “married couples are not required to become parents.”<sup>183</sup> The federal constitutional claims were summarily dismissed as well, by using previous cases and similar logic.<sup>184</sup>

The two new assertions gave the court more trouble. One of these claims was mentioned and dropped without legitimate response and the second was the focus of the court’s writing. The two men first argued that the legislature had not “defined the competency of marriage[,] but only the competency of the individuals seeking to marry” one another.<sup>185</sup> They argued that they were entitled to marry each other because they met the competency requirements individually.<sup>186</sup> Chief Judge Swanson, the opinion’s author, adopted the state’s response which accused the appellants of putting too much weight on the more inclusive current statutory language, which had been changed solely for the purpose of eliminating differential age requirements for males and females.<sup>187</sup> The second new attack focused on

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181. *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974), *cert. denied*, 84 Wash. 2d 1008 (1974).

182. *Singer*, 522 P.2d at 1191 n.6.

183. *Singer*, 522 P.2d at 1195.

184. *See Singer*, 522 P.2d at 1190–97.

185. *Singer*, 522 P.2d at 1189.

186. *See Singer*, 522 P.2d at 1191 n.6.

187. *See Singer*, 522 P.2d at 1191 n.6.

Washington's newly enacted equal rights amendment to the state constitution. After a laborious process, the court came full circle, effectively adopting the state's argument again on this point, which asserted that all same-gender marriages are deemed illegal by the state and, therefore, no equal rights violation has occurred where both female and male pairs are equally denied marriage licenses.<sup>188</sup> This argument runs against the conclusion in *Loving v. Virginia*, which indicated that the fact that antimiscegenation statutes affected all races equally did not remove from them the taint of racial discrimination.<sup>189</sup> Again, a court had to resort to contradictory and circular arguments. The court's reasoning says that "the reason Singer and Barwick are being denied equal protection of the laws is not because of their sex, but because of their sex; second, it says that the reason same-sex couples cannot marry is because same-sex couples cannot marry."<sup>190</sup>

After a judicial silence of nearly twenty years, a court in the nation's capital spoke on this topic in *Dean v. District of Columbia*.<sup>191</sup> This opinion was issued per curiam, with one of the three judges dissenting from the court's dismissal of the petitioners' equal protection claim. Judge Ferren, who wrote the opinion, differed from the judgment of the others in that he would have required the trial court "to determine whether same-sex couples comprise a 'suspect' or 'quasi-suspect' class entitled either to 'strict' or 'intermediate' scrutiny," and, if found, then he would require the District to show a compelling or, at least, substantial interest.<sup>192</sup>

The court was unanimous on the state's right to refuse to issue the couple a marriage license even though the statute was gender-neutral and did not expressly prohibit same-gender marriages.<sup>193</sup> Legislative history showed no intention to include same-gender unions, the judge reasoned.<sup>194</sup> The claim that the refusal to issue a marriage license violated the District's human rights act was dismissed because the court did not believe the enacting body intended to change the meaning of marriage by prohibiting discrimination against persons on the basis of gender or sexual orientation.<sup>195</sup> The majority also denied

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188. See *Singer*, 522 P.2d at 1191 n.6.

189. See *Loving v. Virginia*, 383 U.S. 1, 9-11.

190. Damslet, *supra* note 8, at 574.

191. *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995).

192. *Dean*, 653 A.2d. at 309.

193. See *Dean*, 653 A.2d. at 310-18.

194. See *Dean*, 653 A.2d. at 310-12.

195. See *Dean*, 653 A.2d. at 318-20.

any violation of the constitutional right to marry because same-gender marriage is not a fundamental right supported by the nation's history and tradition.<sup>196</sup>

Judge Ferren spent the bulk of his long dissent on the point of contention between him and the rest of the court, namely, whether gay men and lesbians constituted a suspect or quasi-suspect class.<sup>197</sup> Despite his substantial knowledge and discussion of scientific and legal matters and his suggestion that homosexuality may be a quasi-suspect class, he expressly stopped short of making that determination "without benefit of a trial record with the right kind of expert testimony, subject to cross-examination."<sup>198</sup> On the other hand, the concurring opinion written by Judge Steadman expressed a failure to see any "unconstitutional transgression of equal protection," even if homosexuality was a quasi-suspect class.<sup>199</sup> He opined that the state may give separate recognition to the institution of opposite-gender marriage because it is bound up with procreative sexual relations.<sup>200</sup>

In an opinion that lacked the literary eloquence of those written by the aforementioned judges, Judge Chang of a lower Hawaii court provided continuing hope for proponents of same-gender marriage in *Baehr v. Miike*.<sup>201</sup> He found that the sex-based classification of the state marriage statute, on its face and as applied, violated the equal protection clause of the state constitution.<sup>202</sup> This case has been up the court system once and is again on appeal with implementation suspended until the Hawaii Supreme Court reviews it. The case began in 1990, when three same-gender couples sought marriage licenses from the state health department and sued the state collectively upon their denials.<sup>203</sup> The trial judge dismissed the case, but was reversed by the Hawaii Supreme Court, in a plurality opinion, which held that the state must prove that the law was justified by a compelling state interest.<sup>204</sup> The motion for reconsideration was denied, but the decision was clarified.<sup>205</sup> A flurry of political activity in Hawaii resulted from

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196. See *Dean*, 653 A.2d. at 331-32.

197. See *Dean*, 653 A.2d. at 333-60.

198. *Dean*, 653 A.2d. at 356.

199. *Dean*, 653 A.2d. at 363.

200. See *Dean*, 653 A.2d. at 363-64.

201. *Baehr v. Miike*, No. Civ. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

202. See *Baehr*, 1996 WL 694235, at \*22.

203. See *Baehr*, 1996 WL 694235, at \*1.

204. See *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993).

205. See *Baehr*, 852 P.2d at 74-75.

this decision, including the recommendation by a committee appointed by the legislature, the Commission on Sexual Orientation and the Law, that same-gender marriage be legalized.<sup>206</sup> The political battle continues along the continuum that supports legalized same-gender marriage on one end and a constitutional amendment that would define marriage as between one man and one woman on the other.<sup>207</sup> In a controversial vote, the convening of a constitutional convention was denied,<sup>208</sup> but voters did approve an amendment granting the legislature the power to enact laws that would reserve marriage to opposite-gender couples.<sup>209</sup>

The plurality opinion of the Hawaii Supreme Court<sup>210</sup> analyzed the state constitutional issues presented by the plaintiff couples in much the same way as Judge Ferren did the federal constitutional claims in *Dean v. District of Columbia*<sup>211</sup> except in one significant area of the analysis, namely, the characterization of the class against whom the statute operates. Judge Levinson, for the Hawaii Supreme Court, indicated that the right to privacy argument is not applicable in this case because same-gender marriage is not rooted in tradition nor is it basic to liberty and justice.<sup>212</sup> The court opted against deciding the equal protection claims on the basis of sexual orientation, but announced that the law is an example of gender discrimination, which is protected against under the Hawaii Constitution.<sup>213</sup> Drawing a parallel between the statute and antimiscegenation statutes, the court overruled the dismissal and remanded the case to allow the state to make its compelling interest arguments.<sup>214</sup> As noted above, the state failed to convince Judge Chang that its interests in preventing same-gender marriage were compelling. Now the Hawaii Supreme Court must review those findings.

