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The Strange Pairing: Building Alliances Between Queer Activists and Conservative Groups to Recognize New Families

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THE STRANGE PAIRING: BUILDING
ALLIANCES BETWEEN QUEER ACTIVISTS
AND CONSERVATIVE GROUPS TO
RECOGNIZE NEW FAMILIES

*Nausica Palazzo**

ABSTRACT

This Article explores some of the legal initiatives and reforms that opponents of same-sex marriage in Canada and the United States have pushed forward. Despite being animated by a desire to dilute the protections for same-sex couples, these reforms resulted in “queering” family law, in the sense that they functionalized the notion of family. Consequently, two cohabiting relatives or friends would be eligible for legal recognition, along with all the public and private benefits of such recognition. I term these kinds of “unions” and other non-normative relationships to be “new families.”

The central claim of this Article is thus that new families should build alliances with conservative fringe groups and capitalize on their common interest in creating legal alternatives to marriage. Section I of the Article will provide a primer on the legal remedies available to non-normative relationships. Section II will engage in a comparative analysis of conservative reforms in the United States and Canada that ended up extending eligibility requirements to new families, or that, although currently restricted to conjugal couples, could constitute a viable

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model for protecting all new families, if their eligibility requirements were amended. Section III tries to operationalize legal recognition by analyzing the potential paths to gain it. I will first anticipate and respond to criticism surrounding recognition of new families, and then will lay the foundation for rethinking queer activists' political action. I will then offer some recommendations (a) on the best model for implementation and (b) on forming alliances with conservative groups.

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INTRODUCTION

The rate of marriage has been falling in Western countries for the last few decades,¹ but the level of care and commitment among individuals in relationships has by no means diminished. Instead, people are investing economically and emotionally in relationships which do not resemble the nuclear, romantic, dyadic, heterosexual family.² I will call these non-marital relationships “new families.” New family unions can include (but are not limited to) unmarried conjugal couples, queer assemblies, polyamorous relationships, siblings, friends, and relatives.³

Each unit of two or more people is a family union. Individuals belonging to them are economically and emotionally interdependent and live “familyhood”—but often in ways that challenge traditional notions of family and conjugality. Consider, for example, siblings who decide to

1. This is true in a number of Western countries, including Canada, the U.S., the U.K., and Italy. As to Canada, see JULIEN D. PAYNE & MARILYN A. PAYNE, *CANADIAN FAMILY LAW* 2 (6th ed. 2015). As to the U.S., see *HANDBOOK OF MARRIAGE AND THE FAMILY* 528 (Gary W. Peterson & Kevin R. Bush eds., 2013). As to England and Wales, see Claire Miller, *Number of People Getting Married is Falling—and Here’s the Reason Why*, MIRROR ONLINE (Apr. 27, 2016), <https://www.mirror.co.uk/lifestyle/sex-relationships/number-people-getting-married-falling-7844282>. As to Italy, see *Matrimoni, Separazioni e Divorzi*, ISTAT (Nov. 14, 2016), [https://www.istat.it/it/files/2016/11/matrimoni-separazioni-divorzi-2015.pdf?title=Matrimoni%2C+separazioni+e+divorzi+-+14%2Fnov%2F2016+-+Testo+integrale.pdf%20\(last%20visited%20Jul%2029,%202017\)](https://www.istat.it/it/files/2016/11/matrimoni-separazioni-divorzi-2015.pdf?title=Matrimoni%2C+separazioni+e+divorzi+-+14%2Fnov%2F2016+-+Testo+integrale.pdf%20(last%20visited%20Jul%2029,%202017)).
2. See Lois Harder, *The State and the Friendships of the Nation: The Case of Nonconjugal Relationships in the United States and Canada*, 34 J. WOMEN CULT. & SOC’Y 633, 639 (2009). See also Fiona Williams, *RETHINKING FAMILIES* 48 (2004) (interpreting the increasing diversity in households “as a part of a ‘queering’ of heterosexual relationships”).
3. The term “conjugal” is a synonym with sexual relationships, and is used here to contrast relationships that lack a sexual component. The I use this term intentionally because of the complexity it has inherited from interpretation by courts in common law countries. But conjugality can mean slightly different things in different places. For instance, Canadian courts consider sex to be an unnecessary component of a conjugal relationship. See *infra* Section II.B.

emotionally and financially support each other long-term in a new family arrangement. They are not conjugal, in the sense that they are not in a romantic or sexual relationship,⁴ and therefore, they do not share a fundamental feature of the archetypal married couple, but they do care for each other deeply over the course of their lives. Should financial or emotional problems arise, they will be there for each other. They might live under the same roof, not only to capitalize on economies of scale, but also because when they are home, they recognize each other as family.

The idea of “family” should be defined functionally. This is echoed in the definition provided by the American Home Association (“AHA”) in 1973. According to the AHA, a “family” is a union of:

[T]wo or more people who share resources, share responsibility for decisions, share values and goals, and have commitments to one another over time. The family is that climate that one ‘comes home to’ and it is the network of sharing and commitments that most accurately describes the family units, regardless of blood, legal ties, adoption or marriage.⁵

New family forms are “queer” in the sense that they subvert the pre-arranged and state-approved “proper way of living” familyhood.⁶ The state’s promotion of “proper” familyhood—the heterosexual nuclear family—is a means of ordering society. The “proper” family has the same characteristics as any large system of ordering, whether political, economic, social, or literary,⁷ in that it endeavors to preserve its apparent seamlessness at any cost.⁷ These systems accomplish their appearance of uninterrupted continuity in a variety of ways, including by concealing disruptive information⁸ and exercising disciplinary

4. Brenda Cossman & Bruce Ryder, *What is Marriage-Like Like? The Irrelevance of Conjugal*, 18 CAN. J. FAM. L. 269, 294–300 (2001).

5. NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 33 (2009).

6. *See, e.g.*, Carla A. Pfeffer, *QUEERING FAMILIES: THE POSTMODERN PARTNERSHIPS OF CISGENDER WOMEN AND TRANSGENDER MEN* (2016) (surveying one example of a queer family: that of cisgender women partners of transgender men).

7. Michel Foucault, *Society Must be Defended: Lectures at the College of France, 1975-1976*, at 7–8, 179–80 (Bauro Bertani & Alessandro Fontana trans., 2003); *see also* EVE K. SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 71 (1990).

8. Marvin J. Taylor, *Queer Things from Old Closets: Libraries—Gay and Lesbian Studies—Queer Theory*, 8 RARE BOOKS & MANUSCRIPTS LIBRARIANSHIP 21, 22–23 (1993).

power.⁹ Silencing potentially disruptive knowledge is a condition for the very existence of any such system.

By contrast, queering a system calls attention to deviance, and exposes a system's fissures, ruptures, and biases.¹⁰ This is achieved through individual experience that deviates from proscribed steps.¹¹ Since queering a system undermines that system's ability to appear seamless, the state has an interest in preserving normative families and hiding any disruptive knowledge, including anything concerning non-traditional family forms. This interest is effectuated through explicit state policies, such as laws that channel people into marriage, and by other, subtler social norms, such as regarding individuals who do not marry as social outcasts.

