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The Case for Gay Marriage

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ESSAYS

THE CASE FOR GAY MARRIAGE

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I. INTRODUCTION: MARITAL STORIES

The climax of Harvey Fierstein's 1979 play *Torch Song Trilogy* is a dialogue — well, shouting match — between mother and son about traditional marriage and its gay variant. As is frequently the case, the nature and function of an institution flashes forth only when the institution breaks down or is dissolved — here by the death of Arnold's lover.

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Arnold: [I'm] widow-ing.

. . . .

Ma: Wait, wait, wait, wait, wait. Are you trying to compare my marriage with you and Alan? Your father and I were married for thirty-five years, had two children and a wonderful life together. You have the nerve to compare yourself to that?

. . . .

What loss did you have? . . . Where do you come to compare that to a marriage of thirty-five years?

. . . .

It took me two months until I could sleep in our bed alone, a year to learn to say "I" instead of "we." Are you going to tell me you were "widowing." How dare you!

Arnold: You're right, Ma. How dare I. I couldn't possibly know how it feels to pack someone's clothes in plastic bags and watch the garbage-pickers carry them away. Or what it feels like to forget and set his place at the table. How about the food that rots in the refrigerator because you forgot how to shop for one? How dare I? Right, Ma? How dare I?

Ma: May God strike me dead! Whatever I did to my mother to deserve a child speaking to me this way. The disrespect!

. . . .

Arnold: Listen, Ma, you had it easy. You have thirty-five years to remember, I have five. You had your children and friends to comfort you, I had me! My friends didn't want to hear about it. They said "What're you gripin' about? At least you had a lover." 'Cause everybody knows that queers don't feel nothin'. How dare I say I loved him? You had it easy, Ma. You lost your husband in a nice clean hospital, I lost mine out there. They killed him there on the street. Twenty-three years old, laying dead on the street. Killed by a bunch of kids with baseball bats. Children. Children taught by people like you. 'Cause everybody knows that queers don't matter! Queers don't love! And those that do deserve what they get![1]

In its representation both of the day-to-day nature of gay relationships and of the injustices which beset these relationships because they are not socially, let alone legally, acknowledged as marriages, Fierstein's moving fictional account has its roots deep in the real life experience of lesbian and gay couples. Consider three true-life stories of gay couples:

Years of domesticity have made Brian and Ed familiar figures in the archipelago of middle-aged, middle-class couples who

1. HARVEY FIERSTEIN, TORCH SONG TRILOGY 144-46 (1979).

make up my village's permanent gay male community. Ed drives a city bus. Brian is a lineman for the power company — or rather he was until a freak accident set aflame the cherry-picker atop which he worked. He tried to escape by leaping to a nearby tree, but lost his grip and landed on his head. Eventually, it became clear that Brian would be permanently brain-damaged. After a few awkward weeks in the hospital, Brian's parents refused to let Ed visit anymore. Eventually they moved Brian to their village and home, where Ed was not allowed.

A similar case garnered national attention. In Minnesota, Karen Thompson fought a seven-year legal battle to gain guardianship of her lover, Sharon Kowalski. Sharon was damaged of body and mind in a 1983 car accident, after which Sharon's parents barred Karen for years from seeing her.[2] Although the Minnesota tragedy made headlines, the causes of such occurrences are everyday stuff in gay and lesbian lives. In both Sharon and Karen's and Brian and Ed's cases, if the government had through marriage allowed the members of each couple to be next-of-kin for each other, the stories would have had different endings — ones in keeping with our cultural belief that in the first instance those to whom we as adults entrust our tendance in crisis are people we choose, our spouses, who love us because of who we are, not people who are thrust upon us by the luck of the draw and who may love us only in spite of who we are.[3]

On their walk back from their neighborhood bar to the Victorian which, over the years, they had lovingly restored, Warren and Mark stopped along San Francisco's Polk Street to pick up milk for breakfast and for Sebastian, their geriatric cat. Just for kicks, some wealthy teens from the Valley drove into town to "bust some fags." Warren dipped into a convenience store, while Mark had a smoke outside. As Mark turned to acknowledge Warren's return, he was hit across the back of the head with a baseball bat. Mark's blood and vomit splashed across Warren's face. In 1987, a California appellate court held that under no circumstance can a relationship between two homosexuals — however emotionally significant, stable, and exclusive — be legally considered a "close relationship," and so Warren was barred from

2. *See* KAREN THOMPSON & JULIE ANDRZEJEWSKI, WHY CAN'T SHARON KOWALSKI COME HOME? (1988).

3. Eventually, Thompson did get guardianship of Kowalski, but only after Kowalski's parents withdrew from the field of battle. A Minnesota appeals court held that "this choice [of guardianship] is further supported by the fact that Thompson and Sharon are a family of affinity, which ought to be accorded respect." In re Guardianship of Kowalski, 478 N.W.2d 790, 796 (Minn. 1991).

bringing any suit against the bashers for negligently causing emotional distress.[4]

Gay and lesbian couples are living together as married people do, even though they are legally barred from getting married. The legally aggravated injustices contained in the stories above suggest both that this bar deserves a close examination and that the law, if it aims at promoting justice, will have to be attentive and responsive to the ways couples actually live their lives rather than, as at present, pre-emptively and ignorantly determining which relationships are to be acknowledged and even created by it. America stands at a point where legal tradition is largely a hindrance to understanding what the law should be.

In this article, I advocate the legalization of gay marriage.[5] My analysis does not in the main proceed by appeal to the concept of equality; in particular, nothing will turn on distinctive features of equal protection doctrine. Rather, the analysis is substantive and turns on understanding the nature and meaning of marriage itself.

To count as a marriage, a relation must fulfill certain normative conditions. Marriage is norm-dependent. In the first half of the article, I examine this aspect of marriage. First, in part II-A I examine the going social and legal definitions of marriage and find them all wanting. I then in part II-B tender a substantive, non-stipulative definition of marriage that is centered and analytically based on the norms which inform the way people actually live as couples. I go on to show that gay couples in fact meet this definition.

But marriage is also norm-invoking: when a relation is determined to be a marital one, that property, in turn, has normative consequences. In particular, it invokes a certain understanding of the relation of marriage to government. And so, part III of this article examines, along several dimensions, various normative consequences and legal reforms that are suggested by the values that inform marriage. Along the way, I suggest that the lived experience of gay couples not only shows them as fulfilling the norms of marriage but can even indicate ways of improving marital law for everyone. The article concludes in Part IV with an examination of the social, religious, and legal reforms that are under way toward the recognition and support of gay marital relationships. Part of the chore of plumping for radical legal

4. Coon v. Joseph, 237 Cal. Rptr. 873, 877-78 (Cal. Ct. App. 1987).

5. As a subsidiary matter, I also advocate domestic partnership legislation to the extent that such legislation is a determinate step toward the realization of gay legal marriage and not a distraction from or new hurdle to this goal. *See infra* part IV.

reform is to show that the reform is in fact possible — and that it does not cause the skies to fall.

