

What's Home Got To Do With It? Kinship, Space, and the Case of Family, Spouse and Civil Partnership in the UK

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INTRODUCTION

The analysis that is offered in this Article has two dimensions. The first focuses upon the context in which the battle for legal recognition of same-sex partnerships has taken place. Using two key reported decisions from the U.K.'s final domestic court of appeal, *Fitzpatrick v Sterling Housing*¹ and *Ghaidan v Mendoza*,² the objective here is to explore the shifting terrain against which legal activism relating to the recognition of same-sex domestic relationships has achieved some success in the U.K. These two cases represent key developments in the judicial recognition of the rights of parties in same-sex domestic relationships. These cases have particular importance. In *Fitzpatrick*, the House of Lords decided that a same-sex couple's relationship fell within the meaning of "family." In *Ghaidan* the court decided that the term "spouse" was to be applied to same-sex couples.

Some of the key legal effects flowing from these decisions—concerned with succession rights in relation to interests and rights in property—have been incorporated into the new law that gives State recognition and legitimacy to some same-sex domestic relationships, the Civil Partnership Act of 2004.³ The reforms contained in that Act have been described as introducing a new legal form of domestic partnership that is equivalent to marriage.⁴

The second theme of the Article focuses upon the question, "What is marriage for?" I focus on one of the policies, which the U.K. Government offered as a key rationale for the introduction of a law to give legal recognition to registered same-sex domestic relationships, civil partnership: the promotion

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1. [1999] 4 All E.R. 705 [hereinafter *Fitzpatrick*].

2. [2004] U.K.H.L. 30 [hereinafter *Ghaidan*].

3. 2004, c. 33 (Eng.). On property relations and interests in the home, see Schedule 8 of the Act.

4. See Baroness Hale of Richmond in *Ghaidan*, *supra* note 2, at ¶ 140.

of security, stability, and safety. In the exploration of the first of the two themes, the analysis focuses upon some of the “small changes” at work in the legal recognition of same-sex couples.⁵

The analysis that is offered in this Article seeks to widen the “small changes” agenda. More specifically, I want to draw attention to the importance of “small changes” associated not with a recognition politics of homosexuality, but with a different politics focusing on kinship. I use kinship rather than marriage to highlight a key concern of this different political landscape: the privilege attached to the form of intimate relations within marriage.

Kinship is a term that refers to a more diverse set of relationships that might form a basis of intimate social organisation. Judith Butler offers a useful definition of kinship as “a set of practices that institute relationships of various kinds which negotiate the reproduction of life and the demands of death”⁶ Despite its privileged status, marriage is but one set of practices, institutions, and relationships of kinship. *Fitzpatrick* highlights the connection between legal recognition of homosexuality and the “small changes” that record the struggles for legal recognition of more diverse kinship relations. *Ghaiden* adds another “small changes” context to the legal recognition of same-sex domestic relationships that is connected to but not reducible to a politics of recognition of homosexuality: human rights.

My consideration of *Fitzpatrick* and *Ghaiden* also has a second objective, to add the formerly neglected spatial dimension of the politics of legal recognition of same-sex partnerships. There is a growing body of work on the spatial dimensions of lesbian and gay identity politics in general and law and legality in particular.⁷ My concern here is to draw out and analyze a key spatial theme of the *Fitzpatrick* and *Ghaiden* litigation: “home.” An analysis of the idea of “home” also provides a link with the policy objectives associated with the legal recognition of same-sex domestic partnerships identified above, of security, stability, and safety. “Home,” I will argue, is a central spatial idea of security, stability, and safety. I want to use “home” as a heuristic device to examine and critique the politics that produces and sustains the associations between marriage and its equivalent, civil partnership, as a location of safety, stability and security.

5. Kees Waaldijk, *How The Road to Same-Sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIP: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 437 (R. Wintermute & M. Andenaes eds., 2001).

6. See Judith Butler, *Is Kinship Always Already Heterosexual?*, 13 DIFFERENCES 14, 15 (2002).

7. See, e.g., NICHOLAS K. BLOMLEY, *LAW, SPACE, AND THE GEOGRAPHIES OF POWER* (1994); DAVINA COOPER, *GOVERNING OUT OF ORDER: SPACE, LAW, AND THE POLITICS OF BELONGING* (1998); THE PLACE OF LAW (Austin Sarat et al., eds. 2003).

I. THE SHIFTING TERRAIN: KINSHIP AND "SMALL CHANGES"

Fitzpatrick v. Sterling Housing and *Ghaidan v. Mendoza* represent key developments in the U.K. in the struggle for judicial recognition of the rights of parties in same-sex domestic relationships. Both cases concern succession rights relating to interests in a domestic tenancy. In both cases, the particular law in question is to be found in the Rent Act of 1977,⁸ as amended by the Housing Acts of 1980⁹ and of 1988¹⁰. The relevant parts of the law are to be found in Schedule 1, paragraphs 2 and 3, of the amended Rent Act of 1977. Those parts read as follows:

2 (1) The surviving spouse (if any) of the original tenant, if residing in the dwelling house immediately before the death of the original tenant, shall after the death be the statutory tenant if and so long as he or she occupies the dwelling house as his or her residence.

(2) For the purpose of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant. . . .

3 (1) Where paragraph 2 above does not apply, but a person who was a member of the original tenant's family was residing with him in the dwelling-house at the time of and for a period of 2 years immediately before his death then, after his death, that person or if there is more than one such one of them as may be decided by agreement, or in default of agreement by the county court, shall be entitled to an assured tenancy of the dwelling-house by succession.

In the first case, Martin Fitzpatrick lived with John Thompson, the tenant of the property, as partners from 1976 until Thompson's death in 1994. In 1986, as a result of an accident, Thompson had a stroke, which left him severely incapacitated. Fitzpatrick devoted all his time and energy to giving his partner the twenty-four-hour care he then needed, feeding him and nursing him until his death. Subsequent to his death, Sterling Housing, a social housing landlord with charitable status, asked Fitzpatrick to leave his home, offering him the tenancy of alternative, smaller, accommodation. Fitzpatrick argued that he had a right to succeed Thompson, the tenant, on the tenant's death. He claimed this right on the basis that he was the spouse of Thompson. In the alternative, he argued that he was entitled to succeed on the basis that he satisfied the statutory succession requirements as a member of Thompson's family and that he had resided with the tenant in that capacity for the required statutory period of two or more years before his death.

In the second case, Juan Godin Mendoza had been in a long-term relationship (beginning in 1983) with his partner Hugh Wallwyn-James, who

8. Rent Act, 1977, c. 42 (Eng.).

9. Housing Act, 1980, c. 51 (Eng.).

10. Housing Act, 1988, c. 50 (Eng.).

was the tenant of a basement flat, which was their home. After the death of Wallwyn-James in January 2001, the landlords brought an action for possession. In response Mendoza argued that he had the right to a statutory tenancy on the basis that he was the surviving spouse of the tenant. This raised a challenge to the decision in *Fitzgerald*, in which the House of Lords had rejected Fitzpatrick's claim to be recognized as the tenant's spouse but affirmed his claim to be granted an "assured tenancy" on the basis of his membership of his partner's family.

Mendoza's argument was based upon the Human Rights Act of 1998,¹¹ which had come into effect after the decision in *Fitzpatrick*. In part, Mendoza argued that to exclude parties in same-sex domestic relationships from the category of spouse was discriminatory. Succession rights as a spouse were more beneficial than those available to a person categorized as a family member. With regard to the latter, succession depended upon the satisfaction of a two year residence requirement, which is not a prerequisite of a tenancy available to a spouse. In addition Mendoza argued that the tenancy granted on the basis of being "a member of the family"—an assured tenancy—offered fewer advantages and protections than a tenancy available to "a spouse"—a statutory tenancy. Under the former, the landlord could charge the market rent. Furthermore, an assured tenancy was less secure. Eviction for non-payment of rent was easier under an assured tenancy. Finally, no succession rights were connected to an assured tenancy whereas a statutory tenancy could be passed on. Central to the claims of Fitzpatrick and Mendoza are the parameters of the kinship relations recognized in law. More specifically, the disputes highlight "family" and "spouse" as legal kinship concepts that refer to a set of practices, institutions and relationships related to the transmission of interests and rights concerned with sustaining, transmitting, reproducing and securing a home.

II. THE LEGAL VICISSITUDES OF "FAMILY"

The decisions collected in the *Fitzpatrick* case draw attention to the contested and shifting parameters of meaning of these two kinship concepts. The decision of the House of Lords offers a rich snapshot of the changing legal landscape of legitimate kinship relations in this context over the last ninety years. The legislative origins of attempts to define legitimate kinship relations in this context begin with the Increase of Rent and Mortgage Interest (War Restrictions) Act of 1915¹² and the Increase of Rent and Mortgage Interest (Restrictions) Act of 1920,¹³ which granted succession rights to the widow of the tenant who died intestate or in the event of there being no widow or where

11. Human Rights Act, 1988, c. 50 (Eng.).

12. 5 & 6 Geo. 5, c. 97 (Eng.).