Bearing in mind this alternate vision for the family, this Article will explore some of the legal initiatives and reforms that opponents of same-sex marriage in the U.S. and Canada pushed. The schemes were designed to shift the focus away from marriage equality for LGBT couples and thereby attenuate the expressive benefits of legal recognition for all eligible couples.¹² These initiatives and reforms expanded many protections and benefits for non-married couples. Of course, the reforms were fundamentally conservative because they were—and still are—animated by a desire to “circumvent stronger legal status for same-sex relationships.”¹³ But, ironically and unwittingly, these reforms and proposals have resulted in something much closer to a “queer” vision of family law.

Many socially conservative proposals functionalized the notion of family to the point of including cohabiting relatives and/or friends—although not assemblies comprised of more than two adults. Consider, for example, the reciprocal or designated beneficiary schemes that have been introduced in the United States. Under a designated beneficiary scheme, a person can designate a non-spouse (even a sibling) to be the beneficiary of some public or private law entitlements.

Likewise, some religious groups in Arkansas, Arizona, and Louisiana have shown an interest in legalizing alternative family regimes, such

9. The core disciplinary powers are hierarchical observation, normalizing judgment, and examination. Foucault, *supra* note 7.

10. *Id.*

11. MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHEOLOGY OF THE HUMAN SCIENCES* xx-xxi (1973).

12. The phrase “expressive benefits of recognition” refers to the state and social approval of the union. Martha Nussbaum, *A Right to Marry?*, 98 CAL. L. REV. 667, 671–72 (2010).

13. Harder, *supra* note 2, at 648.

as “covenant” marriages.¹⁴ A similar pattern can be found in Alberta, Canada, where the Adult Interdependent Relationships Act (AIRA)¹⁵ was driven by similar conservative motives.¹⁶ Again, the irony is that such schemes, despite being touted by ultra-conservative organizations or political parties, have resulted in a dramatic pluralization of family law regimes.¹⁷ The introduction of alternative schemes for protecting partnerships—to live alongside traditional marriage—produced a shift in favor of the unexplored land of the non-romantic, non-conjugal, or otherwise non-traditional family.¹⁸

The central claim of this Article is that new families should build alliances with conservative fringe groups and capitalize on their common interest in creating legal alternatives to marriage. While this might seem counterintuitive, many of these initiatives hold promise for queer activists. Despite differing motives, the pluralization of family forms pushed forward by conservatives aligns with queer activists’ interest in opposing the state’s hegemonic and normalizing power.

By contrast, expanding access to traditional marriage holds limited potential for non-normative families.¹⁹ I believe that marriage is not a

14. COVENANT MARRIAGE IN COMPARATIVE PERSPECTIVE (John Witte Jr. & Eliza Elison eds., 2005) (describing covenant marriages as special forms of marriage requiring premarital counseling and tighter requirements on divorce); see Steven L. Nock, Laura A. Sanchez & James D. Wright, COVENANT MARRIAGE: THE MOVEMENT TO RECLAIM TRADITION IN AMERICA 1–4 (2008) (defining covenant marriages as a variant on traditional marriages but with extra requirements, such as premarital counseling and acceptance of divorce in only limited circumstances, such as adultery, domestic abuse, or a prolonged separation. At present, Arizona, Arkansas, and Louisiana are the only three states recognizing this form of “entrenched” marriage).

15. Adult Interdependent Relationships Act, S.A. 2002, c A-4.5 (Can.).

16. Harder, *supra* note 2, at 646. The United Kingdom also had a very prominent legislative debate surrounding the Civil Partnership Act of 2004. See Nicola J. Barker, *Why Care? ‘Deserving Family Members’ and the Conservative Movement for Broader Family Recognition*, in VULNERABILITIES, CARE AND FAMILY LAW 59 (Julie Wallbank & Jonathan Herring eds., 2014). Baroness Ruth Deech’s proposed amendment to the Civil Partnership Act of 2004 would have expanded the status of civil partners to siblings and grandparents by replacing the phrase “sexual nuclear family” with the phrase “deserving family member.” *Id.* After being approved by the House of Lords, however, the House of Commons rejected it. *Id.* Interestingly, once again, the reasons behind its introduction were overt hostility toward same-sex marriage and homophobia: statements like “once you recognize same-sex couples, why not two siblings?” were made with a clear intent to denigrate the former. *Id.*

17. Pluralization of family law regimes refers to the introduction of different regimes alongside traditional marriage.

18. Harder, *supra* note 2, at 635 (“Weirdly and perhaps unintentionally, however, it is precisely this conservative reactionism that has provided the impetus for increased family diversity.”).

19. See *infra* Section III.B.1.

tenable option for many progressive people, given its constraining nature and its history of discrimination and abuse of women.

The constraints of marriage are built on a complex network of behavioral expectations that limit the freedom of spouses (whether cross-sex or same-sex) throughout their lives.²⁰ The expectations around women, marital roles, and having children are part of the bigger web of social rules that serve to limit spouses. Against this backdrop, marriage operates as a crucial social ordering device.²¹

Feminist literature has long articulated how marriage has traditionally been a source of discrimination and oppression for women in terms of both reproduction and division of labor.²² Under this theoretical framework, the marriage equality movement has undermined not only queer attempts at pluralizing families, but also women's liberation: "By appropriating familial ideology, lesbians and gay men may be supporting the very institutional structures that create and perpetuate women's oppression."²³

Additionally, non-normative families often have many characteristics that do not fit within marriage's confines.²⁴ Many queer activists (holding a so-called "radical pluralist position") have harshly criticized the personal cost of assimilation that same-sex couples bore in order to gain access to marriage.²⁵ In the famous essay "Since When Is Marriage

20. Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901 (2000).

21. *Id.* I offer the following personal anecdote by way of elaboration: Last summer I attended the wedding reception of a relative in Southern Italy, a fairly conservative place. After the meal, the conversation drifted to the couple having children. The bride was 45 years old, and it was unlikely that she would be able to have biological children. The people around me knew that and seemed dismayed. The conversation went on for about twenty minutes. When I abruptly but quietly said "Let her live her life," they were taken aback, as if my words made no sense to them.

22. See, e.g., TAMARA METZ, UNTYING THE KNOT: MARRIAGE, THE STATE, AND THE CASE FOR THEIR DIVORCE (2010) (advocating for the separation of marriage and the state, and the introduction of a narrow legal status that includes all intimate caregiving unions); Suzanne B. Goldberg, *Why Marriage?*, in MARRIAGE AT THE CROSSROADS: THE BRAVE NEW WORLD OF TWENTY-FIRST CENTURY FAMILIES 224 (Marsha Garrison & Elizabeth S. Scott eds., 2012).

23. Didi Herman, *Are We Family?: Lesbian Rights and Women's Liberation*, 28 OSGOODE HALL L.J., 797 (1990). Some scholars went further by associating marriage with slavery or prostitution. See, e.g., KATHY BARRY, FEMALE SEXUAL SLAVERY (1971); Roberta Hamilton, *Women, Wives and Mothers*, in RECONSTRUCTING THE CANADIAN FAMILY: FEMINIST PERSPECTIVES 3 (Nancy J. Mandell & Ann Duffy eds., 1988).