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206. See Coolidge, *supra* note 73, at 11–12.

207. See Coolidge, *supra* note 73, at 12–15.

208. See Coolidge, *supra* note 73, at 16–17 (the vote appeared to narrowly approve the convention, but a vast number of spoiled or blank ballots, which the Hawaii Supreme Court ruled must be counted as “no” votes, tipped the balance to invalidate the “yes” vote).

209. See Coolidge, *supra* note 73, at 17; *Election Results*, *supra* note 164 (releasing results from Alaska and Hawaii where voters approved anti-gay measures).

210. See *Baehr*, 852 P.2d at 44.

211. See *supra* notes 191–98 and accompanying text.

212. See *Baehr*, 852 P.2d at 55–57.

213. See *Baehr*, 852 P.2d at 64, 67.

214. See *Baehr*, 852 P.2d at 68.

More recently a New York lower court issued an opinion in *Storrs v. Holcomb*.<sup>215</sup> After acknowledging the determination by the Hawaii Supreme Court that refusal of same-gender marriage must be supported by compelling state interest, Justice Walter Relihan, Jr. explained that an appellate division of New York courts concluded that "only a rational relation need be shown between a similar classification and a legitimate state purpose."<sup>216</sup> Conceding that the point of contention in that case was whether "surviving spouse" extended to the survivor of a same-gender life partner, the court held itself bound by that decision, which it presumed to have included a holding that marriage is limited to opposite-gender couples.<sup>217</sup> In very polite language, the court acknowledged that the argument which states that the government cannot legitimately disallow the exchange of personal vows of commitment between persons of the same gender was "*not without merit*."<sup>218</sup> Still, the judge found it too great a leap from there "to the conclusion that a denial of a marriage license to a same-sex couple" violates any constitutional right.<sup>219</sup> On appeal, Justice Spain determined that the lower court should not have reached the merits of the case and dismissed the action for failure to join the State Department of Health, a necessary party.<sup>220</sup>

A very recent lower court decision breaks fully from case law tradition in the basis of its legal arguments, analysis of legal precedent, and overall tone. This incredibly refreshing opinion was issued by a trial court in response to the state's motion for summary judgment in our nation's other noncontiguous state. *Brause v. Bureau of Vital Statistics*,<sup>221</sup> breaks from tradition by ruling that the state regulation prohibiting marriages between persons of the same gender violates federal and state right to privacy.<sup>222</sup> Unprecedented in the blatant challenge of the social assumptions perpetuated by the above opinions, Judge Michalski says, "It is not enough to say that 'marriage is marriage' and accept without any scrutiny the law before the court. It

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215. *Storrs v. Holcomb*, 645 N.Y.S.2d 286 (Sup. Ct. 1996).

216. *Storrs*, 645 N.Y.S.2d at 287 (citing *In re Cooper*, 592 N.Y.S.2d 797 (App. Div. 1993)).

217. *See Storrs*, 645 N.Y.S.2d at 287 (emphasis added).

218. *Storrs*, 645 N.Y.S.2d at 287.

219. *Storrs*, 645 N.Y.S.2d at 287.

220. *See Storrs v. Holcomb*, 666 N.Y.S.2d 835, 837 (App. Div. 1997).

221. *Brause v. Bureau of Vital Statistics*, No. 3 AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Feb. 27, 1998).

222. *See Id.* at \*1, 4.

is the duty of the court to do more than merely assume that marriage is only, and must only be, what most are familiar with."<sup>223</sup> The court portrays the state role in the facilitation and recognition of marriage as merely ministerial.<sup>224</sup> Judge Michalski points out that, in spite of seeking public recognition, plaintiffs, Jay Brause and Gene Dugan, are asserting their state constitutional right to privacy.<sup>225</sup> Case law in Alaska has protected "very public conduct" under the right to privacy, a right to be free of governmental intrusion into one's intimate affairs.<sup>226</sup> "Clearly, the right to choose one's life partner is quintessentially the kind of decision which our culture recognizes as personal and important. Though the choice of a partner is not left to the individual in some cultures, in ours it is no one else's to make."<sup>227</sup> The court rephrases the question from "whether same-sex marriage is so rooted in our traditions that it is a fundamental right" to "whether the freedom to choose one's own life partner is so rooted in our traditions" as to be fundamental.<sup>228</sup> Judge Michalski explains that asking the wrong question has led courts to reach a contrary conclusion.<sup>229</sup> The opinion concludes by finding that the obvious gender-based classification of the statute would subject it to intermediate scrutiny, if it were not subject to the compelling interests test required by the violation of the fundamental right to privacy.<sup>230</sup> The judge repeatedly refers to Mr. Brause and Mr. Dugan by name. Even in the absence of any binding authority, the opinion is positive evidence of changing judicial views and is a creative approach to the legal problem. It will cause some to reframe their thinking and generally will influence social opinion.

One author's summarization of the arguments by the petitioners in the appellate cases looks like this: 1) "same-sex relationships are equivalent to male-female" relationships because they also "involve a mix of intimacy and commitment and neither are required to be procreative;" 2) therefore, "where a marriage statute does require male-female couples, it should be struck down as unconstitutional" because it violates the right to liberty, privacy, marriage, and equality, and the

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223. *Brause*, 1998 WL 88743, \*2.

224. *See Brause*, 1998 WL 88743, at \*2

225. *See Brause*, 1998 WL 88743, at \*3.

226. *See Brause*, 1998 WL 88743, at \*3

227. *Brause*, 1998 WL 88743, at \*4.

228. *Brause*, 1998 WL 88743, at \*4

229. *See Brause*, 1998 WL 88743, at \*4

230. *See Brause*, 1998 WL 88743, at \*6.

state has insufficient interests to allow violation of these individual rights.<sup>231</sup> The courts, however, were not sympathetic to these arguments and the response mirrored the assertions by saying: 1) "same-sex relationships are not the equivalent of marriage" because same-gender couples are inherently unable to meet the definition of marriage, which historically has only included male-female couples because those are procreative relationships; 2) where a marriage statute is silent, it is intended to limit marriage to male-female couples; 3) where a marriage statute is defined as limited to opposite-gender couples, it is constitutional because it does not violate any constitutional rights.<sup>232</sup>

The positions of the complainants and reasoning of the courts are diametrically opposed. The difference relates to identifying the major premise. For the courts, gender is the defining characteristic of marriage. Any male and female may marry one another, even if they are both homosexual. Even the more recent Hawaii Supreme Court focused on gender and not sexuality when it asserted, "it is immaterial whether the plaintiffs, or any of them, are homosexuals."<sup>233</sup> By defining marriage to exclude two people of the same gender, the courts employed a form of statutory construction that directly contradicts a foundational principle of a free society, namely, that "anything not prohibited is permitted."<sup>234</sup> The older opinions are full of double-talk and circular logic and, although the Hawaii opinion and the District of Columbia dissent show some change in view, the more recent cases (with the exception of Alaska's lower court decision) still rely on the authority of previous courts as giving credence and stability to those arguments.<sup>235</sup> In general, the judges say both that the states have absolute dominion over marriage and that they, as state court officers, are powerless to create a more inclusive definition because the roots are religious and inflexible.<sup>236</sup> Courts are sending the message that the purpose of marital unions is procreation, but having children, planning to have

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231. Coolidge, *supra* note 73, at 8.