13. 15 & 16 Geo. 5 c. 17.

the original tenant was a woman, to family members.¹⁴ Changes under the Rent Act of 1965¹⁵ extended the duration of succession rights, giving protection to the second generation of widows and family members. The Rent Act of 1977 consolidated the existing law. The next major step was section 76 of the Housing Act of 1980, which extended rights of succession to a surviving spouse of either sex. In 1988, the Housing Act introduced an amendment to the Rent Act of 1977 redefining the term "spouse." "Spouse" was extended to include persons living as husband and wife. This particular reform is of special interest in this context. It is an exceptional and relatively recent attempt by the legislature to define the meaning of a category of kinship. Legislative attempts in this ninety-year history to define the other key kinship category found in this context, "family," are notable by their absence. Changes in the meaning of that category have taken place through litigation.

The *Fitzpatrick* decision falls squarely within this judicial reform tradition.

The judgments and final decision in *Fitzpatrick* indicate that the term "spouse" is a kinship category most resistant to judicial change. In part, *Fitzpatrick's* claim was that he had spousal succession rights. Central to that claim was an argument that "spouse" is not a gender-specific term.¹⁶ As a result of the 1988 reforms, he argued, the term "spouse" was no longer a term confined to parties in a domestic relationship who had complied with the formal requirements of marriage. The House of Lords accepted that the 1988 reforms extended the range of kinship relations that might fall within the parameters of the term spouse. However, they went on to conclude that there remained an assumption in that reform that the kinship relations falling under that extended term must comply with the marital requirement that one party be male and the other be female. We will return to the challenge that *Ghaidan* raised later.

While *Fitzpatrick* failed to establish his claim on the basis of being his partner's "spouse," he did succeed on the basis of being a member of his partner's family. Central to this success are the various small changes that have taken place in the meaning of the term "family" in a heterosexual context. As successive members of the *Fitzpatrick* court acknowledge, in contrast to the term "spouse," the legal map of the term "family" shows that this term is a more elastic kinship concept capable, both within and outside the law, of multiple and diverse meanings. The judgments in *Fitzpatrick* offer a snapshot of the various contexts, in which struggles over the meaning of this term have taken place.

14. The Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, 23 & 24 Geo. 5, c. 32, § 13 (Eng.), imposed a requirement that those claiming as family members had to show that they had resided in that property as a family member for six months prior to the death of the tenant.

15. Rent Act, 1965, c. 75 (Eng.).

16. Similar arguments had been rejected by an earlier Court of Appeals decision, *Harrogate Borough Council v. Simpson*, 2 F.L.R. 91 (1986).

The judgment illustrates that various criteria have been used to shift and police the boundaries of the meaning of "family." One approach defines the parameters of family by reference to the concept of affinity, emphasizing the importance of legal processes of relationship formation, in particular marriage but also adoption. Affinity also works to bring a wider network of persons within the parameters of "family" by way of connections arising out of these formal processes, such as those who can be categorized as "in-law" and "step" relationships. Another approach highlights consanguinity, which gives priority to themes of descent from a common source. Biological links such as "birth" and degrees of proximity and distance through "blood lines" are given importance in this approach. Another approach extends the parameters of recognized kinship relations falling within the meaning of "family" by way of focusing on conduct and more specifically conduct that mimics already legally recognized marital relations. Here family might include a de facto marriage or a de facto adoption.

The parameters of legitimate kinship that might fall under the category of "de facto family" have been highly contested, resulting in a changing landscape that, when viewed out of historical time, produces a legal picture that appears to be contradictory and inconsistent. Struggles over the legal recognition of a relationship between a man and a woman, living together as husband and wife but outside of the formal institution of marriage, are the central focus of this particular lesbian and gay struggle for recognition of same-sex relationships and have a special significance in the court's reasoning in *Fitzpatrick*. I turn now to those cases.

The earliest judicial recognition of a heterosexual relation outside of formal marriage being recognized as a "family" in the context of access to succession rights is where the domestic relationship is marked by clear evidence of reproduction, with children arising out of the relationship.¹⁷ More controversial were heterosexual relationships where this child-rearing and intergenerational dimension of kinship was lacking—that is where there were no children. In *Fitzpatrick*, Lord Slynn identified two key decisions, *Gammans v. Ekins*¹⁸ and *Dyson Holdings Ltd. v. Fox*.¹⁹ These cases, he suggested, represented two extremes of judicial responses to the limits of legitimate kinship in this context.

In *Gammans*, the defendant to the landlord's claim for possession of the premises had lived with the tenant for some twenty years. He had adopted her surname and had "posed" as her husband throughout that time.²⁰ While they never married, neighbours regarded them as man and wife. The Court of Appeal overturned a decision made in the County Court that the defendant was a member of her family. In doing so the Court of Appeal refused to grant the

17. See *Hawes v Evenden* 1 W.L.R. 1169 (1953).

18. 2 K.B. 328 (C.A. 1950).

19. Q.B. 503 (C.A. 1975).

20. *Gammans*, *supra* note 18, at 141e-f.

man succession rights. Lord Justice Asquith endorsed the analysis of the law presented by counsel for the landlord:

Counsel for the landlord was right in saying that the material decisions limit membership of the same family to three relationships—first, that of children; secondly, those constituted by way of legitimate marriage between husband and wife; and thirdly, relationships whereby one person becomes in loco parentis to another. Beyond that point the law has not gone.²¹

These various mechanisms, Lord Justice Jenkins noted, “extend the meaning of the word ‘family’”²² However, the application of these criteria to the defendant led the court to conclude that his relationship with the deceased, the tenant, could not be categorized as a family relationship, there being neither children nor compliance with the necessary formal requirements of marriage. Asquith went on to state the essence of the defendant’s difficulties in the following terms:

If . . . the relationship involves sexual relations, it seems to me anomalous that a person can acquire a “status of irremovability” by having lived in sin, even if the liaison has been one protracted in time and conclusive in character. To say that two people masquerading, as these two were, as husband and wife—there being no children to complicate the picture—that they were members of the same family, seems to me an abuse of the English language²³

Here, in the absence of children and formalities the domestic relationship is characterised as a sexual relationship which provides no basis for legitimation and hence, no basis for rights and interests granted by law.

The binary relation of natural/unnatural is used to mark and police the boundaries of legitimate kinship. For example, the third judge, Master of the Rolls Sir Raymond Evershed, singles out the statutory reforms that change the patrilinear dimensions of legitimate kinship relations. The language of the Act, which seems to confer succession rights on the husband of a female tenant, he explained is “peculiar.” The “peculiar” language marks this reconfigured kinship relation as an “unnatural” one.²⁴ He explains, “In the case of a childless marriage I should certainly not have thought it natural to refer to the husband as a member of the wife’s family.”²⁵ The benefits granted by participation in that institution, Evershed suggests, are not to be readily extended beyond that patrilinear context.²⁶

21. *Gammans*, *supra* note 18, at 141 g-h.

22. *Gammans*, *supra* note 18, at 142 b.

23. *Gammans*, *supra* note 18, at 141 h.

24. *Gammans*, *supra* note 18, at 143 a-b.

25. *Gammans*, *supra* note 18, at 143 a-b.

26. The patrilinear aspects of the case are commented upon by the judges in *Dyson Holdings* but the judges in this later case conclude that such aspects are no longer a requirement of recognized kinship relations.

In another comment, Evershed offers a different insight into the nature of legitimate kinship: "It may not be a bad thing that it is shown by this decision that in the Christian society in which we live one, at any rate, of the privileges, which may be derived from marriage, is not equally enjoyed by those who are not married."²⁷ Here the rejection of an argument to extend the parameters of legally recognised kinship relations to an enduring heterosexual sexual relationship focuses upon the preservation of a particular institutional form of kinship, marriage. For Evershed this form of kinship is closely associated not only with biological reproduction but also with the preservation and social reproduction of a particular moral and religious social order.

In *Dyson Holdings*, the defendant to the landlord's application for possession had been living with the tenant for over forty years. She took his name and was known as "Mrs Wright." The couple pooled their incomes and used the monies to pay expenses including the rent. There were no children and the couple never went through a formal ceremony of marriage. Mr. Wright, the tenant, died in 1961. Subsequent to that event, "Mrs Wright" continued to pay the rent, the tenancy remaining in the name of her deceased partner. It was more than ten years after the death of the tenant that the then landlords, Dyson Holdings, questioned this state of affairs. The court concluded that this was a family relationship.