24. See *infra* Section III.B.1.

25. See, e.g., MATTILDA BERNSTEIN SYCAMORE, THAT'S REVOLTING!: QUEER STRATEGIES FOR RESISTING ASSIMILATION (2008); Jessica R. Feinberg, *Avoiding Marriage Tunnel Vision*, 88 TUL. L. REV. 259 (2013); Paula Ettelbrick, *Since When Is Marriage a Path*

a Path to Liberation?,” Paula Ettlebrick cautioned against the risk of assimilation that comes with an extension of marriage to gay couples.²⁶ That concern, shared by many, is that by assimilating into traditional marriage, same-sex couples will negate some of the most powerful aspects of their union, especially its “different and subversive” nature.²⁷

There is an additional problem here. Not only does marriage equality hold a limited potential for new families, it also, and more dangerously, has undermined the advocacy for pluralistic relationships²⁸ that do not necessarily align with a heteronormative married couple.²⁹ The marriage equality movement has unwittingly established a new hierarchy of socially legitimate relationships: in raising up married same-sex couples, it necessarily left new or atypical relationships on the margins of society.³⁰ This fact has struck a fatal blow to family pluralism in many states.³¹ The interest in extending marriage resulted in *a priori* opposition to legal alternatives to marriage, such as domestic partnerships and civil unions, because those designations were seen as falling short of achieving the same “dignity” as marriage.³² Such progressive skepticism

to Liberation?, reprinted in WILLIAM B. RUBENSTEIN, CARLOS A. BALL & JANE S. SCHACTER, *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* 683 (3d ed. 2008).

26. See Ettlebrick, *supra* note 25, at 683. Gay litigators rejected her stance, and the position expressed in the Family Bill of Rights by Lambda attorney Evan Wolfson, calling for an extension of marriage to same-sex families, prevailed. See Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 529, 536 (2009).
27. Brenda Cossman, *Family Inside/Out*, 44 U. TORONTO L.J. 1 (1994).
28. For an overview of the debate surrounding the prevalence of the marriage stance over the liberationist fringe, see Polikoff, *supra* note 26, at 535–36.
29. Feinberg, *supra* note 25.
30. Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMP. L. REV. 511, 538 (1990) (“[T]he prospect of lesbian marriage is detrimental because it creates a two-tier system of ‘good’ and ‘bad’ lesbians that elevates married lesbian couples over other varieties of lesbian relationships.”); see also Cossman, *supra* note 27, at 8; Ettlebrick, *supra* note 25, at 684 (“[T]he right to marry will not transform our society from one that makes narrow, but dramatic, distinctions between those who are married and those who are not married to one that respects and encourages choice of relationships and family diversity.”).
31. Cyril Ghosh, *The Emergence of Marriage Equality and the Sad Demise of Civil Unions*, 73 STUD. L. POL. & SOC’Y 1 (2017).
32. Before *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), civil unions or domestic partnerships effectively denied same-sex couples federal spousal benefits. See *Garden State Equal. v. Dow*, 82 A.3d 336, 367 (N.J. Super. Ct. Law Div. 2013) (holding that the law regarding civil unions in New Jersey ran afoul of the state equality clause since it implicated a denial of federal benefits).

toward alternative regimes has frequently resulted in laws that automatically converted them into marriages.³³

Even if not directly seeking to repeal civil unions and other regimes, many LGBT advocates downplay such statuses, considering them as mere stepping-stones to full marriage.³⁴ By contrast, I argue that alternatives to marriage are better suited for the advancement of all families—including heterosexual—for several reasons, including their reduced focus on the traditional conjugal family, their plasticity, and, often, their simplicity.³⁵ I do not argue for the abolition of marriage for couples who currently qualify for it. Instead, I argue that new families and queer activists should concentrate on working with conservative groups to further their common interest in plural family regimes.

Section I of the Article will provide a primer on the legal options available to non-normative relationships. I will attempt to provide a comprehensive menu of legal options for future reforms. Section II will engage in a comparative analysis of conservative reforms in the U.S. and Canada that extended eligibility requirements to new families, and those that, although currently restricted to conjugal couples, could constitute

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33. After the U.S. recognized same-sex marriage, states varied in what they did with civil partnerships. Some, such as Delaware, decided to forcibly convert civil unions into marriages. See *Civil Unions and Domestic Partnership Statutes*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx> (last updated Nov. 18, 2014). Other states left civil unions in place, but attempted to repeal the reciprocal beneficiary scheme. See *Civil Union Licenses*, COOK COUNTY CLERK'S OFFICE, <https://www.cookcountyclerk.com/service/civil-union-licenses> (last visited Nov. 11, 2018); Council of the Dist. of Columbia Comm. on Pub. Safety & the Judiciary, *Report on Bill 18-482, Religious Freedom and Civil Marriage Amendment Act of 2009*, Gay & Lesbian Activists Alliance (Nov. 10, 2009), <http://www.glaa.org/archive/2009/b18-482committeereport1110.pdf>. Reactions to these decisions were mixed at best. The forcible conversion of civil unions into marriages has been called "sad," since it sacrifices the potential that alternative regimes hold to be meaningfully different from marriage. Ghosh, *supra* note 31 (speaking in the heading of her Article of a "Sad Demise of Civil Unions").
34. See, e.g., *Civil Unions: Stepping Stone to Same-Sex Marriage*, UNITED FAMILIES INTERNATIONAL (Feb. 2, 2011), <https://unitedfamilies.org/homosexuality/civil-unions-stepping-stone-to-same-sex-marriage/> (last visited Nov. 10, 2018) (quoting the following excerpt from an ACLU press release: "Although the passage of civil union legislation represents an important step forward on the road toward full equality for LGBT individuals in Illinois, the ACLU continues to work to achieve the freedom to marry for all couples."); Thomas F. Coleman, *The Hawaii Legislature Has Compelling Reasons to Adopt a Comprehensive Domestic Partnership Act*, 5 L. & SEXUALITY 541, 568 (1995) (arguing in favor of the Reciprocal Beneficiary Act as a wise intermediate step toward full equality for same-sex couples).
35. These new regimes tend to be easier to enter into and dissolve, are scarcely formalized, and in the case of designated beneficiary schemes, they set out a very clear and short set of benefits that parties can assign to one another by merely checking a box.

a viable model for protecting all new families if their eligibility requirements were amended. In doing so, I will assess how such schemes reflect upon the notion of family, and the extent to which they have already resulted in family legal pluralism. Section III tries to operationalize legal recognition by analyzing the potential paths to gain it. I will first anticipate and respond to criticism surrounding recognition of new families, and then will lay the ground for rethinking queer activists' political action. I will offer some recommendations on (a) the best model for implementation and (b) how to form alliances with conservative groups.

A. *Definitional Section*

1. What is a Family?

The AHA defines family as “two or more people who share resources, share responsibility for decisions, share values and goals, and have commitments to one another over time.”³⁶ I believe this definition needs to be supplemented with three additional criteria germane to identifying a family:

- (1) A free decision to enter into the relationship, made by consenting adults,³⁷
- (2) A commitment to take responsibility for the other person(s),³⁸ and

36. POLIKOFF, *supra* note 5, at 33. When it comes to decisions as to whether parties are economically interdependent, I share the view of the Alberta Law Reform Institute that the criterion should rely on a presumption of reciprocal dependence to avoid costly and cumbersome inquiries into personal aspects of the relationship. *See* ALBERTA LAW REFORM INSTITUTE, PROPERTY DIVISION: COMMON LAW COUPLES AND ADULT INTERDEPENDENT PARTNERS, FINAL REPORT 112, at 46 (June 2018) (“Legislated eligibility criteria should instead rely on presumptions. If the relationship between two individuals meets certain observable criteria, it should be presumed that they have formed an economic partnership or that they intend to share property.”).