232. Coolidge, *supra* note 73, at 8-9.

233. *Baehr*, 852 P.2d at 53 n.14.

234. *Damslet*, *supra* note 8, at 565-66.

235. *See, e.g.*, *Dean v. District of Columbia*, 653 A.2d 307, 315-16 (relying on *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Jones v. Hallhan*, 501 S.W.2d 588 (Ky. 1973); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); and others, for support of its opposite-gender only definition of marriage); *Storrs*, 645 N.Y.S.2d at 287 (relying on *In re Cooper* 592 N.Y.S.2d 797 (App. Div. 1993), which cited *Baker* with approval).

236. *See Damslet*, *supra* note 8, at 576.



children, or being capable of having children is not necessary, as long as the biological traits of the two partners are those of reproductive complementarity. Some courts find *Griswold v. Connecticut* to support the right of heterosexuals to choose to limit reproduction without acknowledging the reciprocal argument that, if the procreation component is no longer essential for opposite-gender couples, then procreation is no longer a valid reason to deny same-gender marriage.<sup>237</sup> Others take judicial notice of the same convoluted reasoning.

More interesting than the illogic employed by the courts in deciding these cases is the emotion behind the strained arguments. A common thread behind these opinions is the view that these couples' claims are so preposterous as to only deserve short shrift, exemplified by the curt dismissal of claims.<sup>238</sup> No facts are given in these cases about the relationships of the couples. In fact, their names are rarely mentioned.<sup>239</sup> Although a few of the opinions indicate the dates that the couples applied for marriage licenses, they focus on the fact that both partners are of the same gender as the *only* pertinent fact in the case. As a well-established legal principle, limiting facts to those that are material is laudable. However, the message is very strong as to the lesser importance of the petitioners because of their sexual orientation. One reads all the earlier opinions and has the feeling that the courts were on the verge of condemning these cases as just plain silly. Consider the language in *Singer v. Hara*:

[I]t is apparent from a review of cases dealing with legal questions arising out of the marital relationship that the definition of marriage as the legal union of one man and one woman who are otherwise qualified to enter into the relationship not only is clearly implied from such cases, but also was deemed by the court in each case to be so obvious as not to require recitation.<sup>240</sup>

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237. See *Baker*, 191 N.W.2d at 186–87.

238. See *Baker*, 191 N.W.2d at 186 n.2 (“We dismiss without discussion petitioners’ additional contentions that the statute contravenes the First Amendment and Eighth Amendment of the United States Constitution.”); *Jones*, 501 S.W.2d at 590 (“[W]hat they propose is not a marriage.”).

239. The following cases do not mention the plaintiffs’ names even once in the opinion: *Storrs v. Holcomb*, 666 N.Y.S.2d 835 (App. Div. 1997); *Jones*, 501 S.W.2d 588; *Storrs v. Holcomb*, 645 N.Y.S.2d 286 (Sup. Ct. 1996).

240. *Singer*, 522 P.2d at 1191–92.

However, by addressing the petitioners' challenges (even while dismissing the claims), in spite of their obvious errors, the courts may have extinguished the hopes of other gay couples and discouraged such claims in the future. In fact, couples did try other avenues and avoided directly challenging state marriage statutes for nearly twenty years. Hawaii and Alaska may offer some hope of the extension of the right to marry to lesbians and gay men, but even these are long shots when all of the resulting political ruckus, within those states and across the nation, is taken into consideration. In spite of their losses, cases like those described above test the climate and provide the extreme demands that make other requests by gay couples seem less threatening and even quite acceptable.

#### *D. Case Law on Gay Family Issues and Other Legal Protection*

Judges across the nation have faced hundreds of other cases brought by or relating to same-gender couples and their families. For example, judges have interpreted the cohabitation agreements for same-gender couples,<sup>241</sup> determined custody rights for children of the relationship upon its dissolution,<sup>242</sup> and ruled on employment or social benefits for same-gender partners of decedents.<sup>243</sup> These do not seem to fluster judges as much as requests by lesbians and gay men for legal marital recognition and accompanying benefits. The response to these other issues has been mixed. With such a large volume of cases and issues, this Article will be limited to just a small sample in the exploration of attitudes which underlie the decisions.

Ironically, the courts are willing to help in the dissolution of the very relationships that they refuse to recognize as having legal significance, as long as the parties have a cohabitation agreement of some sort. One way in which courts do this is to base the decision on logic similar to that of *Marvin v. Marvin*<sup>244</sup> and allow any oral or written contract to be enforceable to the extent it is severable from an agreement to provide sexual services.<sup>245</sup> While reiterating that no legal rights

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241. See, e.g., *Jones v. Daly*, 176 Cal. Rptr. 130 (Ct. App. 1981).

242. See, e.g., *A.C. v. C.B.*, 829 P.2d 660 (N.M. Ct. App. 1992).

243. See, e.g., *Rovira v. AT & T*, 817 F. Supp. 1062 (S.D.N.Y. 1993).

244. *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976). See *supra* note 110 and accompanying text.

245. See, e.g., *Whorton v. Dillingham*, 248 Cal. Rptr. 405 (Ct. App. 1988) (citing *Marvin* as authority and holding an oral cohabitation agreement between two men enforceable,

flow to such relationships as a matter of law, these courts find that no impediment exists to prevent parties from agreeing to provide certain rights and obligations.<sup>246</sup> One court even compared the agreement to a prenuptial agreement.<sup>247</sup> Other courts review the validity of cohabitation agreements for compliance with required elements of contracts without consideration of the couples' intimate relations.<sup>248</sup> In these cases, the enforcement may be precluded by the failure to comply with the statute of frauds or some technical defect.<sup>249</sup> If the parties have made no agreement of any sort, but base their arguments on the marital nature of their relationship, the court can deny recognition of any special status based on the inability of such couples to enter into marriage.<sup>250</sup> Regardless of how the courts decide these cases, they give attention to the nature and length of the relationship, showing more respect for the persons involved than the opinions directly addressing same-gender marriage.

Same-gender couples have sought, mostly unsuccessfully, to acquire economic gains generally allowed only to married persons by suing third parties for the denial of various benefits. In *Rutgers Council of AAUP Chapters v. Rutgers*,<sup>251</sup> the court held that the denial of health insurance coverage to same-gender domestic partners of employees did not violate a state law against discrimination, the equal protection clause of the state constitution, or a state executive order prohibiting

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"even though parties' sexual relationship was an express part of consideration therefor"); *Crooke v. Gilden*, 414 S.E.2d 645 (Ga. 1992) (finding contract enforceable as supported by legal consideration and finding any illegal sexual activity as, at most, incidental to the contract rather than required by it).