Again, the issue is the absence of signs of reproduction from this relationship. Master of the Rolls Lord Denning rendered the requirement of reproduction an arbitrary requirement of "family:"

[I]f the couple had a baby nineteen years ago which died when a few days old, or as a young child, the woman would be a "member of the tenant's family," but if the baby had been still-born, or if the woman had had a miscarriage nineteen years ago, she would not be a member of his family. Yet for the last nineteen years they had lived together as man and wife. That seems to be a ridiculous distinction. So ridiculous, indeed, that it should be rejected by this court²⁸

All the judges in the Court of Appeal emphasize the social and political nature of the category "family." The shifting and contested nature of legitimate kinship relations gives legitimacy to the court's extension of legally recognized kinship relations beyond relationships that do not fit neatly within the parameters of relationships defined by reference to strict compliance with formalities or the rigidity of biological models and pathways of descent. The frequency of heterosexual domestic relationships that have not gone through a ceremony of marriage and the decline in the stigma attached to such relationships were offered as evidence of changes in the pattern of kinship

27. *Gammans*, *supra* note 18, at 143.

28. *Dyson Holdings*, *supra* note 19 at 1033 c-d.

relations.²⁹ The challenge for the court is then how to determine the parameters of “family” in this more complex and shifting landscape.

The court emphasized themes of duration, permanence, and stability. Passing as husband and wife would not in itself be sufficient. Time plays an important role here. Putting these requirements into the context of a heterosexual relationship defined by reference to sexual practices, Lord Justice James noted, “This is not to say that every mistress should be so regarded. Relationships of a casual or intermittent character and those bearing indications of impermanence would not come within the popular concept of a family unit.”³⁰

If duration is the essence of “family,” then that category may potentially include a wide variety of relationships; this might include same-sex partnerships. The House of Lords’s decision in *Carega Properties (formerly Joram Development) v. Sharrat*³¹ has particular importance for *Fitzpatrick* in this context. In the former case, their Lordships explored the significance of duration upon those kinship relations, which might be categorised as “family.”

In *Joram Development*, the relationship was that of a seventy-five-year-old woman, the tenant, and a twenty-four-year-old man. While a heterosexual relationship, the decision suggests that this was not a sexual relationship; the couple acted as aunt and nephew. The judgment gives little to explain the division between those kinship relations that may or may not give rise to succession rights. The “most unusual” facts of the case³² were offered as a justification for the refusal to consider the factors that differentiate this kinship relation from others that have been officially recognised. However, this does not mean that the reported decision does not offer some guidance on how the boundaries of that term are to be drawn. Lord Diplock offers the following extract from the judgment of Lord Justice Russell, in the earlier case of *Ross v. Collins*, as the rationale for his decision:

[Family] still requires, it seems to me, at least a broadly recognizable de facto familial nexus. This may be capable of being found and recognised as such by the ordinary man—where the link would be strictly familial had there been a marriage or where the link is through adoption of a minor, de jure or de facto, or where the link is “step,” or where the link is “in-law” or by marriage. But two strangers cannot, it seems to me, ever establish artificially for the purposes of this section a familial nexus by acting as brothers or as sisters even if they call each other such and consider their relationship to be tantamount to that. Nor in my view, can an adult man and woman who establish a platonic relationship establish a familial nexus by acting as a devoted

29. *Dyson Holdings*, supra note 19, at 1033 e-f (Lord Denning) and 1035 b-d (James LJ).

30. *Dyson Holdings*, supra note 19, at 1035 d.

31. [1979] 2 All E.R. 1084. See amendment above. The Court of Appeal report is under the name of *Joram*.

32. *Id.* at 1084 h.

brother and sister or father and daughter would act, even if they address each other as such and even if they refer to each other as such and regard their association as tantamount to such. Nor in my view, would they indeed be recognised as familial links by the ordinary man.³³

In the first instance, the de facto parameters of kinship recognized here are somewhat circular. Only those relations recognised in law will be recognised in law. This circular argument also figures the heterosexual nature of these relationships: Legal kinship relations are constructed through heterosexuality, only heterosexual relations may be figured as legal kinship relations. However, as the judgments in *Joram Development* indicate, heterosexuality appears not so much a necessary, but a sufficient dimension, of legal kinship, as not all durable heterosexual relationships of close proximity will fall within the definition of de facto family.

The substance of "family" is difficult to determine from this judgment. However, the formation and maintenance of the boundaries of legitimate kinship is clearly a high judicial priority. *Joram Development* offers an insight into the judicial techniques, by which these boundaries are formed and policed: The binary opposition between essence and artifice is crucial. This binary is not a distinction of recent invention, but one that is well established.³⁴ It is present in *Gammans*, in which the childless relationship of a man and woman living in a marital way is described by Asquith as "a masquerade" and by Jenkins as an "artificial relationship."³⁵

The justices construct the already legitimated relationship, figured as essence, in opposition. The division between essence and artifice is a distinction and a boundary that is rich in meaning. These many meanings are produced through the operation of these terms as metaphors and metonyms. For example, these terms draw a boundary separating order from disorder. Extending legal recognition raises not so much a vision of new kinship relations that might facilitate human and social reproduction but the spectre of disorder/chaos, which is figured in various ways. This chaos is heralded in the characterization of change as "an alarming vista"³⁶ and also takes the form of a threat to the English language.³⁷ For Jenkins in *Gammans*, the terms "brother" and "sister" illustrate the threat to language. He explains, "I see no reason why two friends should not set up house together, one changing his or her name to that of the other, and then to give out that they were sisters or brothers or

33. [1979] 2 All E.R. 1084, 1087 (quoting *Ross* [1964] 1 All E.R. 861, 866)

34. Nor is it a distinction that is peculiar to the legal recognition of kinship relations. It is a distinction that had widespread significance in relation to the recognition of legal subjects. For example, the distinction has widespread significance in corporate law. See Leslie J. Moran, *The Art of Corporate Criminal Capacity*, 1 SOC. & LEGAL STUD. 371 (1992).

35. See *Gammans*, *supra* note 18 at 141 a (Asquith LJ) and 141 h (Jenkins lj).

36. See *Gammans*, *supra* note 18, at 142 g-h.

37. See *Gammans*, *supra* note 18, at 142 a.

brother and sister as the case might be”³⁸ The anxiety expressed here is that the terms “brother” and “sister” are no longer natural (fixed) relations of consanguinity but nothing more than a cultural effect, a fabrication. Nor in this choice of examples, we might speculate, is the spectre of incest far from the judicial mind. This draws attention to another way in which the binary oppositions of order and disorder are represented: by way of the human form. The figure of the family as chaos that is offered by Diplock above is the “stranger” and more specifically the family made up of “strangers.”³⁹

Zygmunt Bauman, writing about the nature of “strangers” explains, “There are friends and enemies. And there are *strangers*.”⁴⁰ This observation highlights the peculiar significance of the stranger. The stranger is a third figure. In the first instance, Bauman suggests, there is the relation of friend to enemy, which he explains, is a “master opposition,” between inside and outside, which:

sets apart truth from falsity, good from evil, beauty from ugliness. It also differentiates between proper and improper, right and wrong, tasteful and unbecoming. It makes the world readable and thereby instructive. It dispels doubt. . . . It assures that one goes where one should.⁴¹

The relation of friend to enemy described here is a violent hierarchy with a very specific quality: It creates the social and cultural order with characteristics of certainty and stability. Bauman describes the relation as a “cozy antagonism” and a “collusion” where the “enemy” is always represented as distinct, separate and distant from the friend, geographically, socially, and culturally.⁴² The third term, “stranger,” is a figure that disrupts this stable and comfortable state of affairs. The stranger, Bauman tells us, is; “[N]either friend nor enemy; because he may be *both*.”⁴³ The stranger conflates opposites.

Diplock’s image of the family as made up of “strangers” turns the family into a “stranger.” This is an image of the family that is neither the “true” nor the “false” family but *both*, the truth of familial relations *and* its falsity. As a “stranger” this family is both good *and* evil; the propriety of the family (its proper meaning) *and* its impropriety (its improper meaning) co-exist. There is also a spatial dimension in this image of the stranger family: It is a family that is both distant from the “true” family *and* proximate to it. The figuration of the family through the category of the stranger produces that family as a troubling and persistent ambivalence, representing the world as an unreadable place, a place of doubt and uncertainty. It is a family form that gives shape to an experience of loss, of orientation, of direction, and place. As a relation of

38. *Gammans*, *supra* note 18, at 142, h.

39. See LESLIE J. MORAN ET AL., *SEXUALITY AND THE POLITICS OF VIOLENCE* (2003), especially Chapter 8 for an analysis of the politics of estrangement in a lesbian and gay context.

40. ZYGMUNT BAUMAN, *MODERNITY AND AMBIVALENCE* 53 (1991).

41. *Id.* at 54.

42. *Id.* at 55.

43. *Id.* at 55 (emphasis added).

“both”, “and” (both the same as the already recognised family and at the same time radically different from it), figured as an affinity of strangers, this family personifies a special threat and an exceptional danger, “more horrifying than that which one can fear from the enemy.”⁴⁴ Diplock’s fantasy of a family of strangers is an image of a family that signifies the family not as the foundational social relation of a society but as a relationship that embodies a loss of orientation, the lack of a foundation and, as such, a state of exceptional danger. This image of chaos, and the anxieties it invokes, produces the perceived importance and felt urgency of the need to police and conserve the boundaries of legitimate kinship.