II. Definitions of Marriage: Its Normative Content

A. *Definitional Failures*

1. Social and Legal Attempts to Define Marriage

Usually in religious, ethical, and legal thinking, issues are settled with reference to a thing's goodness. Yet oddly, the debate over gay marriage has focused not on whether the thing is good but on whether the thing can even exist. Those opposing gay marriage say that the very definition of marriage rules out the possibility that gay couples can be viewed as married.[6]

If one asks the average Jo(e) on the street what marriage is, the person generally just gets tongue-tied. Try it. The meaning of marriage is somehow supposed to be so obvious, so entrenched and ramified in daily life, that it is never in need of articulation.

Standard dictionaries, which track and make coherent common usages of terms, are unhelpfully circular. Most commonly, dictionaries define marriage in terms of spouses, spouses in terms of husband and wife, and husband and wife in terms of marriage.[7] In consequence, the various definitions do no work in explaining what marriage is and so simply end up assuming or stipulating that marriage must be between people of different sexes.

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6. *See, e.g.*, Adams v. Howerton, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) (holding that under the Immigration and Nationality Act a gay man could not be considered an "immediate relative" of another with whom he had lived for years and had had a marriage ceremony). "Thus there has been for centuries a combination of scriptural and canonical teaching under which a 'marriage' between persons of the same sex was unthinkable and, by definition, impossible." *Id.*

Similarly, in 1991, Hawaii's Director of the Department of Health argued before Hawaii's Supreme Court: "The right of persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special relationship between a man and a woman." Baehr v. Lewin, 852 P.2d 44, 61 (Haw. 1993).

7. The Concise Oxford Dictionary, for example, offers the following definitions:

"Marriage: relation between married persons, wedlock."

"Married: united in wedlock."

"Wedlock: the married state."

"Spouse: husband or wife."

"Husband: man joined to woman by marriage."

"Wife: married woman esp. in relation to her husband." Concise Oxford Dictionary 594, 746, 1241, 1478, 1493 (3d ed. 1964).

Legal definitions of marriage fare no better. Many state laws only speak of spouses or partners and do not actually make explicit that people must be of different sexes to marry.[8] During the early 1970s and again in the early 1980s, gays directly challenged these laws in four states, claiming that in accordance with common law tradition, whatever is not prohibited must be allowed, and that if these laws were judicially construed to require different-sex partners, then the laws constituted unconstitutional sex or sexual orientation discrimination.[9] Gays lost all these cases, which the courts treated in dismissive, but revealing, fashion.[10]

The courts would first claim that the silence of the law notwithstanding, marriage automatically entails gender difference. The best known of these rulings is the 1974 case *Singer v. Hara*, which upheld Washington's refusal to grant a marriage license to two males. The case defined marriage as "the legal union of one man and one woman" as husband and wife.[11] This definition has become *the* legal definition of marriage, since it has been taken up into the standard law dictionary, *Black's Sixth*

8. For example, "Kentucky statutes do not specifically prohibit marriage between persons of the same sex, nor do they authorize the issuance of a marriage license to such persons." Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973). One of the very first gay marriage cases — one from Minnesota — also dealt with a state statute that failed to expressly prohibit same-sex marriages. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

9. De Santo v. Barnsley, 476 A.2d 952 (Pa. 1984) (two persons of the same sex cannot contract a common law marriage notwithstanding the state's recognition of common law marriages between persons of different sexes); Singer v. Hara, 522 P.2d 1187 (Wash. 1974); *Jones*, 501 S.W.2d at 588; *Baker*, 191 N.W.2d at 185.

10. Other cases that, in one way or another, have held that gays cannot marry are *Adams*, 486 F. Supp. at 1119; Succession of Bascot, 502 So. 2d 1118, 1127-30 (La. 1987) (holding that a man cannot be a "concubine" of another man); Slayton v. Texas, 633 S.W.2d 934, 937 (Tex. 1982) (stating that same-sex marriage is impossible in Texas); Jennings v. Jennings, 315 A.2d 816, 820 n.7 (Md. 1974) (explaining that "Maryland does not recognize a marriage between persons of the same sex"); Dean v. District of Columbia, No. CA 90-13892, slip op. at 18-21 (D.C. Super. Ct. Dec. 30, 1991) (invoking passages from Genesis, Deuteronomy, Matthew, and Ephesians to hold that "societal recognition that it takes a man and a woman to form a marital relationship is older than Christianity itself"); *In re* Estate of Cooper, 564 N.Y.S.2d 684, 687 (N.Y. Sup. Ct. 1990) (refusing to "elevat[e] homosexual unions to the same level achieved by the marriage of two people of the opposite sex"); Anonymous v. Anonymous, 325 N.Y.S.2d 499, 500 (N.Y. Sup. Ct. 1971) (stating that "[m]arriage is and always has been a contract between a man and a woman").

11. *Singer*, 522 P.2d at 1193.

Edition, where the case is the only citation given in the section on marriage.[12]

Yet, the *Singer* definition tells us nothing whatever of the content of marriage. First, the qualification "as husband and wife" is simply circular. Since "husband" and "wife" *mean* people who are in a marriage with each other, the definition, as far as these terms go, presupposes the very thing to be defined. So what is left is that marriage is "the legal union of one man and one woman." Now, if the term "legal" here simply means "not illegal," then notice that a kiss after the prom can fit its bill: "the legal union of one man and one woman." We are told nothing of what "the union" is that is supposed to be the heart of marriage. The formulation of the definition serves no function other than to exclude from marriage — whatever it is — the people whom America views as destroyers of the American family, same-sex couples and polygamists: "*one* man and *one* woman." Like the ordinary dictionary definitions, the legal definition does no explanatory work.[13]

Nevertheless, the courts take this definition, turn around, and say that since this is what marriage *means*, gender discrimination and sexual-orientation discrimination is built right into the institution of marriage; therefore since marriage itself is permitted, so too must be barring same-sex couples from it. Discrimination against gays, they hold, is not an illegitimate discrimination in marriage, indeed it is necessary to the very institution: No one would be married if gays were, for then marriage wouldn't be marriage. It took a gay case to reveal what marriage is, but the case reveals it, at least as legally understood, to be nothing but an empty space, delimited only by what it excludes — gay couples. And so the case has all the marks of being profoundly prejudicial in its legal treatment of gays.

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12. BLACK'S LAW DICTIONARY 972 (6th ed. 1990).