246. See, e.g., *Posik v. Layton*, No. 96-2192, 1997 WL 136208, at \*1 (Fla. App. Mar. 27, 1997) (enforcing cohabitation agreement between two women and extending the *Marvin* principle to same-gender couples in Florida), cert. denied, 699 So.2d 1374 (Fla. 1997).

247. See *Posik*, 1997 WL 136208, at \*1.

248. See, e.g., *Ireland v. Flanagan*, 627 P.2d 496 (Or. Ct. App. 1981) (finding that the implicit intent of the parties was to pool their resources and requiring equitable reimbursement to one party upon dissolution of their relationship).

249. See, e.g., *Robin v. Cook*, N.Y.L.J., Oct. 30, 1990, at 22 (holding the oral agreement between two women to be in violation of the statute of frauds because it was to last for the life of one of the parties).

250. See, e.g., *Seward v. Mentrup*, 622 N.E.2d 756 (Ohio Ct. App. 1993) (finding no entitlement to legal or equitable division of couple's combined property in the absence of marriage or contract); *DeSanto v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984) (holding that because a male couple could not contract to common-law marriage, the court would not grant a divorce, equitable distribution, or alimony).

251. *Rutgers Council of AAUP Chapters v. Rutgers*, 689 A.2d 828 (N.J. Super. Ct. App. Div. 1997).

discrimination in the executive branch on the basis of sexual orientation.<sup>252</sup> Similarly, courts have disallowed pension payments<sup>253</sup> and spouse's elective share under a will<sup>254</sup> for gay partners. Yet, a New York court held that a noneviction provision of the rent control laws included the unmarried life partner of a deceased gay male tenant as well as persons related by blood or law.<sup>255</sup> Lawsuits have also been initiated to allow joint petition for bankruptcy,<sup>256</sup> to increase veteran's educational benefits,<sup>257</sup> and to change immigration classification.<sup>258</sup>

One of the higher profile cases concerned medical guardianship of a severely injured accident victim.<sup>259</sup> This story received national attention because the victim's partner, Karen Thompson, agreed to the appointment of the victim's father as guardian after both had cross-petitioned for guardianship. She did so believing that she would be allowed visitation rights and input into medical decisions. The father terminated Karen's visitation rights. She was not allowed to see the injured woman, Sharon Kowalski, for almost four years, at which point Sharon had recovered enough to be able to express her desire to see Karen.<sup>260</sup> Karen visited Sharon at the nursing home and was allowed to take her for semi-monthly weekend visits to the home they

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252. *Rutgers*, 689 A.2d at 828.

253. *See, e.g., Rovira v. AT&T*, 817 F. Supp. 1062 (S.D.N.Y. 1993) (deeming the deceased employee's same-gender partner and partner's children as ineligible for death benefits under ERISA-covered pension plan).

254. *See, e.g., In re Cooper*, 592 N.Y.S.2d 797 (App. Div. 1993) (upholding lower court decision that the surviving partner of same-gender relationship is not a surviving spouse within the meaning of statute allowing the surviving spouse to elect against decedent's will).

255. *See Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (N.Y. 1989).

256. *See, e.g., In re Allen*, 186 B.R. 769 (Bankr. N.D. Ga. 1995) (disallowing same-gender couple the right to file joint petition for bankruptcy relief based on their failure to meet the eligibility requirement that they be married, but refraining from addressing whether the state's refusal to issue marriage licenses to same-gender couples was unconstitutional).

257. *See, e.g., McConnell v. Nooner*, 547 F.2d 54 (8th Cir. 1976) (refusing to grant an increase in educational benefits to a veteran, who was a petitioner in *Baker v. Nelson*, because, although the increase was designed for veterans with dependents, this veteran had a same-gender dependent spouse not legally recognized by the court in *Baker*).

258. *See, e.g., Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982) (denying male alien the immigration classification of immediate relative of a citizen because same-gender marriage did not qualify the alien as the U.S. citizen's spouse).

259. *See In re Guardianship of Kowalski*, 478 N.W.2d 790 (Minn. Ct. App. 1991) (reversing lower-court decision and holding that the lesbian partner of a brain-injured automobile accident victim should have been appointed as her guardian).

260. *See Kowalski*, 478 N.W.2d at 791-92.

shared before the accident. The most recent court action was in response to Sharon's father's request to be relieved as guardian.<sup>261</sup> Some friends and members of the Kowalski family, all of whom had initiated less contact than Karen had with Sharon while she was institutionalized, opposed Karen's petition for guardianship and won in the lower court.<sup>262</sup> The willingness of Judge Davies to review these facts in detail shows some compassion and understanding on the part of the court. To the judge, this case was not about these women's affectational orientation, but was about Karen's commitment and Sharon's wishes and best interests.<sup>263</sup>

Child custody and adoption cases require that the court determine what is in the best interests of the children involved.<sup>264</sup> Naturally, this test requires that courts take family relations into consideration. One Massachusetts case discussed the family dynamics in great detail to support a decision that unmarried cohabitating women, one of whom was the biological mother of the child, could jointly adopt the child because it was in the child's best interest.<sup>265</sup> This construction of adoption statutes, which did not confine the interpretation of the legislative purpose to the encouragement of traditional family structures, allowed the court to read the statute in accordance with contemporary experience.<sup>266</sup>

Negligent infliction of emotional distress or bystander distress and loss of consortium warrant mention. In the landmark case *Dillon v. Legg*,<sup>267</sup> recovery for negligent infliction of emotional distress was predicated on finding that the victim and the plaintiff were closely

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261. See *Kowalski*, 478 N.W.2d at 791.

262. See *Kowalski*, 478 N.W.2d at 792.

263. See *Kowalski*, 478 N.W.2d at 797.

264. See, e.g., *Bottoms v. Bottoms*, No. 2157-96-2, 1997 WL 421218, at \*1 (Va. Ct. App. July 29, 1997) (following *Eichelberger v. Eichelberger*, 345 S.E.2d 10, 11 (1986), stating the standard for deciding issues concerning the custody of children "is a matter of judicial discretion which courts must exercise with the welfare of the children as the paramount consideration"); Recent Case, 107 HARV. L. REV. 751, 753-54 (indicating that many states have directed by statute the best interests test for adoptions and others have set that standard through case law).

265. See *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993). See also *In re Adoption of Evan*, 583 N.Y.S.2d 997 (Sur. Ct. 1992) (allowing adoption of child by lesbian partner of his biological mother and stating that New York law recognizes that a child's best interest is not related to the sexual orientation of his or her parents). These two cases may have been made easier for the judges by the fact that the woman seeking to adopt in each of these situations was a professional with a high income.