How does this impact upon the judges in *Fitzpatrick*? The two dissenting judges, Lords Hutton and Hobhouse, follow Diplock’s judgment emphasizing the dangers of contingency and the security of formality and consanguinity. In contrast to this, the argument found in the judgments of the majority—in support of the conclusion that two gay men in a relationship fall within the definition of “family”—puts permanence, duration, and stability center stage. While the priority given to these aspects of kinship relations might have been developed in a heterosexual marital context in the final instance, their heterosexual associations are taken to be neither necessary nor sufficient for a familial kinship relationship to be legally recognized. With regard to Fitzpatrick’s claim, it is the evidence of mutual interdependence, shared lives, the evidence of durable caring and love, of commitment and support, that were made significant in order to satisfy the pre-existing requirements of de facto marital family relations.

Can Waaldijk’s “law of small change” hypothesis⁴⁵ be applied here? First, it should be noted that he develops this formula in relation to recognition of and acceptance of homosexuality and not specifically with regard to change in other contexts. Second, he frames it as a hypothesis that relates to legislative change. The *Fitzpatrick* decision does not fall neatly within either of the two parameters of Waaldijk’s original hypothesis. While the case is about recognition of same-sex rights, my argument is that the context, in which those rights emerges should not and cannot be confined to a separate and free-standing struggle for the recognition of homosexuality. *Fitzpatrick* offers much evidence of the importance of gender politics in previous attempts to shift the meaning of legitimate kinship relations in order to protect women’s interests and create rights for women.

Second, *Fitzpatrick* draws attention to the need to think of law reform outside the limits of legislative change. Through statutory interpretation the judiciary plays a role as a reformer of law. The substance of Waaldijk’s hypothesis is that for change to be possible, it must be characterized as small

44. *Id.* at 55.

45. Waaldijk, *supra* note 5.

and be accompanied by further “condemnation of homosexuality.”⁴⁶ There is clear evidence in support of a requirement that any change be presented as a small change. However, this is far from a requirement specific to the struggle for homosexual recognition in law. Within the Western hermeneutic legal tradition, the practice of generating legal meaning emphasizes repetition and continuity of meaning, not difference and change in meaning.⁴⁷ In this scheme, judicial interpretation must be represented as continuity. In *Fitzpatrick*, continuity comes from the application of the previous court decisions. *Dyson Properties* provides perhaps the best example of continuity even though the substance of the decision involves a radical departure. The judgments shroud change with the trappings of continuity. Likewise, in *Fitzpatrick*, the House of Lords represents their radical support for same-sex couples as no change at all.

With regard to Waaldijk’s other suggestion, that any change that advances the recognition of homosexuality in law is accompanied by a denunciation, I again must raise some doubts about this characterization of legal change peculiar to that particular context of recognition. In *Fitzpatrick*, if there is any attempt to “condemn,” associated with the change heralded in that case, it would be wrong to conclude that the condemnation in this context is confined to homosexuality. It works in, and through, the fabrication of the limits and the boundaries of the concept of recognised kinship, which is in this case both intimately connected to issues of homosexual recognition, but not reducible to it.

III. “SPOUSE” UNDER HUMAN RIGHTS

I now want to turn to the second case. In *Ghaidan*, the House of Lords returned to the meaning of, what in *Fitzpatrick* appeared to be the less plastic kinship category, “spouse.” *Ghaidan* shifted the context, in which the meaning of “spouse” might be addressed, to that of a human rights paradigm. At the time of *Fitzpatrick*, the Human Rights Act of 1998⁴⁸ had not come into effect. That Act brings the European Convention on Human Rights⁴⁹ fully into English law. Section 3 of the Act is a key provision of this legislation. In that section, Parliament decreed that all legislation existing and future should be read, and given effect to, in a way that is compatible with the convention, “so far as it is possible to do so.” The section does not require ambiguity in the law as a prerequisite for judicial intervention.

46. Waaldijk, *supra* note 5, at 440.

47. For an analysis of this in relation to same-sex political engagements with the law, see Leslie J. Moran, *Lesbian and Gay Bodies of Law*, in HANDBOOK OF LESBIAN AND GAY STUDIES 291 (Diana Richardson & Steven Seidman eds., 2002). On the Western legal tradition more generally, see HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983).

48. Human Rights Act, 1998, c. (Eng.).

49. European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

Another important feature of the Human Rights Act is that the question of the compatibility of legislation with the Convention is assessed when the issue comes before the Court for determination and not at the date when the legislation was enacted or came into force.⁵⁰ However, their Lordships noted that it remains possible for Parliament to pass legislation that is not “[C]onvention-compliant.”⁵¹ The challenge facing the court was described by Lord Nicholls’s as one of, “separating the sheep from the goats.”⁵²

In *Ghaidan*, the majority of the House supported what might be described as taking a “bold line”⁵³ on matters of human rights. Lord Nicholls explained his approach in the following terms:

[T]he mere fact the language under consideration is inconsistent with a convention-compliant meaning does not of itself make a convention-compliant interpretation under [section] 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But [section] 3 goes further than this. It is also apt to require a court to read in words, which change the meaning of the enacted legislation, so as to make it convention-compliant. In other word, the intention of Parliament in enacting [section] 3 was that, to an extent bounded only by what is “possible,” a court can modify the meaning, and hence the effect of primary and secondary legislation.⁵⁴

The limit to this extended interpretative function, Lord Nicholls explains, is that the courts must not adopt a meaning that is inconsistent with a fundamental feature of the legislation.⁵⁵

As the objective of the Human Rights Act is Convention-compliance, what are the Convention provisions on kinship relations? Baroness Hale notes that certain kinship relations are given special status in the Convention. Article 12 singles out the married family for special protection, guaranteeing the right to marry and found a family. Furthermore, she notes that the European Court of Human Rights in Strasbourg has accepted that protection of the “traditional family” is in principle a legitimate aim of state action.⁵⁶ The traditional family is constituted by marriage.

These points draw attention to the reproduction of heterosexual privileges and the priority given to already existing legally sanctioned kinship patterns in human rights provisions. As already noted in the context of domestic law, such a privilege might exclude the application of rights to persons in same-sex kinship relations. What is the effect of this apparent privilege in the Convention and under the Human Rights Act of 1998?

50. *Ghaidan*, *supra* note 2, at ¶ 23; *see also* *Wilson v. First County Trust Ltd.* [2003] 4 All E.R. 97.

51. *Ghaidan*, *supra* note 2 at para 27.

52. *Ghaidan*, *supra* note 2, at ¶ 27.

53. *See* Rebecca Bailey-Harris, *Lesbian and Gay Family Values and the Law*, 29 FAM. L.J. 560, 566.

54. *Ghaidan*, *supra* note 2, at ¶ 32.

55. *Ghaidan*, *supra* note 2, at ¶ 27.

56. *See* *Karner v. Austria* [2003]14 B.H.R.C. 674, at 682, ¶ 40.

In the final instance these pre-existing privileges do not prove to be fatal to the success of Mendoza's application. Central to this outcome is a finding that existing statutory provisions in the U.K. that set out the kinship relations that might already benefit under existing law are not confined to relations arising out of compliance with the formal requirements of marriage. More specifically the existing legal definition of a "spouse" already embraces individuals in relations between men and women outside of formal marriage. To then distinguish and discriminate between heterosexual couples who are not formally married and same-sex couple, who also are not formally married, would under the convention and now under domestic law require a good reason as it would be contrary to the fundamental principle of equality.

The case then turns on an analysis of the nature of cross sex couples in domestic relationships and their differences from and similarities to same-sex couples in a similar relationship. It is in this context that the court in *Ghaidan* return to examine the shifting terrain of legitimate kinship relations found in the *Fitzpatrick* decision. Various dimensions of heterosexual domestic relationships are considered and rejected as being of the essence of spousal relations: sexual practices, in particular sexual intercourse, and children. The essence of a cross-sex spousal relationship is found to be interdependence, love, a sense of belonging to one another, stability, permanence, and sharing. The majority conclude that that same-sex relationships can have the same qualities. To then distinguish between hetero-sex and same-sex, the court concludes, is in breach of Article 14 of the Convention.

In *Ghaidan*, the struggle for legal recognition of same-sex interests is connected not only to political struggles around kinship but to another political agenda, human rights. However, there is a need for caution with regard to the latter context. It is important to note that in the decision of *Ghaidan*, the jurisprudence of lesbian and gay rights under the Convention while important has been limited. In this instance human rights facilitates a bold interpretation of the parameters of existing legally recognised kinship relations. In order to do this the pre-existing domestic law on kinship again plays a key role. This is not to suggest an either/or politics at work here: either human rights or kinship. Both are important in their conjunction with same-sex recognition struggles. To pinpoint their relative significance is not, I would suggest, either a possible or necessary objective.