37. As I explain further below, minors are not eligible to enter a caregiving relationship under the proposed approach. Though children can of course be parented by new families, this Article contemplates only those family relationships that are “horizontal,” that is, between equal and consenting adults. Within horizontal relationships, I have made a methodological choice to include both non-conjugal relationships (where a sexual component is absent, such as siblings) and non-normative conjugal units (which include an unconventional sexual component, as in polyamorous relationships) in this Article’s analysis.

38. U.S. courts usually adopt similar requirements in determining whether a common law marriage exists. In addition to the foregoing, courts also consider also whether the

(3) That the relationship be of some duration.³⁹

The first criterion makes it clear that the new family partnership is a horizontal relationship. It thus prevents a party from entering into a formal, intimate relationship with a minor (a vertical relationship).⁴⁰ This condition is similarly not met when there is a legal duty of support between the family members. For instance, parents who owe a duty of care to adult children⁴¹ cannot enter into a horizontal relationship with that child.⁴²

The second criterion requires investigation into whether the relationship is maintained upon a willful decision to take responsibility for the other person(s). Note, however, that taking responsibility is not synonymous with joint legal responsibility for acts committed by another person. It merely points to the intention to commit to and take care of the other parties to the relationship. In this way, the second criterion distinguishes new families from parties merely engaging in sexual or relational behavior without commitment. Legal reforms in this field should sort out those relationships that are based on a decision, rather

members' welfare is prioritized above that of others. See Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 304–05 (2015).

39. I hesitate to include a timeline for qualification, but any legal scheme will likely require one year or more.
40. The legal definition of “minor” for purposes of the proposed scheme is left to the relevant authority, usually the state or another delegated authority. The state could allow persons above or below the age of 16 to enter a horizontal relationship scheme, under certain conditions such as parental consent. See, e.g., MICH. COMP. LAWS ANN. § 551.103 (Westlaw through P.A. 2018 No. 341, 2018 Reg. Sess. of 99th Mich. Leg. 2007).
41. Parents might owe a duty of care to their adult children for a number of reasons. For example, in the context of separation, child support does not necessarily end when children turn 18, especially when the child decides to pursue post-secondary education. See, e.g., COMMONWEALTH OF MASSACHUSETTS, CHILD SUPPORT GUIDELINES 10–11 (2017), <https://www.mass.gov/files/documents/2017/09/01/2017-child-support-guidelines.pdf> (follow “2017 Child Support Guidelines” hyperlink).
42. One might wonder whether a lack of consent occurs whenever a party feels pressured into the relationship due to moral or social reasons. An example might be the case of an old and disabled aunt, who has no relatives left alive except her young nephew. In this case, the nephew will be socially and intimately persuaded that his aunt needs care, and will thus likely take on the burden of caring for her. In such a case, no legal duty to support her can be traced to him, but still, the factual context generates a social and moral duty which is, to some extent, tantamount to a legal one. The factual situation exerts such pressure on the nephew that no genuine and spontaneous horizontal relationship can be deemed present. Even so, I believe that this case is no exception to the notion of consent and that the nephew, if willing to enter a formal relationship with the aunt, should be allowed to do so.

than a presumption (as would be the case with marriage), to take responsibility for one or more other persons. Such a functional inquiry will help identify those relationships that deserve material benefits.

The third criterion, duration, is necessary to ensure that the parties are emotionally and economically committed. While the creation of such commitment and the amount of time necessary to form it is highly subjective, a legal regime will necessarily require a fixed duration.⁴³ A more objective criterion requiring the relationship to be of some duration is useful in distinguishing extemporaneous relationships from more solid ones. I believe that a durational requirement below one year would pose problems in terms of administrability, as it would be complicated for an administrator to verify that the relationship is enduring.⁴⁴

The definition provided above, however, is of general applicability. The answer to the question “what kind of caregiving is relevant for purposes of this Article?” is context-specific and depends on the model of recognition for new families—whether registration, ascription, or contract. This general definition will therefore have to be adjusted according to the model of recognition.

As will be discussed more below, some models, such as registration schemes and contractual models, restrict themselves to establishing eligibility criteria.⁴⁵ Parties who meet the eligibility criteria have the possi-

43. Heather Conway & Philip Girard, *'No Place Like Home': The Search for a Legal Framework for Cohabitants and the Family Home in Canada and Britain*, 30 QUEEN'S L.J. 715, 730 (2005) (“[A]t some necessarily arbitrary point, one can infer that the ‘trial’ period of a relationship has passed, such that it is reasonable to consider a commitment to exist.”).

44. Ultimately, there is another criterion that could be helpful in distinguishing deserving caregiving relationships from non-deserving relationships: the absence of a unilateral direction in care. The criterion means that there is a virtual symmetry in the distribution of caregiving duties. Dependency is a different basis on which relationships can unfold and deserves a specific legal framework, for that type of care needs to be rewarded in special ways (for example, through disability benefits and/or compensation for private care). See MARTHA A. FINEMAN, *AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004); Martha A. Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403 (2001); MARTHA A. FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); Martha A. Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251 (2010–2011); Martha A. Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239, 240 (2001). I decided to omit this criterion because I believe its inclusion would have had a discriminatory impact on people with disabilities. It is also unnecessary. Whenever a disability affects the ability of the party to fully consent to a relationship, the lack of consent is itself a sufficient bar to recognizing the relationship. When the disability does not vitiate the party's ability to consent, there is no valid reason for preventing a person, however vulnerable, from entering into the relationship.

45. See *infra* Section I.A, C.

bility of self-designating their beneficiary. Thus, for these two models, policymakers only need to fix the formal eligibility criteria, such as the number of persons able to formalize the relationship, and the type of the qualifying relationship (whether it applies to relatives and/or friends, conjugal and/or non-conjugal families, etc.).⁴⁶

In any such case, one of the first decisions in drafting eligibility criteria is to resolve the formal versus functional inquiry that the scheme commands. For example, a formal inquiry might only ask: Are these two unmarried people, who are consenting adults and of sound mind? If so, they are eligible to become a family.⁴⁷ By contrast, a functional inquiry would examine the characteristics of the relationship, and ask: Are these two unmarried individuals in a committed relationship?⁴⁸ Or are they in a mutually caregiving relationship? Functional definitions would always be more flexible and could include a larger number of families. But they might require an intrusion into the private sphere of the family unit, and they are difficult and costly to administer. By contrast, formal criteria are easier to verify and are more respectful of autonomy because they leave space for self-designation. Unlike registration and contracts, an ascriptive system ascribes a status to parties who meet the eligibility criteria, regardless of the will (or actions) of such parties. Therefore, it is necessary to define what the conditions should be for ascription. The criterion referring to a commitment to take responsibility for the other person(s) in the relationship is incompatible with this model, since ascription operates on the assumption that once functional characteristics are detected, the status must be ascribed regardless of the parties' will.