13. Even the highly analytical historian John Boswell, in his recent book on the history of gay marriage, fares no better in coming up with a definition of marriage: "It is my understanding that most modern speakers of English understand the term 'marriage' to refer to what the partners expect to be a permanent and exclusive union between two people, which would produce legitimate children if they chose to have children, and which creates mutual rights and responsibilities, legal, economic, and moral." JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE 10 (1994); *cf. id.* at 190. But if one asks "what partners?" "what union?" "what rights?" and "what responsibilities?", I fear the answer in each instance must be "marital ones," in which case the definition goes around in the same small circle as the law. And *legitimate* children just *are* children of a marriage, so, that component of the definition is circular as well.

2. Gender in Marital Law

If we shift from considering the legal definition of marriage to the legal practices of marriage, are there differences of gender that insinuate themselves into marriage, so that botched definitions aside, marriage does after all require that its pairings be of the male-female variety? There used to be major gender-based legal differences in marriage, but these have all been found to be unjust and have gradually been eliminated through either legislative or judicial means. For example, a husband used to have an obligation to take care of his wife's material needs without his wife (no matter how wealthy) having any corresponding obligation to look after her husband (however poor). Now both spouses are mutually and equally obliged.[14] At one time a husband could sell his wife's property without her consent; the wife had no independent power to make contracts. But these laws have not generally been in force since the middle of the last century and are now unconstitutional.[15] It used to be that a husband *by definition* could not rape his wife — one could as well rape oneself, the reasoning went. Now, while laws governing sexual relations between husbands and wives are not identical to those governing relations between (heterosexual) strangers, they are nearly so, and such differences as remain are in any case cast in gender-neutral terms.[16] Wives are legally protected from ongoing sexual abuse from husbands — whatever the non-legal reality.

Now that gender distinctions have all but vanished from the legal *content* of marriage, there is no basis for the requirement that the legal *form* of marriage unite members of different sexes. The legal definition of marriage — "union of one man and one woman" — though doggedly enforced in the courts, is a dead husk that has been cast off by marriage as a living legal institution.[17]

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14. HARRY D. KRAUSE, FAMILY LAW IN A NUTSHELL 92 (2d. ed. 1986) [hereinafter FAMILY LAW].

15. *Id.* at 96-103. *See, e.g.*, Kirchberg v. Feenstra, 450 U.S. 455 (1981) (invalidated Louisiana's community property statute that gave the husband, as the family's "head and master," the unilateral right to dispose of property jointly owned with his wife without her consent).

16. FAMILY LAW, *supra* note 14, at 127-29.

17. "However unpleasant, outmoded or unnecessary, whatever sex discrimination remains in family *law* is trivial in comparison with the inequality of spouses that result from family *facts*, from the traditional role division which places the husband into the money-earner role and the wife into the home where she acquires neither property nor marketable skills." *Id.* at 146.

3. Babies in Marital Law

Perhaps sensing the shakiness of an argument that rests solely on a stipulative definition of little or no content, the courts have tried to supplement the supposedly obvious requirement for gender disparity in access to marriage with appeal to reproduction. By assuming that procreation and rearing of children is essential to married life, the courts have implicitly given marriage a functional definition designed to eliminate lesbians and gay men from the ranks of the marriageable.[18] "As we all know" (the courts self-congratulatorily declare), lesbians are "constitutionally incapable" of bearing children by other lesbians, and gay men are incapable of siring children by other gay men.

But the legally acknowledged institution of marriage in fact does not track this functional definition. All states allow people who are over sixty to marry each other, with all the rights and obligations marriage entails, even though biological reality dictates that such marriages will be sterile. In Hawaii, the statute that requires women to prove immunity against rubella as a condition for getting a marriage license exempts women "who, by reason of age or other medically determined condition are not and never will be physically able to conceive children."[19] In 1984, Hawaii also amended its marriage statute to delete a requirement that "neither of the parties is impotent or physically incapable of entering into the marriage state."[20] This statutory latitude belies any claim that the narrow purpose of marriage is to promote and protect propagation.[21]

The functional definition is too broad as well. If the function of marriage is only to bear and raise children in a family context, then the state should have no objection to the legal recognition of polygamous marriages. Male-focused polygamous families have been efficient bearers of children; and the economies of scale afforded by polygamous families also make them efficient in the rearing of children.[22] So given the actual scope of legal marriage, reproduction and child rearing cannot be its purpose or primary justification.

This finding is further confirmed if we look at the rights and obligations of marriage, which exist independently of whether a marriage generates children and which frequently are not even

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18. *See* Singer v. Hara, 522 P.2d 1187, 1195 (Wash. 1974).

19. Baehr v. Lewin, 852 P.2d 44, 50 n.7 (Haw. 1993) (quoting HAW. REV. STAT. § 572-7(a) (Supp. 1992)).

20. *Id.* at 48 n.1 (quoting HAW. REV. STAT. § 580-21 (1985)).

21. *Id.* at 48.

22. *See* Dirk Johnson, *Polygamists Emerge from Secrecy, Seeking Not Just Peace, But Respect*, N.Y. TIMES, Apr. 9, 1991, at A22.

instrumental to childbearing and rearing. While mutual material support might be viewed as guarding (indirectly) the interests of children, other marital rights, such as the immunity against compelled testimony from a spouse, can hardly be grounded in child-related purposes. Indeed, this immunity is waived when relations with one's own children are what is at legal stake, as in cases of alleged child abuse.[23]

The assumption that childrearing is a function uniquely tethered to the institution of heterosexual marriage also collides with an important but little acknowledged social reality. Many lesbian and gay male couples already are raising families in which children are the blessings of adoption, artificial insemination, surrogacy, or prior marriages. The country is experiencing something approaching a gay and lesbian baby boom.[24] Many more gays would like to raise or foster children. A 1988 study by the American Bar Association found that eight to ten million children are currently being raised in three million gay and lesbian households.[25] This statistic, in turn, suggests that around six percent of the U.S. population is made up of gay and lesbian families with children.[26] We might well ask what conceivable purpose can be served for these children by barring to their gay and lesbian parents the mutual cohesion, emotional security, and economic benefits that are ideally promoted by legal marriage.[27]

4. Marriage as a Creature of the State

If the desperate judicial and social attempts to restrict marriage and its benefits to heterosexual parents are conceptually disingenuous, unjust, and socially inefficient, the question arises: what is left of marriage? Given the emptiness of its standard justifications, should marriage as a legal institution simply be abolished? Ought we simply to abandon the legal institution in favor of a family policy that simply and directly looks after the interests of children, leaving all other possible familial relations on the same legal footing as commercial transactions?

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23. FAMILY LAW, *supra* note 14, at 131.

24. *See, e.g., Susan Chira, Gay and Lesbian Parents Grow More Visible*, N.Y. TIMES, Sept. 30, 1993, at A1; Daniel Coleman, *Gay Parents Called No Disadvantage*, N.Y. TIMES, Dec. 2, 1992, at B7; *Homosexuality Does Not Make Parent Unfit, Court Rules*, N.Y. TIMES, June 22, 1994, at A8.