IV. TAKING THE SPATIAL POLITICS SERIOUSLY

Ghaidan brings out another dimension of the litigation, rights relating to the home, which are to be found in Article 8 of the Convention. Baroness Hale explains:

It is common ground that one of the [C]onvention rights is engaged here. Everyone has the right to respect for his or her home. This does not mean that the state—or anyone else—had to supply everyone with a home. Nor does it mean that the state has to grant everyone a secure right to live in his or her home. But if it does grant that right to home, it must not withhold it from others in the same or an analogous situation.⁵⁷

From this summary it is clear that the human rights relating to home is subject to many qualifications. However, where the state does offer to protect the home, the Convention provisions indicate that those provisions should be widely available and compliant with the fundamental principle of equality. In the twentieth century, there is a tradition of state intervention to protect and sustain the home in English Law. Lord Nicholls noted that it was “common ground” that the Rent Act provisions outlined above fell within the “ambit” of the right to respect for a person’s home guaranteed by Article 8.⁵⁸ The statutory objective, he went on to explain, is to facilitate succession in spousal and family contexts in which two people have made a home together. The security of tenure that is granted ensures the sustainability of the home independent of which of them dies first.⁵⁹ Lord Nicholls’s comments in *Ghaidan* echo observations he made in the earlier case of *Fitzpatrick*. There he explained that “the underlying legislative purpose was to provide a secure home for those who share their lives together with the original tenant in the manner, which characterises a family unit.”⁶⁰

Both cases, and the many decisions of earlier courts referred to in the judgments that plot the shifting terrain of kinship relations, also record the changing landscape of legal protection of a person’s home. When does a “home” come into being? How and when might it be recognized and sustained over time and more specifically across the shifting terrain of intimate relations. What is the extent of state protection? In *Ghaidan*, the protection was achieved through the interpretation of the term “spouse.” In the final instance in *Fitzpatrick*, the home generated by a same-sex couple was recognised and secured by way of an interpretation of the word “family.”

“Home” is a spatial theme at the core of the relevant law and of the legal disputes in *Fitzpatrick* and *Ghaidan*. However, with the exception of its appearance in Article 8 of the Convention, “home” is not a category that formally appears as a key legal term of art. As Lord Nicholls notes, “home” appears as the underlying objective of statutory intervention. As such, it is not a term that is to be found in the relevant acts of Parliament under consideration in these two cases—the Increase of Rent and Mortgage Interest (War Restrictions)

57. *Ghaidan*, *supra* note 2, at ¶135.

58. *Ghaidan*, *supra* note 2, at ¶12.

59. *Ghaidan*, *supra* note 2, at ¶13.

60. *Fitzpatrick*, *supra* note 1, at 722.

Act of 1915 and the Increase of Rent and Mortgage Act of 1920—which provide the historical roots of legislative attempts to secure the home, and the Rent Act of 1977, as amended by subsequent Housing Acts.

In each context, “home” is referred to in, and through, the legal language of personal and property interests and rights, as well as through the language of kinship relationships.⁶¹ More specifically, “home” appears through a consideration of the nature of a tenancy and the relationship between the tenant’s interests, rights, and duties and the landlord’s property interests, rights, and obligations. “Home” takes shape through the legal language concerned with the transmission of those legal relations by succession and the parameters of transmission. Through succession, the recognition of rights in, the sustainability of, and the security of, the home is addressed by way of an examination of kinship relations, such as “marriage,” “spouse,” and “family,” that are duly recognized, and legitimated, in, and through, the law. As the underlying purpose, “home” is intimately connected to all, even while formally absent. It is perhaps a trite point to merely identify the relevance of home in this law and litigation. My purpose in highlighting “home” is more specific: to draw out the spatial politics of the struggle for legal recognition of same-sex partnerships.

There is already a significant and growing body of work that highlights and explores the spatial themes of identity politics concerned with same-sex practices and relationships. Much of this work is to be found in sexual and cultural geography, as well as in scholarship informed by urban studies, which documents and analyzes the rich diversity of spatial categories, through which struggles over recognition of sexualized intimacy and sexual belonging take place.⁶² These include place, site, environment, the urban, suburban, and rural, queerscapes, locality, liminality, utopia and heterotopia, ghetto, region, neighborhood, building, and home. More familiar spatial themes are the categories of “community,” “nation,” and “state.”⁶³ These and other geographical categories such as, “the international,” “the supranational,” and “the global” have been deployed in various legal contexts, such as in demands

61. For an analysis of these two legal frames of reference in English law, see THE LAW COMMISSION OF ENGLAND AND WALES, NO. 278, SHARING HOMES: A DISCUSSION PAPER (2002), available at <http://www.law.com.gov.uk>.

62. See, e.g., Moran, *supra* note 41; MAPPING DESIRE: GEOGRAPHIES OF SEXUALITY (David Bell & Gill Valentine, eds. 1995); MANUEL CASTELLS, THE CITY AND THE GRASSROOTS: A CROSS-CULTURAL STUDY OF URBAN SOCIAL MOVEMENTS (1983); Gill Valentine, (Re)Negotiating the Heterosexual Street: Lesbian Productions of Space, in BODYSPACE: DESTABILIZING GEOGRAPHIES OF GENDER AND SEXUALITY 146 (Nancy Duncan, ed. 1996); AARON BETSKY, QUEER SPACE: ARCHITECTURE AND SAME-SEX DESIRE (1997).

63. See, e.g., DENNIS ALTMAN, THE HOMOSEXUALIZATION OF AMERICA, THE AMERICANIZATION OF THE HOMOSEXUAL (1982); DAVINA COOPER, SEXING THE CITY: LESBIAN AND GAY POLITICS WITHIN THE ACTIVIST STATE (1994); Cooper, *supra* note 8; GARY KINSMAN, THE REGULATION OF DESIRE: SEXUALITY IN CANADA (1987).

for civil and human rights⁶⁴ and have been, more recently, formulated in terms of sexual citizenship.⁶⁵ This work on the spatial dimensions of identity politics draws attention to an important matter: lesbian and gay experiences of self are always experiences of location: of being in place or out of place, of belonging.

The most pervasive spatio-corporeal theme outside, as well as within, the context of struggles for legal recognition is the distinction between “the public” and “the private.” In many respects, the dominance of this particular spatial dichotomy is unsurprising. Eve Sedgwick points to the cultural importance of these spatial terms.⁶⁶ The public/private binary, she argues, does phenomenal cultural work in Western liberal democratic societies. This is realized through an extensive metonymic chain of associations condensed within the public/private binary: for example, as a relation of the impersonal/personal, of the inauthentic/authentic, of danger/safety, and of insecurity/security to name but a few. Such is the range of meanings produced through the public/private distinction that it threatens, she warns, to make it not only difficult to differentiate it from, but also to imagine, alternative spatial categories. It is therefore not surprising that in the context of same-sex intimacy, in general, and same-sex domestic relations, in particular, that the public and the private have been dominant spatial themes closely connected with matters of the reach of law and its jurisdiction. From the nineteenth century, the public/private binary has been a prominent feature of attempts to fabricate and govern the space/body/law interface, according to the particular requirements of law’s limits.⁶⁷

In *Fitzpatrick* and *Ghaidan*, the spatial theme of “home” is never far away from a politics that seeks to imagine and institutionalize new legal locations of belonging.⁶⁸ While the home is often closely associated with the private, following Sedgwick’s warnings, it is important not to re-write or dismiss ‘home’ as merely a term that can be subsumed under the dominant distinction of public/private. In the next section I want to explore the characteristics of home in more detail and to answer the question: What does taking home seriously add to our understanding of the struggles for legal recognition of same-sex partnerships in the cases and the law being considered here?

64. See, e.g., CARL F. STYCHIN, *GOVERNING SEXUALITY: THE CHANGING POLITICS OF CITIZENSHIP AND LAW REFORM* (2003); CARL F. STYCHIN, *A NATION BY RIGHTS: NATIONAL CULTURES, SEXUAL IDENTITY POLITICS, AND THE DISCOURSE OF RIGHTS* (1998); *HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE* (Kees Waaldijk & Andrew Clapham, eds., 1993).

65. See, e.g., DAVID BELL & JON BINNIE, *THE SEXUAL CITIZEN: QUEER POLITICS AND BEYOND* (2000); DAVID T. EVANS, *SEXUAL CITIZENSHIP: THE MATERIAL CONSTRUCTION OF SEXUALITIES* (1993); SHANE PHELAN, *SEXUAL STRANGERS: GAYS, LESBIANS, AND DILEMMAS OF CITIZENSHIP* (2001).

66. EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* (1990).

67. Lesbian scholars have challenged the importance of the public-private relation. See, e.g., Gail Mason, *(Out)Laws: Acts of Proscription in the Sexual Order*, in *PUBLIC AND PRIVATE: FEMINIST LEGAL DEBATES* 66 (Margaret Thornton ed., 1997).