Legal scholarship employs several terms to refer to new family relationships, partly because this field of scholarship is still a work in progress, and partly because there is intrinsic difficulty in employing analytical linguistic categories. Being aware of the "symbolic power of legal kinship terminology," one needs to choose one's words with the

46. Thus, for contracts and registration schemes, legislators should use the first and second criteria to define eligibility criteria. By contrast, legislators should not use the third criterion, duration. This is because contracts and registration models rest on self-authorship: Any individual can decide to designate someone as beneficiary and/or to acquire a status, without having to demonstrate that the relationship is of some duration (just as two people marrying do not have to demonstrate the duration of their relationship).

47. COLO. REV. STAT. ANN. § 15-22-105(1) (Westlaw through 2018, 2d Reg. Sess. of 71st Gen. Assemb.).

48. D.C. CODE ANN. § 32-701 to 710 (Westlaw through July 27, 2018).

utmost care, so as to avoid the risks of regulation, normalization, and exclusion inherent in ordinary linguistic labels.⁴⁹

For the purposes of this Article, I use phrases such as “aspiring novel families,” “non-normative relationships,” “adult horizontal relationships,” “new kinship unions,” and “unmarried family units,” but not entirely synonymously. Although they refer to the same subject—the new, unconventional family—they stress different aspects of the relationship, such as the lack of benefits or recognition, the lack of characteristics consistent with the nuclear family, or the horizontality of the relationship. By contrast, terms like “families,” “family units,” and “relationships” are used interchangeably.

(i) *Aspiring novel family units*: This is a broad conception of the family that includes any group of people, related or unrelated, who engage in caregiving but whose relationship is not yet legally recognized. The term emphasizes the political agency of new family groups and their quest for legal recognition.

(ii) *Non-normative relationships*: This term refers to relationships that do not comply with the norm of the ideal marital couple, as accepted in the Western socio-legal culture—the nuclear, romantic, dyadic, heterosexual family. “Non-normative” need not mean “unregulated.” Non-normative family formations have historically slipped under the radar of the law, as in the case of non-conjugal relationships in Alberta, and some will continue to do so.

(iii) *Adult horizontal relationships (or adult-adult relationships)*: This term refers to a relationship that two or more consenting adults enter into, regardless of children. I used the phrase to underline the distinction between the asymmetrical “vertical” relationship between children and parents, and the symmetrical “horizontal” relationship of consenting adults.⁵⁰

(iv) *Non-marital family units*: This is a broad phrase that encompasses all families developed outside of wedlock. The term places emphasis on the divide between marital couples and new families, and reminds the reader that new families are excluded from the standard package of marital benefits, like tax breaks, evidentiary privileges, etc. Marriage is still, much to the distaste of many, the “reigning proxy” for

49. Frederik Swennen & Mariano Croce, *The Symbolic Power of Legal Kinship Terminology: An Analysis of ‘Co-motherhood’ and ‘Duo-motherhood’ in Belgium and the Netherlands*, 25 SOC. & LEGAL STUD. 181 (2016).

50. Note that the symmetry is just potential. All adult-adult relationships involve some form of asymmetry at some point, as one of the parties may experience special problems or vulnerability and require additional support.

relationships deserving of special status.⁵¹ The “unmarried unit” is thus a viable linguistic option because it captures the nuanced landscape of families who do not take on marital status.

(v) New kinship unions/networks: This term draws on the semantic richness of “kinship” to refer to new families.⁵² For example, the translation of “kinship” into Italian, my native language, results in either *parentela*, which means “family,” or *affinità*, which means “friendship” or “affinity.” This beautiful polysemous term thus contains both the sense of mutual affinity and the shared consciousness of belonging to a family, which are foundational aspects of new family formations. Hence, this term can be used as a catch-all for all new families.

2. What is Recognition?

When using the term “recognition” without more, this Article refers to legal recognition, not cultural or social recognition. Within the category of legal recognition, it will be important to distinguish between formal and functional recognition. Formal recognition refers to the automatic legal consequences that attach to certain statuses, such as marriage, civil partnership, or the birth of a child. When partners register their relationship, as in a marriage or a civil union, they are seeking formal recognition.⁵³

By contrast, functional recognition will attach some legal consequences to relationships that do not have a legal status, but are functionally equivalent to relationships that are legally protected. A couple in a common law marriage can seek survivorship benefits despite having no formal recognition because the jurisdiction recognizes the union as being functionally equivalent to marriage.⁵⁴ As discussed below, ascription is a functional mechanism for recognition because it attaches specific

51. CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 108 (2010); Nancy F. Cott, *The Public State*, in JUST MARRIAGE 33 (Mary Lyndon Shanley, Joshua Cohen & Deborah Chasman eds.) (2004).

52. I intend to adopt a broad and inclusive definition of kinship, encompassing both blood ties and interpersonal affinity. See Jane E. Cross, Nan Palmer, & Charlene L. Smith, *Kinship Groups that Deserve Benefits*, 78 MISS. L.J. 791, 797 (2009).

53. Robert Leckey, *Families in the Eyes of the Law: Contemporary Challenges and the Grip of the Past* 15(8) IRPP CHOICES 1, 13 (2009).

54. This is the case, for example, with common law couples in countries such as Canada, where the status is ascribed by government agencies seeking to combat welfare fraud. See *infra* Section I.B.

consequences to couples that are deemed to resemble formally recognized relationships.⁵⁵

Before continuing to the next section, it is important to clarify the legal consequences that attach to recognition, namely, “rights and obligations,” “benefits,” “prerogatives,” and “status.”

The term “rights and obligations” usually refers to the private law consequences of a regime, which can include property rights, succession rights, health-related rights (or prerogatives) such as the right to make decision vis-à-vis human remains or anatomical gifts, and support obligations (throughout the relationship or upon its dissolution).

The term “benefit” can be used in two ways: (i) as a catch-all term to refer to material benefits (under both private and public law) and immaterial benefits (such as the dignity that recognition can confer upon recognized families) or (ii) as a term referring to the legal consequences under public law, i.e., government benefits like social security, welfare, tax allowances, etc. I use the term “prerogative” as a synonym for public and private law “benefits,” especially in referring to health-related rights, such as visitation or medical decision-making.

And finally, “status” refers to the official position of the parties in a relationship in society and before the law. If the parties acquire status, they are no longer seen as “single” before the law, but as “civil partners,” “domestic partners,” and the like. Marriage, like many registration-based regimes, gives its participants a new legal status. Ascriptive regimes, by contrast, do not confer a unitary status—parties continue to be considered legally single for some purposes, and family for other purposes.⁵⁶

55. *Id.*

56. The “pacte civil de solidarité” (PACS) is a contractual partnership whereby two persons in France can govern some aspects of their relationship under agreed-upon terms. See Joelle Godard, *PACS Seven Years On: Is It Moving Towards Marriage?*, 21 INT’L J.L. POL’Y & FAM. 310, 317 (2007). At the outset, the contract did not confer a status, and thus parties remained officially single. *Id.* In 2006, the law was amended to the effect that the contract now confers a status (the parties become “pacsés”). *Id.* Whether to consider PACS as recognition conferred under the contractual or the registration model is an open question, but because they now confer a status and because legal consequences arise upon registration, I think of them as belonging under the registration umbrella.