266. See Recent Case, *supra* note 264, at 752-53.

267. *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968).

related.<sup>268</sup> The definition of "closely related" was given as the opposite of "an absence of any relationship or the presence of only a distant relationship."<sup>269</sup> Some courts have limited this to blood relations within one or two degrees of consanguinity and legal spouses.<sup>270</sup> However, judges are able to take some license in making this determination.<sup>271</sup> One would think gay and lesbian couples could easily show evidence to meet the close relationship test without being married, but the courts are hesitant to recognize their closeness.<sup>272</sup> As a matter of policy, the courts shy from an extension to emotionally significant, stable, and exclusive relationships, while presuming the stability of parent/child and husband/wife.<sup>273</sup> The reason given by one court is that to recognize all close relationships would unreasonably burden all human activity.<sup>274</sup> Oddly enough, courts in some states have determined that families have standing to sue for negligent infliction of emotional distress for the mishandling of a corpse,<sup>275</sup> but have not allowed gay partners to recover for the distress of watching a living partner be injured.<sup>276</sup> As with negligent infliction of emotional distress, most judges facing loss of consortium claims are concerned with the need to limit liability and potential burden on the courts.<sup>277</sup> However, unmarried heterosexuals have been successful on a few such claims, but no same-gender life partner has.<sup>278</sup>

Even though the courts in all of these cases have allowed some benefits and denied others, the opinions have given more attention to the persons involved and the nature of their relationships than the courts addressing the issue of same-gender marriage. Upon reading these opinions, one senses some degree of tolerance and recognition

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268. *Id.* at 925.

269. *Dillon*, 441 P.2d at 920.

270. *See Coon v. Joseph*, 237 Cal. Rptr. 873 (Ct. App. 1987) (defining close relationship to include parent/child, husband/wife, and common-law husband/wife and refusing damages to gay male who witnessed an assault on his exclusive life partner).

271. *See Dunphy v. Gregor*, 642 A.2d 372 (N.J. 1994) (finding a close relationship between cohabitating opposite-gender couple engaged to be married).

272. *See Coon*, 237 Cal. Rptr. at 873; *Samuelian v. Town of Coventry*, 701 A.2d 814 (R.I. 1997) (dismissing case on procedural grounds, court leaves in place the lower court's decision that state loss of consortium statute does not contemplate suits by same-gender partners).

273. *See Coon*, 237 Cal. Rptr. at 877.

274. *See Coon*, 237 Cal. Rptr. at 876.

275. *See, e.g., Contreras v. Michelotti-Sawyers*, 896 P.2d 1118 (Mont. 1995).

276. *See, e.g., Coon* 237 Cal. Rptr. at 1269.

277. *See Raisty, supra* note 49, at 2648.

278. *See Raisty, supra* note 49, at 2648.

by the courts. These judges show less impatience with what the judges in the cases discussed earlier apparently consider to be fanciful indignation on the part of the petitioners. If the injury for which the petitioners seek relief requires the court to recognize an association between the parties like marriage or intimacy, the court is more likely to balk. In *DeSanto v. Barnsley*,<sup>279</sup> a case where a male filed for divorce from his “common-law husband,” the court affirmed the dismissal by the lower court, differentiating between this situation, where the two men claimed to be married, and cases where the courts had assisted in the equitable dissolution of relationships based on contract.<sup>280</sup> Judge Spaeth said:

If, under the guise of expanding the common law, we were to create a form of marriage forbidden by statute, we should abuse our judicial power: our decision would have no support in precedent, and its practical effect would be to amend the Marriage Law—something only the Legislature can do.<sup>281</sup>

The award of benefits in some of these suits does accentuate the difference between a view of same-gender marriages as illegal and that of same-gender marriages as not provided for by law. If same-gender marriages were illegal, couples would not be able to make arguments for any of these marital-type benefits, much less have courts pay heed and grant some of them. On the other hand, the absence of legal recognition, albeit negative in so many ways already discussed, provides the window for the gradual evolution of the law. By deciding issues case by case, the court is exposed to individuals. As judges and society become more comfortable with same-gender relationships through this exposure, hopefully same-gender marriage will become more accepted, eventually leading to legal recognition.

In addition to seeking protection for their relationships through contract as noted above, gay couples have taken other steps to cement their bond. Some have joined their lives through commitment ceremonies.<sup>282</sup> The adoption of one partner by the other is an attempt to legitimize their next-of-kin status, as well as an attempt to qualify for

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279. *DeSanto v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984).

280. *See id.* at 956.

281. *DeSanto*, 476 A.2d at 956.

282. *See Cox, supra* note 151, at 27 (discussing the transformative effects of sharing her commitment ceremony with her students, friends, family, vendors, and all whom the couple encountered in the planning of the event).

automatic inheritance.<sup>283</sup> Couples may change one or both of their last names, rent or buy a home together, open joint bank accounts, draw up powers of attorney, establish trust accounts, and execute wills.<sup>284</sup> These actions are designed to afford greater protection and do so, to some extent, but none guarantees any greater social or legal respect. Even though some of these have legal force, they are still susceptible to attacks by families of origin. At least one court set aside a legally valid will giving a same-gender lover control over all of the decedent's assets upon a finding of undue influence.<sup>285</sup> Perhaps the best insurance for the fulfillment of one's wishes regarding the status of one's partner is to discuss the relationship with the families of origin, in addition to taking appropriate legal steps, and to explain expectations for the treatment of each other in the event of unforeseeable or unplanned circumstances. Unfortunately, this is not always possible because the family is unsupportive, in which case the revelation could backfire. When the court found undue influence in the will construction case mentioned above, the family of origin of the decedent used a letter he wrote to them regarding his affections for his lover as proof of undue influence.<sup>286</sup>

Perhaps in search of a silver lining, some gay men and lesbians find minor advantages in the states' refusals to bestow the preferred status of marriage on their relationships. Most of these "benefits" are available to any unmarried couple. However, in custody battles over a child born into a same-gender relationship, lesbians and gay men can use the state's legal stance on family in a manner that harms the non-biological parent, the child, and the remainder of the gay and lesbian community.<sup>287</sup> For example, in cases where a lesbian couple with children dissolves its commitment, the biological mother may trivialize

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283. See HAYDEN CURRY ET AL., *A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES* § 1-13 (9th ed. 1993).