68. Richard T. Ford, *Law’s Territory: A History of Jurisdiction*, 97 MICH. L. REV. 843 (1999).

V. MAKING SENSE OF HOME

Struggles over “home,” of having a home, of sustaining a home, of being at home, and the conceptualization of “home” are not unique to lesbians and gay men in domestic partnerships. In this section I want to turn to some of my earlier work which explores the spatial themes of lesbian and gay identity politics and demands for legal recognition. In a study of lesbian and gay experiences of safety, security and stability undertaken with colleagues in the U.K., “home” emerged as a key spatial theme. Before going any further I want to make two preliminary observations about the nature of spatial categories in general and home in particular. First, “home” works not as a spatial term that is in the first or final instance fixed to a particular place, but is *an idea*, through which experiences of place are made. Let me illustrate the point by way of an extract from a gay men’s focus group in Lancaster which was conducted as part of a project on lesbian and gay experiences of safety and security.⁶⁹ Paul, acting as facilitator, used the “kissing test” to begin a group discussion of the spatial dimension of actions, which had been identified in other focus group discussions as “dangerous.” He posed the following question: “So what can and can’t you do and where? What about kissing another man?” Phil replied in the following terms:

I suppose I’d be comfortable kissing another man at my home or in their house or . . . possibly in a gay pub. I wouldn’t feel comfortable at all kissing someone in the street or anything like that, because you would always have in the back of your mind, “Are there any scallies⁷⁰ coming to beat your head in?” And you’re sort of encouraging [violence].⁷¹

Phil’s response offers a catalogue of locations organized in a hierarchy of safety and danger. The key term he uses to characterize safety is “comfortable.” Comfort, our research found, is an affect intimately connected with ideas of

69. The research on lesbian and gay responses to homophobic violence was an empirical research project funded by the UK’s Economic and Social Research Council entitled “Violence, Sexuality, Space,” ESRC research award No. L 133 25 1031. The author undertook this project with Beverley Skeggs and research assistants Paul Tyrer, Karen Corteen, and Lewis Turner. The research used a multi-method approach: surveys, structured interviews and focus groups. The research was undertaken in two locations, Manchester and Lancaster both in the North West of England. It is the largest study of lesbian and gay responses to homophobic violence yet undertaken in the UK. The project established separate focus groups for lesbians, gay men and straight women in both research locations. The inclusion of straight women was based upon previous research which suggested that they were users of gay and lesbian space as safer space. Thirty six focus groups (six per group in each location) were conducted in 1999 to early 2000. See MORAN ET. AL., *supra* note 42 for an extended analysis of the focus group and other project data. The project web site is available at <http://les2man.ac.uk/sociology/vssrp>.

70. Liverpool slang for violent and unruly working-class men. Other terms include “yob” and “yobbo.” On homophobic violence and class, see Leslie J. Moran, *Homophobic Violence: The Hidden Injuries of Class*, in CULTURAL STUDIES AND THE WORKING CLASS: SUBJECT TO CHANGE 206 (Sally Munt ed., 2000).

71. Interview with Lancaster Gay Men’s Focus Group 2.

home.⁷² Through these references to comfort Phil maps the locations where he feels “at home.” His response draws attention to the way in which comfort/home is not an affect and a localizable idea limited in its significance and use to domestic, private or even intimate locations. Home has multiple spatial significance, being relevant to domestic and non domestic, private and public places. This brings me to the second preliminary point. “Home” operates not as an essential spatial term but at the level of metaphor. Thereby it works as a spatial term of belonging and being in place that has wide significance. This is not to deny that home may play an important role in the constitution of experiences of domestic places and domestic relations. However it does require that we resist any temptation to reduce home to a localizable idea that is only associated with one physical space and, I would add, one particular set of kinship relations. More specifically, “home” transcends the public/private distinction as it is a spatial category that is neither public nor private but both.

This has consequences for the way we might understand the litigation in *Fitzpatrick* and *Ghaidan* and its concern with home. “Home,” in those cases, is in the first instance concerned with intimate and domestic relations and places. However, I want to argue that the import of these decisions on home has a much wider significance. In and through these claims relating to the recognition of lesbian and gay home, the courts are also addressing legal recognition of the social and cultural belonging of lesbians and gay men more generally. That particular home also has metaphorical significance and thereby much wider political potential beyond the domestic sphere.

With these matters firmly in mind let me turn to provide a response to the question: What are the qualities and experiences of “home” that make it a particularly significant spatial context in which the shifting terrain of kinship and identity more generally takes place?⁷³ In order to answer this question I again want to draw upon my earlier work on lesbian and gay experiences of safety and security.

Home, that research suggests, is an idea that has a strong ontological resonance, being associated with the “true” self. Carl, a participant in the gay men’s focus groups in the Manchester, offers the following insight bringing many of these features together. He explained:

I think the expression “to feel at home” is to feel comfortable. There’s nothing that compares to being at my own house. I just lie there in front of the TV and have my scruffy jumper on. That is home to me. It’s not being at home, it’s not living at home but just to feel at home. It’s just being comfortable.⁷⁴

72. See MORAN ET AL., *supra* note 42, chapter 6.

73. For an extended analysis of this argument, see MORAN ET AL., *supra* note 42, chapter 6. Nor is it the only spatial category of importance within lesbian and gay politics. For an examination of the uses of cosmopolitanism and boundaries (particularly in the context of the use of ideas of property), see MORAN ET AL., *supra* note 42.

74. Interview with Manchester Gay Men’s Focus Group 5.

Carl's reflections suggest that home is a localizable idea that expresses a very particular ontological experience of being and belonging, where "nothing . . . compares." Central to that experience of "home" is comfort, Carl indicates they are one and the same; to feel at home is to feel comfortable. Comfort is the affective core of "home." Its significance is reinforced by way of the suggestion that "nothing compares." Comfort, Carl suggests here, is a synonym for home.

"Simon," a participant in the gay men's focus groups in Manchester, highlighted the ontological dimensions of home in the following extract. Home, he explained is "about where you feel most comfortable, it's about personal freedom."⁷⁵ As the "most comfortable," home is the locus of authenticity. The linkage between home and "personal freedom" also has ontological resonance, highlighting home as the locus associated with autonomy and agency. The common association of home with "heart" ("home is where the heart is") again highlights the ontological significance of home and in addition points to the affective and emotional dimensions of home. The heart is emotion in contrast to the mind, which connotes reason. The affect most associated with home is "comfort."

Andy, one of our Lancaster gay focus group participants puts this talk of home in the context of a relationship: "I think my home is a gay space as well. . . . I live with my partner. . . . I can be a complete wally⁷⁶ there, and just be myself, which is good."⁷⁷ The now familiar reference to the ontological importance of home is not limited in its application to the isolated individual but also has significance in the context of a home made with a partner. His comment, that it is the location where he can be "a complete 'wally,'" reinforces the ontological importance of home. It stresses freedom from condemnation and damaging judgement: here home is a location where his self may appear free of heterosexual surveillance be it in relation to his individual self or in the context of his relationship with his "partner." The reference to partner brings together these qualities of home and kinship.

Before leaving this more general reflection on the idea of home, I want to add another feature of that idea of belonging and ontological authenticity: it is the distinction between the good and bad home. For many lesbians and gay men the constitution of identity through home is formed by way of two antithetical locations of home; between the parental/straight home and the home of choice, the lesbian and gay home which is respectively a distinction between a bad and a good home.

The empirical data collected in the earlier project suggests that the home of the gay or lesbian couple—the home of choice—is the "good home" produced

75. Interview with Manchester Gay Men's Focus Group 5.

76. "Wally" is a slang term that stupidity.

77. Interview with Lancaster Gay Men's Focus Group 1.

by way of a violent hierarchy of the good and bad home. It is the secure and safe home in contrast to the insecure and dangerous heterosexual/parental home. The “bad home,” the parental/straight home, is a site of anxiety and insecurity, where the sexual self is experienced as a self that is invisible, absent, and at risk. It’s a place of surveillance where there is little or no privacy, where you are “known.” This experience of home is stripped of its associations with privacy and the private as a location of withdrawal, retreat, invisibility and anonymity. This experience of home is as a location of an intense experience of surveillance. Peter, one of the Mancunian gay men described this dimension of home in the following terms: as a place where you are “criticised, and abused, and condemned, and judged, and offended.”⁷⁸ This home is not so much total absence of comfort but is comfort under constant threat and in need of urgent reconfiguration elsewhere: on the street, in bars, in the houses of friends, or in one’s own home—a home of choice.