SECTION I
ABSTRACT MODELS TO RECOGNIZE NON-MARITAL FAMILIES

This section provides a primer on the models for recognizing relationships other than marriage. This background knowledge will be necessary to understand the conservative legal initiatives that will be dealt with in Section II. The models of recognition are the contractual model, the ascription model, the registration model, and various combinations of the three.

A. Contractual Model

The contractual model allows parties to structure their relationship through contracts and wills, regardless of formal recognition.⁵⁷ Through cohabitation and caregiving arrangements, parties can take on marriage-like obligations and design a property regime similar to that of a married couple.⁵⁸ Through wills, a person can designate a beneficiary to inherit property, just as married couples do.⁵⁹

At present, individuals can achieve some of the benefits of family pluralism through private contracts like prenuptial agreements and health care proxies.⁶⁰ However, not all of the legal protections of marriage can be assigned by contract. For instance, in the U.S., a person cannot freely assign Social Security benefits, health insurance benefits, or rights under the Family and Medical Leave Act.⁶¹ In Québec, one of Canada's civil law provinces, public law government programs recognize unmarried couples on a functional basis, but such couples are always legal strangers when it comes to private family law.⁶² Thus, a pure contractual model (where all family-related matters are dealt with by

57. LAW COMM'N OF CAN., BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS 115 (2001), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1720747&rec=1&srcabs=1524246&alg=7&pos=3 (follow "Download This Paper" hyperlink). Even though wills are not technically "contracts," I refer to a "contractual model" for its more immediate evocative power.

58. *Id.*

59. *Id.*

60. Laura A. Rosenbury, *Friends with Benefits*, 106 MICH. L. REV. 189, 231 (2007).

61. *Id.*

62. Leckey, *supra* note 53, at 14. In Québec, de facto couples continue to be excluded from all the remaining prerogatives in the field of succession. See Brigitte Lefebvre, *Récents développements en droit des successions: Le droit québécois*, 14 ELECTRONIC J. COMP. L. 2–3 (2010). Unmarried partners can inherit only by will and cannot make gifts of future property. *Id.*

contract) would require that current laws and regulations be amended to allow for a broader array of benefits.

The contractual model is characterized by a high degree of flexibility since it allows parties to design the bundle of rights and obligations that they deem appropriate, within the limits outlined above.⁶³ By contrast, marriage and registration systems usually provide for a standard set of rights and obligations that automatically accrue through those statuses, with some minor deviations. The contract's tailor-made nature is just a surface advantage; its most valuable asset is its ability to enhance personal autonomy. A legal contract allows the parties to articulate their own expectations, as to "forge one's own contractual regime and negotiate the terms of one's commitment [is] a valued tool in a free society."⁶⁴

The contractual model's benefits are also its shortcomings. This model works best when parties participate on equal footing with each other in the drafting of the agreement, share a relatively similar knowledge, and have balanced bargaining powers.⁶⁵ When this is not the case, it is right to be concerned about the vulnerability of the weaker party.⁶⁶ This factor alone may outweigh the benefits of autonomy and contractual freedom.⁶⁷

Additionally, private contractual law is cumbersome because it requires that parties invest a substantial amount of time and effort in reaching an agreement. The cost of agreement includes both direct costs—the legal fees required to enter into the contract—and indirect costs—spending time, effort, and energy entering into a mutually beneficial contract.⁶⁸ Contracting also generates emotional costs for the parties. First, parties must articulate their expectations for the relationship. This could lead parties to develop an adversarial mentality that might result in negative feelings surrounding the negotiations.⁶⁹ Agreements also suffer from an optimism bias. Any illusions about the likely length of the relationship or their own capacity to resolve future controversies

63. See, e.g., LAW COMM'N OF CAN., *supra* note 57, at 115.

64. *Id.*

65. See Leckey, *supra* note 53, at 12.

66. METZ, *supra* note 22, at 126 (arguing that caregiving itself creates vulnerability).

67. See Leckey, *supra* note 53, at 12.

68. See Helen Reece, *Leaping Without Looking*, in AFTER LEGAL EQUALITY: FAMILY, SEX, KINSHIP 119 (Robert Leckey ed., 2015).

69. *Id.* at 120.

will undermine parties' ability to accurately articulate their expectations.⁷⁰ It is unrealistic to think that these costs will not be relevant.

Furthermore, there is one key limitation to the contractual model that hinders any further analysis: contracts are binding on parties, not on the government. The consequence is that such arrangements are to some extent "invisible" in the eyes of the state and irrelevant for its social law apparatus.⁷¹ Through contracts, families can only regulate areas at free disposition of parties, such as property and financial aspects of cohabitation. Public benefits do not fall within this area. Thus, many families using contracts to overcome this invisibility find themselves in a position where they can only achieve a very limited array of benefits and rights.

The Law Reform Commission of Canada ("the Commission"), a public body advising the Canadian government on family law, has identified two more problems associated with the contractual model.⁷²

1. Lack of "certainty."⁷³ The Commission reported that "throughout [their] consultations, it became clear that simply allowing people the option to enter into private contracts . . . was insufficient because . . . it [did not] offer sufficient guarantee of *certainty*."⁷⁴ Contracts create uncertainty because they lead to non-uniform legal regimes, which are administratively difficult to manage.

The Commission's language can also be read in reference to the couple's uncertainty if their contractual language is unclear. There are many unpredictable but potentially relevant aspects of a relationship (*e.g.*, rules for sharing property, child rearing, support upon dissolution of the relationship, etc.) that can be difficult for parties to foresee. I share this concern. It is unrealistic to think that the contract will articulate all of the parties' expectations. This is a shortcoming that needs to be taken into account when choosing amongst different models.

2. "Lack of official record of those private agreements."⁷⁵ The lack of a publicly-held record would, in the words of the Commission, prevent the "efficient administration of laws and programs where

70. See Anne Barlow, LEGAL RATIONALITY AND FAMILY PROPERTY, *in* SHARING LIVES, DIVIDING ASSETS: AN INTERDISCIPLINARY STUDY 34 (Joanna K. Miles & Rebecca Probert eds., 2009).

71. Leckey, *supra* note 53, at 12.

72. LAW COMM'N OF CAN., *supra* note 57, at 114.

73. *Id.*

74. *Id.*

75. *Id.*

relationships could be relevant.”⁷⁶ But this is not an intrinsic feature of the model. Recently proposed legislation in Missouri and Alabama shows that the state could start recording common contracts through its clerks without many additional administrative costs.⁷⁷ The Commission’s concern can therefore be addressed through a system that sets forth the eligibility conditions to enter the contract, and asks the state administration to merely check that such conditions are met.

B. *Ascription*

Under the ascription model, legal recognition (and legal consequences) attach to cohabiting partners, whether they seek it or not.⁷⁸ Under an ascriptive regime, unmarried partners are conferred with marital-like rights and obligations, but not legal status.⁷⁹ I believe such a system is premised on the assumption that there is little difference between marriage and cohabitation. Ascription is a functional, rather than formal, system of recognition, in the sense that it inquires whether the parties “have functioned similarly to the members of formally recognized family relationships,” such as marriage.⁸⁰ Generally, the legal consequences flowing from ascription fall within the scope of private law (reciprocal rights and obligations) or public law (a package of social benefits and tax exemptions).⁸¹

This model is already implemented in many jurisdictions as “common law marriage,” and it could extend to non-normative relationships—with some caveats. Such is the case in Alberta, Canada, where any two persons (including friends, but excluding relatives) will acquire the status of “Adult Interdependent Partners” if they live in a three-year, interdependent relationship, or in a relationship “of some permanence” while raising a child.⁸²

Unlike the contractual model, which demands an articulation of the parties’ expectations and then crystallizes them in a contract, ascription operates when there is no previously verbalized set of expectations. In this sense, the model can remedy inequalities and unarticulated de-

76. *Id.*

77. S. 13, 2018 Sess. (Ala. 2018), <https://legiscan.com/AL/bill/SB13/2018>; H.B. 1434, 2018 Sess. (Mo. 2018), <https://legiscan.com/MO/bill/HB1434/2018>.