25. EDITORS OF THE HARVARD LAW REVIEW, SEXUAL ORIENTATION AND THE LAW 119 (1990).

26. Craig R. Dean, *Legalize Gay Marriage*, N.Y. TIMES, Sept. 28, 1991, § 1, at 19.

27. Andrew Sullivan, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, NEW REPUBLIC, Aug. 1989, at 22.

Not quite; but to see what is left and worth saving, we need to take a closer look at the social realities of marriage. Currently, state-sanctioned marriage operates as a legal institution that defines and creates social relations. The law creates the status of husband and wife; it is not a reflection of or response to spousal relations that exist independently of law. This notion that the law "defines and creates social relations" can be clarified by looking at another aspect of family law, one which ordinary people might well find surprising, even shocking. If Paul consensually sires a boy and raises the boy in the way a parent does, then we are strongly inclined to think that he is the boy's father in every morally relevant sense. And we expect the law to reflect this moral status of the father. But the law does not see things this way; it does not reflect and respond to moral reality. For if it turns out that at the time of the boy's birth, his mother was legally married not to Paul but to Fred, the boy is declared by law to be Fred's son, and Paul is, legally speaking, a stranger to the boy. If the mother subsequently leaves Paul and denies him access to the child, Paul has no right at all even to explore legally the possibility that he might have some legislated rights to visit the boy — or so the Supreme Court declared in 1989.[28] Here the law defines and creates the relation of father and son — which frequently, but only by legal accident, happens to accord with the moral reality and lived experience of father and son.

Similarly, in the eyes of the law, marriage is not a social form that exists independently of the law and which marriage law echoes and manages. Rather, marriage is entirely a creature of the law — or as Hawaii's Supreme Court recently put it: "Marriage is a state-conferred legal partnership status."[29]

If we want to see what's left in the box of marriage, we need to abandon this model of legal marriage as constitutive of a status, and rather look at marriage as a form of living and repository of norms independent of law, a moral reality that might well be helped or hindered, but not constituted by the law.[30] Further, current legal marriage, at least as conceptualized by judges, with

28. Michael H. v. Gerald D., 491 U.S. 110 (1989).

29. Baehr v. Lewin, 852 P.2d 44, 58 (Haw. 1993).

30. The Supreme Court's three "right to marry" cases implicitly acknowledge that marriage is a social reality and repository of norms, indeed of rights, independent of statutory law, since the right to marry is a substantive liberty right which overrides, trumps, and voids statutory marital law. Loving v. Virginia, 388 U.S. 1, 12 (1967) (voiding laws barring blacks and whites from marrying each other); Zablocki v. Redhail, 434 U.S. 374 (1978) (voiding law barring child support scofflaws from marrying); Turner v. Safley, 482 U.S. 78, 94-99 (1987) (voiding regulation barring prisoners from marrying).

its definitional entanglements with gender and procreation, is likely to distract us from perceiving lived moral reality.

B. *Marriage Defined*

What is marriage? Marriage is intimacy given substance in the medium of everyday life, the day-to-day. Marriage is the fused intersection of love's sanctity and necessity's demand.

Not all loves or intimate relations count or should count as marriages. Culturally, we are disinclined to think of "great loves" as marriages. Antony and Cleopatra, Tristan and Isolde, Catherine and Heathcliff — these are loves that burn gloriously but too intensely ever to be manifested in a medium of breakfasts and tire changes. Nor are Americans inclined to consider as real marriages arranged marriages between heads of state who never see each other, for again the relations do not grow in the earth of day-to-day living.

Friendships too are intimate relations that we do not consider marital relations. Intimate relations are ones that acquire the character they have — that are unique — because of what the individuals in the relation bring to and make of it; the relation is a distinctive product of their separate individualities. Thus, intimate relations differ markedly from public or commercial transactions. For instance, there is nothing distinctive about your sales clerk that bears on the meaning of your buying a pair of socks from him. The clerk is just carrying out a role, one that from the buyer's perspective nearly anyone could have carried out. But while friendships are star cases of intimate relationships, we do not count them as marriages; for while a person might count on a friend in a pinch to take her to the hospital, friendly relations do not usually manifest themselves through such necessities of life. Friendships are for the sake of fun, and tend to break down when put to other uses. Friendships do not count as marriages, for they do not develop in the medium of necessity's demand.

On the other hand, neither do we count roommates who regularly cook, clean, tend to household chores and share household finances as married, even though they "share the common necessities of life." This expression is the typical phrase used to define the threshold requirement for being considered "domestic partners" in towns that have registration programs for domestic partners.[31] Neither would we even consider as married two

31. *See, e.g.*, City of Berkeley, California, Domestic Partnership Policy, Statement of General Policy, Dec. 4, 1984, *quoted in* HARRY D. KRAUSE, FAMILY LAW: CASES, COMMENTS AND QUESTIONS 159 (3d. ed. 1990).

people who were roommates and even blended their finances if that is all their relationship comprised. Sharing the day-to-day is, at best, an ingredient of marriage.

Marriage requires the presence and blending of both necessity and intimacy. Life's necessities are a mixed fortune: on the one hand, they frequently are drag, dross, and cussedness, yet on the other hand, they can constitute opportunity, abidingness, and prospect for nurture. They are the field across which, the medium through which, and the ground from which the intimacies which we consider marital flourish, blossom, and come to fruition.

III. THE NORMATIVE AND LEGAL CONSEQUENCE OF MARRIAGE

A. *The Legal Rights and Benefits of Marriage*

This required blend of intimacy and everyday living explains much of the legal content of marriage. For example, the required blend means that for the relationship to work, there must be a presumption of trust between partners; and, in turn, when the relationship *is* working, there will be a transparency in the flow of information between partners — they will know virtually everything about each other. This pairing of trust and transparency constitutes the moral ground for the common law right against compelled testimony between spouses, and explains why this same immunity is not extended to (mere) friends.[32]

The remaining vast array of legal rights and benefits of marriage fit equally well this matrix of love and necessity — chiefly by promoting the patient tendance that such life requires (by providing for privacy, nurture, support, persistence) and by protecting against the occasions when necessity is cussed rather than opportune, especially when life is marked by crisis, illness and destruction.[33]

First and foremost, state-recognized marriage changes strangers-at-law into next-of-kin with all the rights which this status entails. These rights include: the right to enter hospitals, jails and other places restricted to "immediate family;" the right to

32. *See* FAMILY LAW, *supra* note 14, at 131-132.