The absence of reference to home in a lesbian and gay context from the jurisprudence captured in *Fitzpatrick* and *Ghaidan*, not only represents the absence of same-sex couples, but the absence of same-sex homes from the social world that has been subject to judicial scrutiny. In that jurisprudence, the home is a heterosexual location. The violent hierarchy of this symbolic and affective spatial politics of home also plays a key role in the formation of the heterosexual subject, both individually and through kinship relations made by reference to that location. It is within this scheme, that the same-sex home becomes the basis for a claim. As a heterosexed location, the lesbian and gay home is the “bad home” in opposition to “the good home” of the heterosexual subject and of heterosexual kinship relations. It is through this violent hierarchy that the lesbian and gay in the home signifies the corruption of the home. This is the political context, in which battles over the meaning of home, in general, and the family home, in particular, must be located.

As Lord Nicholls explained, the central policy under consideration in both *Fitzpatrick* and *Ghaidan* was to provide a secure home for those who share their lives with the original tenant in a manner, which characterizes a spousal relation or that of a family unit. The exclusion of lesbian and gay partnerships from the categories of spouse and family unit was also an exclusion from recognition of that home, from access to a stable, sustainable home that might be protected in, and through, the law. As such, the home imagined in, and through, the relation of landlord and tenant, succession, and the wider landscape of kinship relations was the heterosexual home, a home where the homosexual was always already absent. This was also a distinction between the heterosexual home as the “good home” in contrast to the homosexual home as the “bad home.” As has been illustrated above, the majority judges in both *Fitzpatrick* and *Ghaidan* redraw the boundaries of legitimate kinship to

78. Interview with Manchester Gay Men’s Focus Group 5.

incorporate some same-sex relationships within these borders. In doing so, they also re-drew the boundaries of home and, consequently, those of legitimate belonging, as well.

VI. SECURITY, STABILITY, SAFETY

This brings me to the second objective of this Article: to offer an answer to the question, "what is marriage for?" In exploring this question, I want to focus upon one of the U.K. government's avowed objectives in the introduction of legislation to give legal recognition to registered same-sex domestic relationships: the promotion of security, stability and safety. Security and stability are presented as over-arching objectives of the new institution of registered civil partnership and as rationales for the legal framework. Registered same-sex domestic relationships are offered as a legal framework, through which security and stability might be achieved for each individual involved in the partnership, as well as in their relations with third parties: other individuals, the community, or the nation-state.

One attempt to represent the security, safety, and stability that the government believes flows from legal recognition of same-sex couples is to be found in the Women and Equality Unit Report, setting out the proposal for reform:

Civil partnership registration would bring increased security and stability to those same-sex couples who register, and to their children. The Cabinet Office Life Satisfaction⁷⁹ survey, published in December 2003, found that marriage increases people's life satisfaction and happiness by an amount equivalent to an additional income of £72,000. Civil partnership registration could provide similar social and psychological benefits to same-sex couples, equivalent to an increase in collective annual income of £6.1 billion to £62.2 billion depending upon take-up.⁸⁰

In this instance, the stability and security that flow from the new legal institution of civil partnership for individuals, for the couple, and for the wider national collective appears to be the accumulation of social capital. This is characterized by reference to a crude utilitarian calculus of pleasure and displeasure, which, in turn, is understood through an experience that is, at least metaphorically, of individual and collective economic wealth generation. Another instance of security and stability, which Government suggests will flow from the establishment of a civil partnership registration scheme, is to be found in the following observation:

79. THE CABINET OFFICE, LIFE SATISFACTION SURVEY (Dec. 2003), *available at* <http://www.strategy.gov.uk/2001/futures/attachements/ls/paper/pdf>.

80. WOMEN AND EQUALITY UNIT, CIVIL PARTNERSHIP: A FRAMEWORK FOR THE LEGAL RECOGNITION OF SAME-SEX COUPLES 69 (2003).

The creation of a new legal status for same-sex couples would play an important role in increasing social acceptance of same-sex relationships, reducing homophobia and discrimination and building a safer and more tolerant society.⁸¹

This particular dimension of security and stability focuses more on the impact of partnership registration on third parties than on the effect that registration has on the parties that form the partnership themselves. It is in this context that one of the responses to the proposals for civil partnership registration particularly interested me. It comes from the proposals that focus upon the formal processes that will bring the same-sex partnership within the parameters of legitimacy, the formal requirement of prior notice and registration. These formal requirements draw attention to one of the functions of marriage law, to make the relationship public. Disclosure is a key dimension of governance. With the benefits of legal recognition come the burdens of governance.

In the summary of responses to the proposals produced by the Women and Equality Unit⁸² about the prerequisites and procedures concerned with the requirement to make a public declaration of the request to register and the act of registration the Women and Equality Unit noted that:

There was however a widespread concern about protecting the safety of same-sex couples whom might register their civil partnership. Fear of homophobic violence is a real concern and many felt that a civil partnership would provide easy access to the names, addresses and occupations of lesbians, gay and bisexual couples. Many people felt that the personal details of those who register should not be made available to the public.⁸³

These comments suggest that the requirement of registration, a key formal technique of recognition, does not herald safety, stability, and security but has instead provoked fear and anxiety.⁸⁴

These anxieties, associated with public disclosure, echo concerns that have been voiced by lesbians and gay men in other contexts in which legal recognition is being given to lesbian and gay needs. One example is in relation to new police and criminal justice approaches that are designed to take homophobic violence seriously. The public disclosure of the victim's sexual identity, through the reporting and investigative process or in the court room proceedings or mass media reports, is a factor that influences decisions by

81. WOMEN AND EQUALITY UNIT, *supra* note 87, at 70.

82. WOMEN AND EQUALITY UNIT, *RESPONSES TO CIVIL PARTNERSHIP: A FRAMEWORK FOR THE LEGAL RECOGNITION OF SAME-SEX COUPLES* (2003) [hereinafter *RESPONSES*].

83. *Id.* ¶ 4.4, at 22.

84. In response, the Report offers the possibility of more general changes being proposed by government that will limit public access to information about addresses and occupations.

lesbians and gay men not to report incidents to the police.⁸⁵ There is also a wider body of literature exploring the perils of visibility in the wider context of litigation.⁸⁶

The expressions of anxiety in response to the proposed requirement of public disclosure are particularly interesting. They offer an instance in which we find the simultaneous juxtaposition of security, stability and safety and insecurity, instability and danger. My interest here is two fold. How are we to make sense of this juxtaposition? And, more specifically what is the trajectory of the juxtaposition of opposites in the declaration that security, stability and safety are the avowed objectives of legal recognition and reform?

In the U.K., the documentation of the dangers of same-sex domestic relationships is in its infancy. One context in which data is beginning to emerge is in relation to domestic violence. The largest national survey of lesbian and gay experiences of domestic violence, undertaken by SIGMA Research, found that twenty-two percent of women and twenty-nine percent of men had experienced domestic violence.⁸⁷ Another survey focusing on Birmingham, in the middle of England, found that thirty-five of female and thirty percent of male respondents said they had experienced domestic violence from a current or past partner.⁸⁸ The British Crime Survey 1996 carried out a self-completion survey amongst the general population that measured the lifetime experiences of domestic violence. That survey found that twenty-six percent women and seventeen percent men had experienced domestic violence. Comparisons between surveys that focus on the general population's experience of domestic violence and lesbian and gay surveys are problematic for a range of methodological reasons. Furthermore, the lesbian and gay experience of domestic violence may differ from heterosexual experiences of domestic violence being it is a conflation of experiences not only of violence in same-sex relationships but also violence in previous heterosexual contexts. In a survey undertaken with Bexley and Greenwich Councils, two London boroughs' rates of experiences of domestic violence were similar to those found in the SIGMA data. However, when analysed by reference to gender, forty-three percent of female respondents reported experiences of domestic violence, compared to twenty percent of male respondents. One factor influencing this gender difference was the importance of former opposite sex partners as the perpetrators of domestic violence against female respondents.⁸⁹

85. Elizabeth Stanko & Paul Curry, *Homophobic Violence and the "Self" at Risk: Interrogating the Boundaries*, 6 SOC. & LEGAL STUD. 513 (1997).

86. See, e.g., *Symposium, Homophobia in the Halls of Justice: Sexual Orientation Bias and Its Implications Within the Legal System*, 11 AM. U. J. GENDER SOC. POL'Y & L. (2002).

87. SIGMA RESEARCH, *LESBIAN AND GAY EXPERIENCES OF DOMESTIC VIOLENCE* (2003).

88. PINK SHIELF PROJECT, *A MATTER OF TRUST: RECOMMENDATIONS FROM THE PINK SHIELF PROJECT* (2002).

89. LESLIE J. MORAN ET AL., *COUNT ME IN: A REPORT ON THE BEXLEY AND GREENWICH HOMOPHOBIC CRIME SURVEY* (2003) [hereinafter *COUNT ME IN*].