284. See CURRY ET AL., *supra* note 283, at §§ 2-4, 2-8, 2-14, 4-4, 5-6, 5-31.

285. See *In re Will of Kaufmann*, 247 N.Y.S.2d 664, 684-86 (N.Y. App. Div. 1964), *aff'd*, 204 N.E.2d 864 (N.Y. 1965).

286. See *Kaufmann*, 247 N.Y.S.2d at 671.

287. See Lorri L. Jean, *Lesbian Co-Parent Battles Have Repercussions*, *THE LESBIAN NEWS*, Dec. 1996, at 22; *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991) (holding that lesbian partner was not a parent within the statutory meaning and could not apply for determination of issue of visitation rights); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 434 (Wis. 1995) (remanding for determination of whether mother's former lesbian partner has parent-like relationship with the child). The argument by the biological mother need not expressly invalidate the relationship, because she may simply rely on her presumptive right to deny visitation.



the relationship so as to prevent the nonbiological mother any custody or visitation rights.<sup>288</sup> This may be more harmful to the community as a whole because it lends credence to homophobic views and offers ammunition for future discrimination.<sup>289</sup>

### *E. Other Evidence of Social Opinion*

Just as judges find it easier to accept same-gender couples if they are not seeking to align their relationships too closely with heterosexual marriages, the general public supports equal rights for gay men and lesbians while opposing same-gender marriage.<sup>290</sup> In addition to fundamentally challenging the religiously based morals of some members of the public, the extension of marriage status to gay men and lesbians is viewed as taking away some of the identity of heterosexuals by devaluing their marriages.<sup>291</sup> Marriage symbolically "institutionalizes, and ritualizes the social meaning of heterosexuality."<sup>292</sup> Even though marriage licenses are not a limited resource (if they were, heterosexuals would have exhausted the supply by now with so many multiple marriages), heterosexuals fear same-gender marriages would take something quantifiable from them.<sup>293</sup>

Without naming the package "marriage," some municipalities, corporations, associations, unions, schools, and states are willing to offer partner benefits such as health insurance, bereavement leave, and

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288. See Jean, *supra* note 287, at 22–23; Sara Miles, *Jane vs. Jane*, OUT, Dec.–Jan. 1998, at 128, 130–31.

289. See Jean, *supra* note 287, at 23.

290. See Thomas F. Coleman, *The Hawaii Legislature Has Compelling Reasons to Adopt a Comprehensive Domestic Partnership Act*, 5 L. & SEXUALITY 541, 549 (1995) (asserting that the general public is opposed to same-gender marriage according to various polls, but supports domestic partnership rights); Coolidge, *supra* note 73, at 13 (citing 1996 Hawaii poll showing opposition to same-gender marriage at 71%); Tobisman, *supra* note 8, at 118 (referencing 1996 exit poll that showed over half of Americans believed gay male and lesbian families should have legal protection, but over half also supported DOMA); *Poll Shows Wide Opposition to Same-Sex Marriage*, Associated Press, Aug. 14, 1998, at 1, available in 1998 WL 7437301; *Poll Update Newsweek: Gay Rights Issues*, Am. Pol. Network: Hotline, Vol. 10 No. 174, available in WESTLAW, APN-HO 40.

291. See Mohr, *supra* note 7, at 106.

292. Mohr, *supra* note 7, at 106.

293. See Fallon, *supra* note 8, at 184; Mohr, *supra* note 7, at 106. See also *Same-Sex Marriage: Hearings on S. 1740 Before the Senate Judiciary Comm.*, 104th Cong. (1996) (Statement of Congressman Steve Largent) available in 1996 WL 387295 (F.D.C.H.).

pension survivor benefits.<sup>294</sup> Hawaii offers any two adults who cannot legally marry the right to share medical insurance, state pensions, and inheritance rights.<sup>295</sup> The bill also gives the right to sue and to own property jointly.<sup>296</sup> By executive order, New York City established a system permitting same-gender couples to register as unmarried domestic partners.<sup>297</sup> Churches such as the Metropolitan Community Churches and the Unitarian Universalist Association of Congregations perform same-gender unions,<sup>298</sup> but more mainstream churches like the Episcopal and United Methodist denominations have defeated proposals to perform such ceremonies.<sup>299</sup> Whether law influences social opinion or public outcry changes the law is not as significant as the substance of each message. A willingness to accept and recognize gay and lesbian unions stops just short of calling them marriages. Ignoring this fact does not aid the cause of same-gender couples. The better approach is to accept it and move gradually toward changing the prejudices behind the opinion poll numbers.

#### IV. HOW LEGALIZATION MIGHT CHANGE VIEWS OF GAY COUPLES

*"[E]ven marriage doesn't have the same meaning anymore."*<sup>300</sup>

If same-gender marriages were legalized today, the dynamics discussed above, which developed over many years, would not simply reverse or disappear. Over time, gay men and lesbians may come to view their own relationships with greater legitimacy. They likely would lose some privacy in the process as their families became more

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294. See Knight, *supra* note 11, at 109 (naming numerous cities, including Seattle, Madison, and San Francisco, and corporations, including Levi-Strauss, Apple, and Time Warner, that have extended benefits to same-gender partners and indicating several universities that have opened family housing to gay families); Tobisman, *supra* note 8, at 116 (indicating that over 30 municipalities, a number of major corporations, universities, the California Bar Association, and Vermont have extended certain benefits to domestic partners).

295. See 1997 Haw. Sess. Laws, Act 383.

296. See 1997 Haw. Sess. Laws, Act 383.

297. See Damslet, *supra* note 8, at 561.

298. See Damslet, *supra* note 8, at 561.

299. See Cecile S. Holmes, *Methodist Council Affirms Stance Against Gay Unions as Church Law*, HOUSTON CHRON., Aug. 12, 1998, at 10; *Gay Marriages Rejected: Supporters Encouraged by Episcopal Church's Narrow Defeat of Proposal to Recognize Union of Same-Sex Couples*, LUBBOCK AVALANCHE-JOURNAL, July 20, 1997, at 5A.

300. Spoken by Karen Wright, in *THE CHILDREN'S HOUR* (Mirisch Co. 1961).

visible and churches, courts, employers, and schools became more involved in the workings of their homes. They might rely more heavily on the system and others than on themselves to provide the support necessary to sustain long-term commitments.

More gay men and lesbians would likely make themselves known, including those who have been hiding their relationships, those who have chosen to live their lives celibate, and those who have masqueraded as heterosexual.<sup>301</sup> Whether this would be considered a social cost<sup>302</sup> of the legalization of marriage turns on which social outcome one considers more valuable—encouraging persons to conform at any personal sacrifice or freeing all to learn, unabashedly, who they are and live as whom they discover themselves to be. The social influence of homosexual couples on the children they raise is unclear,<sup>303</sup> but the nature and nurture arguments of the origin of sexual orientation are both implicated because some couples adopt (environmental influence only) and others have children through assisted conception or surrogate delivery (environmental and genetic influence). Naturally, rational minds differ as to how legalization could affect gay couples and the institution of marriage.

Would marriage make same-gender relationships more stable as it purports to do for opposite-gender couples? Or, would same-gender marriages strike a fatal blow to the foundation of the institution as some commentators discussed above fear? Four different arguments can be made analyzing the impact of same-gender marriage on the institution of marriage itself. For some, “[m]arriage converts houses into homes, the consumption of food into customs of nurturance, and sex into filiation” creating an “intersection of gayness and the everyday at marriage.”<sup>304</sup> The status of marriage, therefore, can “promote intimacy because it’s attentive to the ways in which intimate relationships

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301. Cf. Arthur A. Murphy & John P. Ellington, *Homosexuality and the Law: Tolerance and Containment II*, 97 DICK. L. REV. 693, 706 (1993)(advocating against changes in the law that imply state approval of homosexual unions which could lead to an increase in homosexual behavior).