33. *Baehr*, 852 P.2d at 59 (catalogues the most salient rights and benefits that are contingent upon marital status). The benefits discussed in this section are drawn from this case and from a catalogue of marital privileges given in a 1993 Georgia Supreme Court case, Van Dyck v. Van Dyck, 425 S.E.2d 853 (Ga. 1993) (Sears-Collins, J., concurring) (holding that a state law authorizing cutoff of alimony payments to a former spouse who enters into a voluntary cohabitation does not apply when the cohabitation in question is a lesbian one). *See also* 1 HAYDEN CURRY & DENIS CLIFFORD, A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES 2 (R. Leonard ed., 6th ed. 1991).

obtain "family" health insurance and bereavement leave; the right to live in neighborhoods zoned "single family only;" and the right to make medical decisions in the event a partner is injured or incapacitated.

Both from the partners themselves and from the state, marriage provides a variety of material supports which ameliorate, to a degree, necessity's unfriendly intervals. Marriage requires mutual support between spouses. It provides income tax advantages, including deductions, credits, improved rates, and exemptions. It provides for enhanced public assistance in times of need. It governs the equitable control, division, acquisition, and disposition of community property. At death, it guarantees rights of inheritance in the absence of wills — a right of special benefit to the poor, who frequently die intestate. For the wealthy, marriage virtually eliminates inheritance taxes between spouses, since spouses as of 1981 can make unlimited untaxed gifts to each other even at death.[34] For all, it exempts property from attachments resulting from one partner's debts. It confers a right to bring a wrongful death suit. And it confers the right to receive survivor's benefits.

Several marital benefits promote a couple's staying together in the face of changed circumstances. Included in the benefits are the right to collect unemployment benefits if one partner quits her job to move with her partner to a new location because the partner has obtained a new job there, and the right to obtain residency status for a noncitizen partner. Currently lesbians and gay men are denied all of these rights in consequence of being barred access to legal marriage, even though these rights and benefits are as relevant to committed gay relationships as to heterosexual marriages.

B. *The Structuring of Lesbian and Gay Relationships*

The portraits of gay and lesbian committed relationships that emerge from ethnographic studies suggest that in the way they typically arrange their lives, gay and lesbian couples fulfill in an exemplary manner the definition of marriage developed here.[35]

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34. FAMILY LAW, *supra* note 14, at 107.

35. *See* ALAN P. BELL & MARTIN S. WEINBERG, HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN (1978); PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES: MONEY, WORK, SEX (1983); DAVID P. MCWHIRTER & ANDREW M. MATTISON, THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP (1984); SUZANNE SHERMAN, LESBIAN AND GAY MARRIAGES: PRIVATE COMMITMENTS, PUBLIC CEREMONIES (1992); KATH WESTON, FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP (1991).

In gay relationships, the ways in which the day-to-day demands of necessity are typically fulfilled are themselves vehicles for the development of intimacy. It is true that gay and lesbian relationships generally divide duties between the partners — this is the efficient thing to do, the very first among the economies of scale that coupledom affords. But the division of duties is in the first instance a matter of personal preference and joint planning, in which decisions are made in part with an eye to who is better at doing any given task and who has free time — say, for ironing or coping with car dealerships. But adjustments are made in cases where one person is better at most things, or even everything. In these cases, the relation is made less efficient for the sake of equality between partners, who willingly end up doing things they would rather not do. Such joint decisions are made not from a sense of traditionally assigned duty and role, but from each partner's impulse to help out, a willingness to sacrifice, and a commitment to equality.[36] In these ways, both the development of intimacy through choice and the proper valuing of love are interwoven in the day-to-day activities of gay couples. Choice improves intimacy. Choice makes sacrifices meaningful. Choice gives love its proper weight.

C. *Weddings and Licensing Considered*

If this analysis of the nature of marriage is correct, then misguided is the requirement, found in most states, that beyond securing from government a marriage license, the couple, in order to be certifiably married, must also undergo a ceremony of solemnization, either in a church or before a justice of the peace.[37] For people are mistaken to think that the sacred valuing of love is something that can be imported from the outside, in public ceremonies invoking praise from God or community.[38] Even wedding vows can smack of cheap moral credit, since they are words, not actions. The sacred valuing of love must come from within and realize itself over time through little sacrifices in day-to-day existence. In this way, intimacy takes on weight and shine, the ordinary becomes the vehicle of the extraordinary, and the development of the marital relation becomes a mirror reflecting eternity. It is more proper to think of weddings with their ceremonial trappings and invocations as *bon voyages* than as a social institution which, echoing the legal institution of mar-

36. *See* WESTON, *supra* note 35, at 149-50.

37. FAMILY LAW, *supra* note 14, at 47-48.

38. On sacred values, see generally Douglas MacLean, *Social Values and the Distribution of Risk*, *in* VALUES AT RISK 85-93 (Douglas MacLean ed., 1986).

riage, defines and confers marital status. In a gay marriage, the sanctifications that descend instantly through custom and ritual in many heterosexual marriages descend gradually over and through time — and in a way they are better for it. For the sacred values and loyal intimacies contained in such a marriage are a product of the relation itself; they are truly the couple's own.

The model of marriage advanced here is highly compatible with, indeed it recommends, what has been, until recently, by far the most usual form of marriage in western civilization, namely, common law marriage — in which there is no marriage license or solemnization. Currently only about one-fourth of the states legally acknowledge common law marriages, but over the largest stretches of western civilization, legally certifiable marriage was an arrangement limited almost exclusively to the wealthy, the noble — in short, the few.[39]

In a common law arrangement, the marriage is at some point, as the need arises, culturally and legally acknowledged in retrospect as having existed all along. It is important to remember that as matter of law, the standard requirement of living together seven years is entirely evidentiary and not at all constitutive of the relation as a marriage.[40] So, for example, a child born in the third year of a common law marriage is legitimate from the moment of its birth and need not wait four years as Mom and Dad log seven years together. The marriage was there in substance all along. The social and legal custom of acknowledging common law marriage gives an adequately robust recognition to marriage as a lived arrangement and as a repository of values.

The securing of a marriage license is something the state may well want to encourage as a useful device in the administration the legal benefits of marriage. But the licensing should not be seen as what legally constitutes the marriage when questions arise over whether the marriage in fact exists (say, in paternity, custody, or inheritance disputes). In turn, it is completely legitimate for the state to terminate marital benefits if in fact the couple gets a license but is not fulfilling the definition of marriage as a living arrangement. The state already investigates such cases of fraud when marriage licenses are secured simply to acquire an enhanced immigration status for one of the licen-

39. FAMILY LAW, *supra* note 14, at 50. For a review of the literature on the vagaries of marriage as an institution, see Lawrence Stone, *Sex in the West: The Strange History of Human Sexuality*, NEW REPUBLIC, July 8, 1985, at 25-37. *See also* BOSWELL, *supra* note 13, at 32-33, 35.