78. Leckey, *supra* note 53, at 12.

79. LAW COMM’N OF CAN., *supra* note 57, at 116.

80. Leckey, *supra* note 53, at 3.

81. *Id.* at 12.

82. *See infra* Section II.B.

sires—especially for women, who are more likely to be the vulnerable party.⁸³ The system purports to prevent exploitation and impose obligations that correspond to the expectations of the majority of couples.⁸⁴ While there are some families who choose not to marry, many partners “drift into” cohabitation and can overlook the consequences of the new arrangement.⁸⁵ Ascription is intended to correct this problem.

My view is that this system cannot truly apply to aspiring family formations. It is imperative that parties in new families attempt to articulate their desires for their relationship, since they are inherently new and non-normative. It would be a mistake for a non-traditional family to rely on traditional notions of familyhood. New families have characteristics—who they love and how—that are unique by definition, and the category of new family is too heterogeneous to expect the state to make a great effort in categorizing or according the appropriate benefits to all of them. By articulating their desires and expectations, new families also avoid the risk of assimilating into a hegemonic norm, as with state categorization.⁸⁶

Additionally, ascription can infringe on personal autonomy.⁸⁷ Parties in committed relationships—especially the wealthier party—might not intend to bind themselves in a marriage-like arrangement. Some scholarship has aptly referred to ascription as “conscription,” emphasizing the compulsory nature of the regime.⁸⁸ Under an ascriptive regime, parties not only fail to consent to the regime, but might also lack awareness that consequences have attached at all.⁸⁹ Efforts can be made to raise public awareness about the consequences of an ascriptive regime,

83. Martha Albertson Fineman, *Vulnerability and Inevitable Inequality*, 3 OSLO L. REV. 133, 136–38 n.6–16 (2017) (challenging the idea of marriage as a partnership between equals, and analyzing the multiple contexts showing that it was and is a gender-dependent union, such as accumulation of property and divorce).

84. Leckey, *supra* note 53, at 12.

85. Winifred Holland, *Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?*, 17 CAN. J. FAM. L. 114, 151–67 (2000).

86. Foucault has described how normalization operates by describing a four-step approach whereby the state: (i) eliminates or disqualifies what it terms as useless and irreducible; (ii) normalizes remaining knowledges to make them communicate and fit together; (iii) creates a hierarchy of knowledge, whereby the most particular and least generalizable knowledges become subordinated; (iv) builds a pyramidal centralization that enables it to control these knowledges. Foucault, *supra* note 7, at 180.

87. LAW COMM'N OF CAN., *supra* note 57, at 116.

88. Marsha Garrison, *Reviving Marriage: Could We? Should We?*, 10 J.L. & FAM. STUD. 279, 296 (2008).

89. *Id.* (“Although people may opt out of certain statutory provisions governing their relationships, they are not always aware of this possibility.”).

when enacted, but even so, the autonomy conundrum might be difficult to overcome.

A serious shortcoming of the ascription model also lies in its over-inclusive nature. This danger is clear in the case of conjugal relationships, such as common law couples. Once statutory conditions are met, all couples are treated alike, regardless of their concrete attributes.⁹⁰ The same over-inclusion might arise in the case of non-conjugal relationships. This shortcoming could be further accentuated if one considers that, absent a sexual component within the relationship, two roommates or friends who do not wish to bind themselves could become family in the eyes of the law if the eligibility requirements are easy enough to meet (e.g., mere cohabitation). There is no bright line that separates a friend from an interdependent life partner. Given the difficulty in determining the economic and emotional link between these parties, any ascriptive mechanism is likely to be fraught with error.

There are different means of implementing an ascription model. When attachment of the legal consequences occurs independent of the request of any of the parties, it is called “pure ascription.”⁹¹ Conversely, when recognition comes at a partner’s request, it is called “partial ascription.”⁹²

1. Purely Ascriptive Recognition

There are many examples of purely ascriptive recognition. Financial aid for university students in the U.S. is allocated purely by ascription: public financial aid awards may be reduced if the lender learns that the student’s unmarried parents are in a marriage-like relationship.⁹³ This reduction occurs *independent of a request by the student or her parents*.

90. LAW COMM’N OF CAN., *supra* note 57, at 116. *See also* discussion *infra* Introduction, Section A.

91. Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276, 1313 (2014).

92. *Id.* at 1313–33 (offering an account of the difference between pure and partial ascription). Legal scholarship does not always distinguish between these two types of ascription. However, cases triggering pure and partial ascription are qualitatively different, and deserve an *ad hoc* analysis.

93. Rebecca Klein, *FAFSA Changes to Recognize Same-Sex Parents by 2014*, HUFFINGTON POST (Apr. 30, 2013, 1:30 PM), http://www.huffingtonpost.com/2013/04/30/fafsa-changessame-sex-parents-2014_n_3185755.html; Erez Aloni, *Relationship Recognition Madness*, HUFFINGTON POST (June 12, 2013, 1:10 PM), http://www.huffingtonpost.com/erez-aloni/relationship-recognition-madness_b_3422346.html?utm_hp_ref=college&ir=College#es_share_ended.

Ascription is more problematic when it deals with legal recognition that neither party seeks. It can also have significant draconian effects on a new family. In a pure ascriptive regime, state recognition might result in economic injustice: for example, by determining, via ascription, that a family is no longer entitled to a public benefit.⁹⁴ This phenomenon is called “deprivative recognition,”⁹⁵ and is particularly acute in the context of government welfare benefits.⁹⁶ For example, in California, Oklahoma, and Kansas, an unmarried adult male residing in the house can result in termination or reduction of the Temporary Assistance for Needy Families (TANF)—a federal welfare program that helps needy children and their families.⁹⁷

Pure ascription can also bring about economic maldistribution in that it deprives parties of the benefits of singlehood, but does not simultaneously confer the economic privileges of family status (such as tax exemptions).⁹⁸ It is thus an asymmetrical system which can result in deprivation and economic injustice for new families.

2. Partially Ascriptive Recognition

“Partial ascription” models require that at least one party initiates an action. For example, in many places, upon dissolution of an unmarried partnership, a party can bring a claim for maintenance.⁹⁹ The court will inquire into the nature of the relationship and consider the parties as if they were legal spouses if certain functional attributes are met, such as the duration of cohabitation.¹⁰⁰ Partial ascription is somewhat less problematic than pure ascription, as the recognition of rights or duties

94. Aloni, *supra* note 91, at 1313.

95. *Id.* at 1314.

96. Kieran Tranter, Lyndal Sleep, & John Stannard, *The Cohabitation Rule: Indeterminacy and Oppression in Australian Social Security Law*, 32 MELB. U.L. REV. 698, 699 (2008); Leckey, *supra* note 53, at 31. *But see* Aloni, *supra* note 91, at 1320.