302. See Elizabeth Kristol, *The Marrying Kind*, in THE MORAL AND LEGAL DEBATE, *supra* note 7, at 132, 135.

303. See Kristol, *supra* note 302, at 135 (suggesting that sexual orientation is not immune from social influence); Jonathan Pickhardt, *Choose or Lose: Embracing Theories of Choice in Gay Rights Litigation Strategies*, 73 N.Y.U. L. REV. 921, 934–37 (1998) (discussing scientific studies which indicate genetic factors play a key part in determining sexual orientation).

304. Mohr, *supra* note 7, at 106.

can be constitutive of one's sense of self."<sup>305</sup> In other words, status provides a unified sense of self for each partner that guides them as a couple through changes in sentiment which occur in long-term commitments.<sup>306</sup> Although gay men and lesbians in committed relationships "score high on scales designed to measure attachment, caring and intimacy,"<sup>307</sup> they generally experience fewer acts of support from family and friends that help promote durability in heterosexual unions. Customs such as wedding showers, ceremonies, honeymoons, anniversary congratulations and parties, and shared mail addressed with reciprocal titles seem so common to be without much impact, but offer regular and ritualized reminders of promises made. Legalization of same-gender marriage would thus strengthen homosexual relationships. On a different side of the debate stand those who believe that same-gender marriage would uproot marriage all together. Together stand those who worry about the symbolic drain of what they consider to be the significant meaning (i.e., "heterosexual") attributed to marriage and those who fear moral degradation of family life. The latter arguments focus on gay promiscuity, but commentators cannot agree as to whether studies actually support that stereotype.<sup>308</sup> Theoretically, any existing promiscuity would be eliminated by the social reinforcement and imposition of self-restraint and fidelity that accompanies the higher status.<sup>309</sup> That is dependent, of course, on the willingness of gay and lesbian couples to accept an exclusive model for sexual relations.<sup>310</sup>

Two other sides to the issue are expressed by those lesbians and gay men who believe same-gender couples have new insights and lessons to teach heterosexuals<sup>311</sup> and by those authors who feel the fluidity of defining marriage and family would be compromised by buying into the traditional paradigm.<sup>312</sup> Interestingly, gender provides

305. REGAN, *supra* note 3, at 89.

306. See REGAN, *supra* note 3, at 89.

307. REGAN, *supra* note 3, at 120.

308. Compare Knight, *supra* note 11, at 116 (asserting that "an enormous body of research" supports this characterization), with Maguire, *supra* note 76, at 66 (claiming that studies do not support a conclusion that homosexuals are more promiscuous than heterosexuals).

309. See REGAN, *supra* note 3, at 120.

310. See Mohr, *supra* note 10, at 233-34 (suggesting gay men may select alternate expressions of commitment and sacrifice, rendering sexual exclusivity less significant in marriage and love).

311. See Mohr, *supra* note 10, at 233-34.

312. See Christensen, *supra* note 162, at 1303, 1317.

a general, albeit not absolute, cultural dividing line between these views. Some gay men assert the view that same-gender couples offer relief from the unnecessary focus on monogamy and provide new models for showing love and commitment.<sup>313</sup> Other improvements include: 1) the acceptance of the principle that a committed union evolves over time with the relationship itself creating a third partner; and 2) the more effective incorporation of friendship into the model for romantic coupling.<sup>314</sup> Some lesbians, on the other hand, claim marriage is inherently patriarchal and, therefore, to accept it as a model for their lives would cause domestication and force assimilation into the mainstream.<sup>315</sup> Resistance would be futile, presumably. The bottom line is that it is difficult to predict exactly what psychological and sociological effects the legalization of same-gender marriage would have in the long-run, but certainly some changes would occur both to lesbian and gay couples and to the establishment.

Similarly, many new benefits would be available to same-gender pairs, but the extent of material, presumptive, and preferential rewards that would be bestowed upon gays as they entered the hegemony is not clear. A grocery list of selectable items (including many previously discussed) illustrates the potentially vast impact. Benefits currently guaranteed by marital status touch the following areas: 1) federal and state income taxation; 2) independent retirement account employment status exceptions; 3) Social Security survivor benefits; 4) unemployment compensation; 5) immigration preferences; 6) testimonial privileges; 7) loss of consortium, negligent infliction of emotional distress, or wrongful death causes of action; 8) intestate succession claims and elective share rights; 9) estate and gift tax exemptions; 10) child support and visitation rights; 11) medical emergency guardianship; 12) health, life, and dental insurance; 13) legalization of sexual acts; 14) adoption and foster parenting; 15) bereavement and dependent care leave; 16) paternity (or the equivalent) presumptions; 17) community property; 18) equitable dissolution; 19) university family dorm housing access; 20) jail visitation; 21) country club family memberships; and 22) travel and other commer-

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313. See, Mohr, *supra* note 10, at 233-34; see also Sullivan, *supra* note 10, at 130.

314. See Mohr, *supra* note 10, at 233-35; see also Sullivan, *supra* note 10, at 130.

315. See Cain, *supra* note 145, at 72; Ertelbrick, *supra* note 9, at 119-20.

cial discounts.<sup>316</sup> Certainly, all of these benefits do not attach immediately to legalization because many are privately subsidized.

Finally, some thinly veiled dangers and complexities would necessarily follow any action by the courts or legislature to give legal recognition to gay families. These must be anticipated and softened where possible. The legalization of same-gender marriage before social opinion supports such a move could expose gay men and lesbians who receive licenses to increased hate acts and discrimination.<sup>317</sup> Just as the military policy of "don't ask, don't tell, don't pursue" has increased witch hunts and harassment,<sup>318</sup> the much higher degree of mandated acceptance found in legalized same-gender marriage would inspire backlash in every form. One look at the response to *Baehr v. Lewin*<sup>319</sup> in Hawaii and in legislative chambers and voting booths across the nation highlights the political gay-bashing possible when the public is so threatened. When an issue is brought before it, a court must decide it based on law and not "private biases" and possible injury.<sup>320</sup> The court's responsibility to do so is no reason to deny or downplay the reality of danger. The courts may become the complaining grounds for those who are materially and morally injured.<sup>321</sup> The legislature

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316. See Carl, *supra* note 148, at 53; Christensen, *supra* note 162, at 1321 n.123; Anthony C. Infanti, *Baehr v. Lewin: A Step in the Right Direction for Gay Rights?*, 4 L. & SEXUALITY 1, 4 (1994); Tobisman, *supra* note 8, at 113.

317. Backlash reminiscent of that following desegregation (and continuing today) could be expected. Just as with other forms of discrimination, the fear of heightened harassment is not alone sufficient to stop social progress. However, unlike others who are subject to discrimination, the legalization of same-gender marriage may expose those who are now protected by their invisibility. The legalization of same-gender marriage could be dangerous if it creates the appearance of acceptance and safety, encouraging reticent couples to come out and marry, but really exposing them to violent responses by members of society.