40. FAMILY LAW, *supra* note 14, at 49.

sees.[41] Indeed, that immigration fraud through marriage licenses is even conceptually possible is a tacit recognition that marriage *simpliciter* is marriage as a lived arrangement, while legally certified marriage is and should be viewed as epiphenomenonal or derivative — and not vice versa.

D. *The Relation between Love and Justice*

If intimate or private relations of a certain quality provide the content of marriage, what can the law and public policy provide to marriage? Why do we need legal marriage at all? Folk wisdom has it that both love and justice are blind. But they are blind in different ways, ways which reveal possible conflicts and tensions between love and justice in practice.[42]

Justice is blind — blindfolded — so that it may be a system of neutral, impersonal, impartial rules, a governance by laws, not by idiosyncratic, biased, or self-interested persons. Principles of justice in the modern era have been confected chiefly with an eye to relations at arm's length and apply paradigmatically to competitions conducted between conflicting interests in the face of scarce resources. Equal respect is the central concern of justice.[43]

Love is blind — (as the song goes) blinded by the light — because the lover is stutteringly bedazzled by the beloved. In love, we overlook failings in those whom we cherish. And the beloved's happiness, not the beloved's respect, is love's central concern.

Within the family, we agree that the distribution of goods should be a matter of feeling, care, concern, and sacrifice rather than one conducted by appeal to impartial and impersonal principles of equity. Indeed, if the impersonal principles of justice are constantly in the foreground of familial relations, intimacy is destroyed. If every decision in a family requires a judicial-like determination that each member got an equal share, then the care, concern, and love that are a family's breath and spirit are dead. Justice should not be front and center in family life.

But love may lead to intolerable injustices, even as a spinoff effect of one of its main virtues. In the blindness of love, people will love even those who beat them and humiliate them. Con-

41. *Id.* at 47.

42. This section draws on some ideas in Claudia Mills & Douglas MacLean, *Love and Justice*, QQ: REPORT FROM THE INSTITUTE FOR PHILOSOPHY AND PUBLIC POLICY, Fall 1989, at 12-15.

43. For a classic statement of this position, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180-83, 272-78 (Harvard Univ. Press 1978)(1977).

versely, aggressors in these cases will feel more free to aggress against a family member than a stranger exactly because the family is the realm of love rather than of civic respect. Some of these humiliations are even occasioned by the distinctive opportunities afforded by traditional family life — in particular, society's misguided notion that everything that occurs behind the family's four walls is private, and so beyond legitimate inquiry.

Conflicts between love and justice can be relieved if we view marriage as a legal institution that allows for appeals to justice when they are needed. Justice should not be the motivation for loving relations, but neither should love and family exist beyond the reach of justice. Justice needs to be a reliable background and foundation for family life. Therefore, legal marriage should be viewed as a nurturing ground for social marriage, and not (as now) as that which legally defines and creates marriage and so tends to preclude legal examination of it.

E. *The Contribution of Minorities to Family Law Reform*

Marriage law should be a conduit for justice in moments of crisis — in financial collapse, in illness, at death — to guard against exploitation both in general and in the distinctive forms that marriage allows.

And indeed family law reform has generally been moving in this direction. State-defined marriage is an evolving institution, not an eternal verity. As noted, inequitable distributions of power by gender have been all but eliminated as a legally enforced part of marriage.[44] People at the margins of society have frequently provided the beacon for reform in family law. Already by the 1930s, black American culture no longer stigmatized children born out of wedlock, though whites continued to do so.[45] In 1968, the Supreme Court belatedly came to realize that punitively burdening innocent children is profoundly unjust, and subsequently, through a series of some thirty Supreme Court cases, illegitimacy has all but vanished as a condition legally affecting children born out of wedlock.[46] Further, black Americans provided to the mainstream the model of the extended family with its major virtue of a certain amount of open texture and play in the joints. In 1977, this virtue too was given constitutional status when the Supreme Court struck down zon-

44. *See supra* text accompanying notes 14-17.

45. GUNNAR MYRDAL, AN AMERICAN DILEMMA 935 (Harper & Row 1962) (1944).

46. FAMILY LAW, *supra* note 14, at 154-55.

ing laws that discriminated against extended, typically black, families.[47]

Currently society and its discriminatory impulse make gay coupling very difficult. It is hard for people to live together as couples without having their sexual orientation perceived in the public realm, which in turn targets them for discrimination. Sharing a life in hiding is even more constricting than life in a nuclear family. Members of nongay couples are here asked to imagine what it would take to erase every trace of their own sexual orientation for even one week. Still, despite oppressive odds, gays have shown an amazing tendency to nest.[48] And those lesbian and gay male couples who have persevered show that the structure of more usual couplings is not a matter of destiny, but of personal responsibility. The so-called basic unit of society turns out not to be a unique immutable atom; it can adopt different parts, and be adapted to different needs.

F. *Gay Couples as Models of Family Life*

Gay life, like black culture, might even provide models and materials for rethinking family life and improving family law. I will now chart some ways in which this might be so — in particular drawing on the distinctive experience and ideals of gay male couples.[49]

Take sex. Traditionally, a commitment to monogamy — to the extent that it was not simply an adjunct of property law, a vehicle for guaranteeing property rights and succession — was the chief mode of sacrifice imposed upon or adopted by married couples as a means of showing their sacred valuing of their relation. But gay men have realized that while couples may choose to restrict sexual activity in order to show their love for each other, it is not necessary for this purpose; there are many other ways to manifest and ritualize commitment. And so monogamy (it appears) is not an essential component of love and marriage. The authors of *The Male Couple* found that:

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47. Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977).

48. *See supra* note 35 (studies of gay couples).

49. Lesbian legal theorists have generally supposed marriage too sexist an institution to be salvaged, and lesbian moral theorists also have found traditional forms of coupling highly suspect. Some recommend communal arrangements as the ideal for lesbians. Others have proposed that lovers should not even live together. *See* Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 9, 14-17; Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"* 79 VA. L. REV. 1535 (1993); SARAH LUCIA HOAGLAND, LESBIAN ETHICS: TOWARD NEW VALUE (1988); CLAUDIA CARD, LESBIAN CHOICES (1994).