Refocusing this time on data relating to the home rather than to the partnership per se, there are various studies that highlight the dangers of the home in the lesbian and gay context. For example, in their study of "male gay-hate related homicides" in Australia, Mouzos and Thompson found that the majority of incidents of homicide (sixty-two percent) occurred in a residential setting, with almost all of the incidents occurring in the victim's home.⁹⁰ A study by the Greater Manchester Lesbian and Gay Policing Initiative, "Lesbians' Experiences of Violence and Harassment" found that the home is a major location of lesbians' experiences of violence and harassment.⁹¹ A similar picture, highlighting the importance of home as the location of much homophobic violence, is to be found in a much larger study analysing police data of lesbian and gay reports of violence made to London's Metropolitan Police service, the "Understanding and Responding to Hate Crime" initiative.⁹² This study found that over fifty percent of incidents of homophobic violence reported to the police occur in or near the home and these acts of violence are performed by persons known to the victims. Central here is the perpetrator's knowledge, or assumed knowledge, of the victim's sexuality; the home and its immediate environs are key locations where knowledge about a person can be generated and disseminated.

My argument here is not that lesbian and gay relationships are especially prone to domestic violence. Nor do I mean to suggest that there is something about same-sex partnerships, or about lesbian and gay households, that explains their prominence as the location of homophobic violence. Rather, I contend that, by promoting safety, security, and stability, legal recognition may not actually displace and erase the perils of same-sex relationships.

In addition to the empirical studies above, and to the uncertainties and insecurities expressed by same-sex partners in relation to the process of public declaration and registration, the Civil Partnership Act of 2004 also evidences the dangers, insecurities, and instabilities that flow from partnership. In many respects, that Act focuses upon the dangers, insecurities, and instabilities of same-sex partnerships, in its attempt to provide a legal response to the problems and failures of partnership. For example, only one of six chapters in the act dealing with the new law in England and Wales,⁹³ addresses the process of partnership formation. The remaining five chapters, consisting of almost fifty sections and thirty schedules, deal with a range of issues that arise when the partnership goes wrong. In these five chapters, the Act provides for the

90. J. MOUZOS & S. THOMPSON, *GAY HATE-RELATED HOMICIDES: AN OVERVIEW OF MAJOR FINDINGS IN NEW SOUTH WALES* (2000).

91. GREATER MANCHESTER LESBIAN AND GAY POLICE INITIATIVE, *LESBIANS' EXPERIENCES OF VIOLENCE AND HARASSMENT* (1999).

92. METROPOLITAN POLICE SERVICE, *HOMOPHOBIC VIOLENCE: UNDERSTANDING AND RESPONDING TO HATE CRIME* (2001).

93. The Act also contains similar provisions for Scotland and Northern Ireland. The balance between the chapters is similar to that found in relation to the new law for England and Wales.

dissolution of partnerships, creates default arrangements for the separation and redistribution of partnership assets, discusses issues of the children of failed partnership, addresses issues of domestic violence, and creates procedures in case of the death of one of the parties.

The Government's suggestion that civil partnership recognition will bring in a new epoch of safety, security, and stability seems to suggest that insecurity, instability, and danger will be eliminated in this context. I want to argue that, far from being eradicated by this new institution, these problems and concerns are at the very heart of this new institution dedicated to stability, safety and security.

This brings me to my second question: What is the trajectory of this juxtaposition of opposites, given that security, stability and safety are the avowed objectives of legal recognition and reform?

In an attempt to answer that question, I turn again to my previous work on home. The empirical data provides evidence that "home" is a deeply ambivalent idea, consisting of experiences of both danger and safety, security and insecurity, and stability and instability. The data also give us some insight into how these opposites are managed: One response is dissociation. To the individual, the ambivalence of home becomes an experience that other people have, thereby preserving the speaker's belief in home's unambiguous and uncontradictory status. Another way of managing these contradictions was by drawing distinctions between the good home and the bad home, between the parental home and the home of choice. Here, different aspects of home are managed through attempts to distribute particular characteristics to particular sites of home. This works through a relation of either/or.

Carole Vance suggests that the logic of either/or is a key mechanism by which ambivalence is managed and thereby denied. She offers an example of the way the logic of either/or is used to manage the ambivalence of sexuality in much feminist work:

Sexuality is simultaneously a domain of restriction, repression, and danger as well as a domain of exploration, pleasure, and agency. To focus only on pleasure and gratification ignores the patriarchal structure in which women act, yet to speak only of violence and oppression ignores women's experience with sexual agency and choice and unwittingly increases the sexual terror and despair in which women live.⁹⁴

When applied to the context of same-sex partnerships, the logic of the either/or binary works to deny the contradictory nature of that practice of kinship. Through the lens of the either/or binary, both the politics, and critique, of domestic relationships is impoverished. This binary construct offers only the problematic paradigm of safety, stability, and security, on the one hand, or the

94. Carole S. Vance, *Pleasure and Danger: Towards a Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 1, 1 (Carole S. Vance ed., 1984).

equally problematic representation of home as the site of violence, danger, and insecurity, on the other. What threatens to get lost is the fact that institutions of safety are institutions of *both safety and danger*, security *and* insecurity, and stability *and* instability, particularly in the context of domestic partnerships. The application of this technique—the differentiation and separation of home into the good and the bad—impoverishes and misrepresents the nature of the institution.

Feminist scholars analyzing domestic relations and the home have challenged the celebration of heterosexual domesticity when represented as a haven of security and safety. This, they argue, is a vision of domesticity, sentimental and saturated with a politics of nostalgia frequently associated with a reactionary and right wing domestic political agenda.⁹⁵ Several scholars have noted the way in which the creation of institutions and relationships dedicated to sanctuary and security also work through violent hierarchies of silencing and excluding.⁹⁶ The challenge of a pastoral romantic politics of sentimental and nostalgic domesticity is not that this politics must be rejected in total but that it needs to be sustained in conjunction with a perspective that does not shy away from the perils of domesticity: a diabolical romance.⁹⁷

VII. CONCLUSION

Fitzpatrick and *Ghaidan* draw attention to the many connections that provide the context out of which legal recognition of same-sex partnerships in the U.K. has emerged. These connections include long-standing battles for women's rights, and the rights of heterosexual partners and children, the rise of a human rights culture, and wider shifts in the U.K. constitution marking a movement away from traditions of liberties towards a rights-based culture.

Fitzpatrick and *Ghaidan* were handed down before Parliament enacted the U.K.'s new civil partnership legislation. They create a status for persons in same-sex partnerships, interests, and rights, which are the same as that applicable to heterosexual couples, albeit in the limited context of succession rights in relation to particular tenancy rights. Coming before the new civil partnership, their incorporation into that act is more a gesture of consolidation rather than one of new reform. With respect to *Ghaidan*, the conclusion that same-sex couples fall within the meaning of the term "spouse" is potentially more wide-ranging in its effect. The rights brought into being in that decision

95. See, e.g., LUCE IRIGARAY, AN ETHICS OF SEXUAL DIFFERENCE (1993); Angelika Bammer, *The Question of Home*, 17 NEW FORMATIONS vii (1992).

96. See, e.g., Bidy Martin & Chandra Talpade Mohanty, *Feminist Politics: What's Home Got to Do with It?*, in FEMINIST STUDIES/CRITICAL STUDIES 194 (Teresa de Lauretis, ed., 1986); Teresa de Lauretis, *Eccentric Subjects: Feminist Theory and Historical Consciousness*, 16 FEMINIST STUD. 115.

97. On diabolical romance, see Leslie J. Moran, *Law's Diabolical Romance: Reflections on the New Jurisprudence of the Sublime*, in CURRENT LEGAL ISSUES: LAW AND POPULAR CULTURE (Michael Freeman ed., 2004).

for same-sex couples do not depend for their operation upon compliance with the new procedures for formal registration found in the civil partnership law. As such, same-sex kinship recognition arising out of that case has not been reduced to a formality, which might restrict access to interests and rights perpetuating, if not creating, a new legal underclass.⁹⁸

In an attempt to understand lesbian and gay struggles for recognition of same-sex partnerships, the analysis of the reported decisions in the House of Lords offered here has drawn attention to the importance of changes to the parameters of legitimate kinship relations. An analysis of the process of recognition of sexual rights and interests, which fails to give due weight to the gender politics that has generated important shifts in kinship arising out of this politics, will be impoverished and problematic. Likewise, a politics of marriage and its equivalents that fails to take seriously the contradictions of that and other institutions of domestic relationships is equally problematic. Any analysis of same-sex domestic relations needs to be vigilant against a will to forget the proximity of safety and danger, security and insecurity. More specifically, it needs to be undertaken with the knowledge that same-sex partnership offers multiple and contradictory experiences of safety and danger. The challenge is to sustain an analysis that does not shy away from ambiguities and brings out and sustains the contradictions. A sexual politics that erases these ambiguities and contradictions offers an impoverished vision of both the present and the future with much potential for misunderstandings. It will blind us to not only the perils but also the pleasures of intimate relationships, and the perils and pleasures of law and law reform.

98. Eligibility criteria found in Section 3 of the Act, and in Part 2, Chapter 1, more generally focusing on the registration requirements and processes, do not require a formal declaration of sexual orientation; the assumption is that the two parties to the partnership will be lesbian, gay, or bi-sexual.