318. See Editorial, *The Spirit of "Don't Ask Don't Tell,"* ST. PETERSBURG TIMES, July 23, 1998, at 16A; Michelle Benecke, *Military Lesbian-Baiting & Witchhunting Intensifies*, THE LESBIAN NEWS, Dec. 1996, at 21.

319. See *supra* notes 201-09 and accompanying text.

320. See *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

321. Cases have been brought before the courts by persons and entities forced to provide benefits under domestic partnership plans and by persons who felt limitations on personal freedom as a result of gay rights legislation. See *Lilly v. City of Minneapolis*, 527 N.W.2d 107 (Minn. Ct. App. 1995) (holding, in suit brought by a taxpayer, that city council resolutions granting healthcare benefits to same-gender domestic partners were without legal effect); *Presbytery of N.J. of the Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454 (3d Cir. 1994) (holding, in declaratory action brought by pastor and church, that complaint was ripe for consideration of whether state anti-discrimination laws would allow state to prosecute pastor if he spoke out against homosexual acts).

may become consumed with the consideration of reactionary legislation.<sup>322</sup> These are examples of some heterosexuals' incredible territorial possessiveness over the marriage domain, and proponents of same-gender marriages must walk lightly for their own safety and in order to be successful overall in the fight for the legalization of same-gender marriage.

Several significant conflicts which are beyond the scope of this Article would arise if the Hawaii Supreme Court were to rule in favor of the same-gender couples. They include conflicts between courts and legislatures, between states, and, possibly, between the United States and other countries.<sup>323</sup> The full faith and credit implications go further than just constitutional application across the nation, they go across time. If the couple vows to love and support one another for life, the state must reciprocate by honoring the relationship for its duration. Consideration of the net benefits goes well beyond the rights of the lesbians and gay men who seek validation of their relationships. The ripple effect touches many lives, many customs, and many private and public institutions.

### CONCLUSION

The ordering of families involves the public grant of legal protection based on status and the public and private recognition and acceptance of family identity.<sup>324</sup> The two are so inextricable that the grudging willingness of society to tolerate same-gender couples, calling themselves married and receiving social benefits, cannot achieve complete equality. Society must be ready to accept same-gender marriage as "an acknowledgment that gayness, like loving and caring, is a relational property, a connection between persons, a human bonding,

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322. One federal example is the Defense of Marriage Act, 28 U.S.C.A. § 1738C (West Supp. 1997). Also, "[f]rom June 1994 to February 1997, at least nineteen states amended their marriage laws to ban or strengthen existing laws banning same-sex marriage." Coolidge, *supra* note 73, at 97.

323. See Coleman, *supra* note 290, at 551-61. For a complete discussion of the full faith and credit implications, see Anthony Dominic D'Amato, Note, *Conflict of Laws Rules and the Interstate Recognition of Same-Sex Marriages*, 1995 U. ILL. L. REV. 911 (1995); Mark Strasser, *Judicial Good Faith and the Baehr Essentials: On Giving Credit Where It's Due*, 28 RUTGERS L.J. 313 (1997); Strasser, *Loving the Romer Out for Baehr*, *supra* note 102.

324. See Christensen, *supra* note 162, at 1364-5.

one in need of tendance and social concern."<sup>325</sup> Political, social, and religious reform that endures is gradual. Thrusting same-gender marriages to the top of the hierarchy of coupledness alongside opposite-gender marriage is simply too much at one time, for gay men and lesbians, and for society. For now, the discussion of the recognition and support of same-gender relationships should focus on programs such as domestic partnerships,<sup>326</sup> avoiding the symbolic transformation of marriage.

Domestic partnership benefits are a product of the marketplace.<sup>327</sup> As such, they are limited by the company's or municipality's choices as to whom to recognize as "domestic partners" and as to the ingredients in the benefits package.<sup>328</sup> Also, they are tied generally to employment and, therefore, result in economic and skill discrimination against couples who cannot afford to make job choices based on benefit options.<sup>329</sup> State-legislated domestic partnership packages could be tailored to provide the degree of benefits acceptable to each state's majority and could extend benefits beyond the workplace.

In addition to domestic partnership benefits, some cities have set up registries for same-gender partners.<sup>330</sup> These provide little more than the opportunity to be on public record as a couple. Even with limited concrete benefit, a transformative power does come from the visibility of a "fortified presence of open lesbians and gay men."<sup>331</sup>

Fortunately, the trend in case law and the employment marketplace is toward greater provision of benefits and recognition for same-gender couples. The recent surge is a positive indication of changing

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325. Mohr, *supra* note 10, at 239.

326. For further discussion of domestic partnerships and their structure, see Coleman, *supra* note 290, at 541, *et. seq.*; Deborah M. Henson, *A Comparative Analysis of Same-Sex Partnership Protections*, in SAME-SEX MARRIAGE *supra* note 9, at 42; Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163 (1995). For an excellent discussion of the political impact as well as the structure of domestic partnerships, see Nancy J. Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less than Perfect Institutional Choice*, 7 TEMP. POL. & CIV. RTS. L. REV. 337 (1998)(evaluating the strategic institutional options for moving toward recognition of same-gender couples).

327. See Knauer, *supra* note 326, at 337-38.

328. See Knauer, *supra* note 326, at 338-39.

329. See Knauer, *supra* note 326, at 338, 359.

330. See Knauer, *supra* note 326, at 340-41.

331. Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 597 (1995) (translating lessons to be learned from the efforts to end discrimination in the military to the legalization of marriage).



attitudes, but is also a reason for caution. The flooding of benefits and exposure could cause a political backlash like that experienced after the 1993 *Baehr v. Lewin* decision.<sup>332</sup> As long as society is supportive of domestic partnership plans and registries, now is the time to cement their validity with legislation, rather than relying on the more progressive, but less secure or inclusive, whims of the marketplace.

Admittedly, to stop at domestic partnership and registry legislation when the tide may support more is a conservative step, but would provide benefits across income levels to same-gender couples in the interim between now and the legislation of same-gender marriages. The step would present a less threatening opportunity for opposite-gender couples to adjust to the idea of sharing marital status, recognizing they lose little by extending benefits to same-gender couples.<sup>333</sup> Also, the legislation of domestic partnerships and registration would allow the gay and lesbian community an opportunity for discussion and consensus-building regarding the ideal of marriage.<sup>334</sup> Any backlash would be cushioned by the already increasing market and social support for same-gender domestic partnership benefits. One author suggests that domestic partnerships, in this way, will move society toward the even broader goal of the normalization of same-gender affectional orientation.<sup>335</sup>

Same-gender marriage has more to do with the institution of marriage and how it affects our understanding of ourselves and others than it does with gay rights. Therefore, quests for its legalization must first seize the chance to discuss the process of change in American law and society before we can make thoughtful revisions that reflect our social views, reclaim the tradition of marriage, and open the door to same-gender couples. This Article is an invitation to that discussion. ✽

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332. See *supra* notes 201–09 and accompanying text.

333. See Knauer, *supra* note 326, at 348.

334. See Knauer, *supra* note 326, at 352.

335. See Knauer, *supra* note 326, at 349.