> [T]he majority of [gay male] couples, and *all* of the couples together for longer than five years, were not continuously sexually exclusive with each other. Although many had long periods of sexual exclusivity, it was not the ongoing expectation for most. We found that gay men *expect* mutual emotional dependability with their partners [but also believe] that relationship fidelity transcends concerns about sexuality and exclusivity.[50]

Both because marital sacrifices must be voluntary to be meaningful and because sexual exclusivity is not essential to marital commitment, the law should not impose monogamy on married couples. And indeed, half the states have decriminalized adultery.[51]

Other improvements that take their cue from gay male couplings might include a recognition that marriages evolve over time. *The Male Couple* distinguishes six stages that couples typically pass through: blending (year one), nesting (years two and three), maintaining (years four and five), building (years six though ten), releasing (years eleven through twenty), and renewing (beyond twenty years).[52] Relations initially submerge individuality, and emphasize equality between partners, though the equality usually at first takes the form of complementarity rather than similarity.[53] With the passage of years individuality reemerges. Infatuation gives way to collaboration. The development of a foundational trust between the partners and a blending of finances and possessions, interestingly enough, occurs much later in the relationship — typically after ten years.[54] While the most important factor in keeping men together over the first ten years is finding compatibility, the most important factor for the second decade is a casting off of possessiveness, even as the men's lives become more entwined materially and by the traditions and rituals they have established.

The fact that relations evolve makes the top-down model of legal marriage as creator of relations particularly inappropriate for human life. Currently at law, the only recognition that marriages change and gather moral weight with time, is the vesting of one spouse's (typically the wife's) interests in the other's Social Security benefits after ten years of marriage.[55] More needs to be explored along these lines. For example, one spouse's

50. McWHIRTER & MATTISON, *supra* note 35, at 285.
51. FAMILY LAW, *supra* note 14, at 130.
52. McWHIRTER & MATTISON, *supra* note 35, at 15-17.
53. *Id.* at 31-33.
54. *Id.* at 104-05.
55. FAMILY LAW, *supra* note 14, at 369, 386.

guaranteed share of the other's inheritance might rise with the logging of years, rather than being the same traditionally fixed, one-third share, both on day one of the marriage and at its fiftieth anniversary.[56] Men's relations also suggest, however, that the emphasis that has been put on purely material concerns, like blended finances, as the marks of a relation in domestic partnership legislation and in a number of gay family law cases is misguided and fails to understand the dynamics and content of gay relations.[57]

In gay male relations, the relation itself frequently is experienced as a third element or "partner" over and above the two men.[58] This third element frequently has a physical embodiment in a home, business, joint avocation, or companion animal, but also frequently consists of joint charitable, civil, political, or religious work. The third element of the relation both provides a focus for the partners and relieves some of the confining centrifugal pressures frequently found in small families. Whether this might have legal implications deserves exploration — it certainly provides a useful model for small heterosexual families.

All long-term gay male relationships, *The Male Couple* reports, devise their own special ways of making the relations satisfying: "Their styles of relationship were developed without the

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56. *Id.* at 104.

57. I am thinking in particular of the 1989 case, Braschi v. Stahl, 543 N.E.2d 49 (N.Y. 1989), in which New York's highest court ruled that two men who had been living together for years with blended finances — whom the court called "unmarried lifetime partners" — qualified as "family members" for the purposes of New York's law governing succession rights on apartment leases. At the time, this was considered the most progressive gay family law case of record. And in one regard the case was progressive. It proposed that the concept "family" should be given an operational definition: if it waddles, flaps, and quacks like a family, then it is a family. But then the case went on to dwell almost exclusively on the material and monetary side of life, so much so that in the end it appeared almost to be a case promoting property rights rather familial relations. And indeed this case has had no progeny.

Two years later, the same court abandoned any effort to define family relationships operationally or functionally and held that a lesbian had no rights at all to visit a daughter whom she had jointly reared with the girl's biological mother. Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991). Here only biology mattered. The same court held later that year that grandparents do have a right to visit their grandchildren even over the objections of both parents. In re Emanuel S., 577 N.E.2d 77 (N.Y. 1991). Clearly much work remains to be done in bring law into accord with what families and marriages functionally are and operationally do. Mere reference to the material circumstances of marriage will not do that work.

58. McWHIRTER & MATTISON, *supra* note 35, at 285.

aid of visible role models available to heterosexual couples."[59] This strongly suggests that legal marriage ought not to enforce any tight matrix of obligations on couples if their long-term happiness is part of the laws' stake. Rather the law ought to provide a ground in which relations can grow and change and even recognize their own endings.

IV. Conclusion: Religious and Legal Reforms Afoot

Given the nature of marriage and the nature of gay relations, it is time for the law to let them merge. And indeed there have been some general legal, social, and cultural shifts in the direction of acknowledging and supporting gay marriages. On January 1, 1995, gay marriages will become legal in Sweden; they have already become legal in Denmark (in 1989) and Norway (in 1993).[60]

In 1993, Hawaii's Supreme Court ruled that Hawaii's marriage laws, which the court interpreted as requiring spouses to be of different sexes, presumptively violate Hawaii's Equal Rights Amendment, which bars sex discrimination. The court ruled that the laws could only be upheld on remand if shown to be necessary to further a compelling state interest.[61] The court preemptively found illegitimate the two standard justifications that have been used in other jurisdictions to claim state interests in restricting marriage to different-sex couples — namely, appeals to the very definition of marriage and to procreation.[62] It looks promising, then, that the court will strike down the ban on same-sex marriages. And if one is married in Hawaii, one is married everywhere — thanks both to common law tradition and to the U.S. Constitution's full faith and credit clause.[63]

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59. *Id.* at 286.

60. *A Swede Deal for Couples*, Advocate, July 12, 1994, at 16.

61. Baehr v. Lewin, 852 P.2d 44, 60-68 (Haw. 1993). Subsequently, Hawaii's legislature voted that marriages in Hawaii must have mixed-sex partners; but since the court had already evaluated this condition in its constitutional analysis of Hawaii's laws, the legislature's vote seems to be a case of moral grandstanding and political posturing. *Hawaii Legislature Blocks Gay Marriage*, N.Y Times, Apr. 27, 1994, at A18.

62. *Baehr*, 852 P.2d at 48 n.1, 61 (Haw. 1993).

63. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1.

Gay marriage is also gradually coming into law through the back door of same-sex second parent adoptions. At least six states have allowed the lesbian partner of a woman with a child to adopt — become the second mother of — the child. But if Heather has at law two moms, what is the relation between her two parents? Strangers at law? Surely not. *Court Grants Parental Rights to Mother of Lesbian Lover*, N.Y. Times, Sept. 12, 1993, § 1, at 42.

As a matter of general cultural perception, recognitions of same-sex domestic partnerships are baby steps toward the legalization of gay marriage. A number of prestigious universities (including Harvard, Columbia, Stanford, the University of Chicago, and the University of Iowa), and prestigious corporations (including AT&T, Bank of America, Levi Strauss and Company, Lotus Development Corp., Apple Computer, Inc., Warner Brothers, MCA/ Universal Inc., The New York Times and Time Magazine) have extended to their employees' same-sex partners domestic partnership benefits, which include many of the privileges extended to their employees' heterosexual spouses.[64] These benefits typically include health insurance. Approximately thirty municipalities, beginning with Berkeley in 1984 and including San Francisco, Seattle, and New York City, have done the same, establishing in some cases a system of civic registrations for same-sex couples.[65]

In June 1994, Vermont became the first state to extend health insurance coverage to the same-sex partners of its state workers.[66] In August 1994, the California legislature passed a bill to establish a registry of domestic partners for both mixed-sex and same-sex couples and gave the partners three legal rights: 1) access to each other when one of them is hospitalized, 2) the use of California's short form will to designate each other as primary beneficiaries, and, most importantly, 3) the establishment of one's partner as conservator if one is incapacitated.[67] On September 11th, Governor Pete Wilson vetoed the legislation, issuing a veto message that failed even to acknowledge the bill's impact on the lives of California's gay couples.[68]

In 1984, the General Assembly of the Unitarian-Universalist Association voted to "affirm the growing practice of some of its ministers in conducting services of union of gay and lesbian couples and urges member societies to support their ministers in

64. *2 Universities Give Gay Partners Same Benefits as Married Couples*, N.Y. TIMES, Dec. 24, 1992, at A10; *Domestic Partnership Benefits Found Not to Increase Employer Costs*, WINDY CITY TIMES, June 4, 1992, at 9; FRONTIERS (Los Angeles), Oct. 7, 1994, at 16.

65. *Workers' Partners Get Benefit of Health Plan*, N.Y. TIMES, Oct. 31, 1993, § 1, at 40.

66. *Vermont Union Wins Benefits for Partners*, N.Y. TIMES, June 13, 1994, at A12. In some jurisdictions, including Vermont, such benefits are also extended to unmarried but cohabiting heterosexual couples.

67. *Senate Passes Historic Domestic Partners Bill*, FRONTIERS (Los Angeles), Sept. 9, 1994, at 17.

68. *Domestic Partner Bill Vetoed in California*, N.Y. TIMES, Sept. 13, 1994, at A6; *see* FRONTIERS (Los Angeles), Oct. 7, 1994, at 36.

this important aspect of our movement's ministry to the gay and lesbian community."[69]

In October 1993, the General Assembly of the Union of American Hebrew Congregations — which is the federation of U.S. and Canadian Reform synagogues — adopted a resolution calling for the legal and social recognition and support of gay domestic partners.[70]

Mainline Protestant denominations have ceased full scale attacks on gay and lesbian relationships and are struggling with the issue of blessing them.[71] In June 1994, the General Assembly of the Presbyterian Church (U.S.A.) came within a few votes of permitting minsters to bless same-sex unions.[72] Also in June 1994, a draft proposal by the Episcopal bishops, after describing homosexuality as an orientation of "a significant minority of persons" that "cannot usually be reversed," went on to say that sexual relationships work best within the context of a committed lifelong union: "We believe this is as true for homosexual relationships as for heterosexual relationships and that such relationships need and should receive the pastoral care of the church."[73] In October 1993, a draft report by a national Lutheran study group on sexuality had called for the blessing and even legal acknowledgement of loving gay relationships.[74]

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69. Paul H. Landen, Unitarian-Universalist Views on Issues in Human Sexuality 134 (1992)(unpublished Ph.D thesis, Michigan State University).

70. General Assembly, Union of American Hebrew Congregations, Recognition For Lesbian and Gay Partnerships (Oct. 21-25, 1993).

71. *See* William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1497-1502 (1993).

72. *Presbyterians Try to Resolve Long Dispute*, N.Y. TIMES, June 17, 1994, at A9.

73. *Episcopal Draft on Sexuality Tries to Take a Middle Course*, N.Y. TIMES, June 26, 1994, § 1, at 9.

74. *Lutherans to Decide Whether to Sanction Homosexual Unions*, N.Y. TIMES, Oct. 21, 1993, at A1; *Lutheran Church Stalled in Drafting Sex Statement*, N.Y. TIMES, Nov. 26, 1993, at A14.

In marked contrast, the Catholic Church has dug in its heels on the issue. In February 1994, Pope John Paul II issued a 100 page "Letter to Families." Among other things, the letter sent a message to Catholics to refrain from supporting the notion of gay and lesbian marriages, calling such unions "a serious threat to the family and society" and viewing them as "inappropriately conferring an institutional value on deviant behavior." The Pope's own definition of marriage, however, seems to be as circular in its exclusion of gays as those definitions explored above (*See supra* part II, A.1): "Marriage . . . is constituted by the covenant whereby a man and a woman establish between themselves a partnership for their whole life." *Pope Calls Gay Marriage Threat to Family*, N.Y. TIMES, Feb. 23, 1994, at A2. The complete English language text of the Letter is published in 23:37 Origins: CNS Documentary Service (March 3, 1994) 637-59.

These actions addressing the material dimensions of gay relationships through domestic partnership legislation and the spiritual dimensions of gay relationships through holy union ceremonies constitute true moral progress if they are steps toward the full legal and religious recognition of gay marriages. They are morally suspect, though, if they simply end up establishing and then entrenching a system of gay relations as separate but equal to heterosexual ones. To move from a position of no gay blessings and privileges to a structure of separate blessings and privileges is to traverse only the moral ground from the Supreme Courts's 1857 *Dred Scott* ruling upholding the form of white supremacy under which blacks could not marry at all — slavery — to its 1896 *Plessy v. Ferguson* ruling upholding the reign of white supremacy that allowed blacks to marry blacks but not to marry whites.[75]

Whether domestic partnership legislation is a stepping-stone or a distracting impediment to gay marriage cannot be known categorically. Whether it is one or the other depends on a number of factors: the specific content of the legislation, the social circumstances of its passage, and the likely social consequences of its passage. I conjecture that states will take the route of domestic partnership legislation until they find out that a "separate but equal" structuring of gay and nongay relationships is hopelessly unwieldy. Then states will resort to the benefits of simplicity and recognize gay marriages straight out.

If the analysis of marriage in this article is correct, then marriage, like knowledge, is a common good, one which any number of people can share without its diminution for any one of the sharers. So heterosexuals have nothing to lose from the institutionalization of gay marriage. And the legalization of gay marriage is a moral advance over mere civil rights legislation. For civil rights legislation tends to treat gayness as though it were a property, like having an eye color or wearing an earring, which one could have in isolation from all other people. But gay marriage is an acknowledgement that gayness, like loving and caring, is a relational property, a connection between persons, a human bonding, one in need of tendance and social concern.

75. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); Plessy v. Ferguson, 163 U.S. 537 (1896). In 1883, the Supreme Court in a cursory opinion had upheld against constitutional challenge anti-miscegenation laws. Pace v. Alabama, 106 U.S. 583 (1883). These laws were finally struck down in 1967. Loving v. Virginia, 388 U.S. 1 (1967).