97. Aloni, *supra* note 91, at 1321–22. For California, see ANN. CAL. WELF. & INST. CODE § 11351.5 (Westlaw through Ch. 181 of 2018 Reg. Sess.). *See also* Russell v. Carleson, 111 Cal. Rptr. 497, 498 (Cal. Ct. App. 1973) (finding the foregoing law compatible with the constitution). The reason only three states have this rule, despite it being a federal program, is that each state defines the relevant “family unit” for purposes of the program.

98. *See* Garrison, *supra* note 88, at 296 (“Because cohabitation typically does not produce the same income-pooling benefits as marriage, a policy based on the assumption of income-pooling by cohabitants is counterfactual and might produce serious inequity.”).

99. *See, e.g.,* Marvin v. Marvin, 18 Cal.3d 660, 664 (Cal. 1976).

100. Aloni, *supra* note 91, at 1313.

has the potential to surprise just one member of a relationship, instead of both.¹⁰¹

Some excerpts from the factual background of the Canadian case *Ross v. Reaney* can be illuminating in this regard.¹⁰² Ross and Reaney were same-sex partners for 18 years, but lived apart for several years due to Reaney's job.¹⁰³

[2] Ross is now 46 years old and is self-employed for approximately 6 months a year as a personal trainer. His disclosed income is approximately \$19,000.00 USD annually. . . .

[3] Reaney is 47 years old and is self-employed in Ontario as a consultant. His disclosed annual income is \$126,000.00 [CAD].¹⁰⁴

This background information reflects the economic asymmetry the couple experienced, which prompted Ross to seek financial support upon dissolution of the relationship.

[3] Ross alleges that the parties were in a *committed* same sex relationship for approximately 18 years. . . .

[4] Ross alleges that during the course of their relationship, the couple made joint decisions with respect to all aspects of their lives and shared their lives including joint participation in financial decisions, social life, and management of their domestic lives. Ross says that their relationship was sexually intimate. They vacationed together. They purchased property together. They maintained principal and other residences together and cared for each other during times of illness. They gave gifts to each other and celebrated holidays and special events together. They held themselves out as partners to their families and friends. . . .¹⁰⁵

101. *Id.*

102. *Ross v. Reaney*, 2003 CanLII 1929 (Can. Ont. Sup. Ct. J.).

103. *Ross*, 2003 CanLII 1929, ¶ 3.

104. *Ross*, 2003 CanLII 1929, ¶¶ 1–3. The amount of the property is in USD as it was generated in Florida, where Mr. Ross, the claimant, worked.

105. *Ross*, 2003 CanLII 1929, ¶¶ 3–4 (emphasis added).

The passage shows Ross's attempt to support his claim for interim support.¹⁰⁶ He emphasizes that the couple was in a "committed" relationship to trigger partial ascription of benefits.¹⁰⁷

[6] Reaney *denies that the parties were in a committed same sex relationship* for 18 years. He claims that the relationship existed for 3 years from 1985 to 1988 at which time Reaney moved to Harvard to complete a 1-year Masters Program. In 1988, Reaney learned that Ross was HIV positive which, according to Reaney, led to dramatic changes in the nature of their relationship . . . Reaney denies that they were sexually intimate after the diagnosis. . . .

[7] Reaney *denies that there was any emotional commitment to Ross other than as friend*. . . .¹⁰⁸

Here, Reaney is acting *pro domo sua* (in his own interest). He asserts that the two were not in a committed relationship and that they were bound only by friendship.¹⁰⁹

[9] . . . In December 1995, Reaney was paying Ross \$3,000 per month. Between June 2002 and August 2002 Reaney unilaterally reduced the payments to \$1,500 per month. In August 2002, the payments were terminated. At this time Reaney was openly and ultimately involved with another partner. Ross says that this ended his relationship with Reaney.

[10] Ross alleges that Reaney began paying the salary after Ross began suffering from chronic fatigue. . . . The salary was a method of providing Reaney with a means of splitting income for income tax purposes.¹¹⁰

In order to gain an advantage in the lawsuit, each party reported the other's fraudulent conduct, as when Reaney alluded to the income-splitting technique,¹¹¹ and even resorted to disclosing details of their sexual life.¹¹² While Ross glorified their story of true love and firm

106. *Ross*, 2003 CanLII 1929, ¶¶ 3–4 (emphasis added).

107. *Ross*, 2003 CanLII 1929, ¶¶ 3–4.

108. *Ross*, 2003 CanLII 1929, ¶¶ 6–7.

109. *Ross*, 2003 CanLII 1929, ¶¶ 6–7.

110. *Ross*, 2003 CanLII 1929, ¶¶ 9–10.

111. *Ross*, 2003 CanLII 1929, ¶¶ 9–10.

112. *Ross*, 2003 CanLII 1929, ¶¶ 6–8.

commitment, Reaney referred to Ross as no more than a friend and rejected all of Ross's factual claims.¹¹³

The important takeaway of the case is that ascription places a great burden on the members of a family who do not want the commitment. One should ask whether redistribution of property from Reaney to Ross is fair. Suppose that, for whatever reason, Reaney did not want to commit to a long-term partnership with Ross. He must therefore have chosen to either end their cohabitation prematurely or else to accept legal ascription. Reaney must also have refrained from transferring money to Ross, even if Reaney's financial situation permitted it, even if Ross's health was compromised, and even if Reaney would have liked to do so. It is hard to see how such a system could represent the best approach to supporting new families.

Partial ascription also creates a barrier to the formation of new supportive networks. It often triggers an intrusive inquiry into partners' lifestyles and sexual and emotional intimacy, as the *Ross v. Reaney* case shows.¹¹⁴ The same goes for non-conjugal partners. Professor Aloni points out that "[i]n the welfare context . . . having an unrelated adult in one's apartment almost immediately invites questions from social workers and could easily deter people from living together."¹¹⁵ This kind of public probing might impair the flourishing of new kinship unions in another respect: It could require people to define their relationship before they otherwise would wish to do so, and then effectively lock the parties into that definition.

Under either approach, the cons outweigh the pros. Involuntary and compulsory recognition are more costly for new families than complete unrecognition.¹¹⁶

C. Registration

Registration is a formal remedy through which parties gain a status, as well as rights and benefits attached to that status. Civil unions, designated beneficiary schemes, and domestic partnerships are all examples of the registration model. Like marriage, all such registration

113. *Ross*, 2003 CanLII 1929, ¶ 7.

114. *Ross*, 2003 CanLII 1929.

115. Aloni, *supra* note 91, at 1329.

116. *Id.* at 1280 ("Largely missing from the celebration of recognition in the law of domestic relations is the simple yet meaningful fact that legal recognition comes with a financial cost—sometimes an unjust cost.").

schemes trigger automatic legal consequences.¹¹⁷ And as with previous systems, such consequences might fall within the scope of private law, public law, or both. Registration-related rights, duties, and benefits might mirror those attached to marriage—or not.¹¹⁸

When registration schemes offer the same benefits as marriage (as with civil unions), they operate as functional equivalents to marriage. In such cases, it is a common drafting technique for legislators to simply add a line of text (such as “or civil unions”) to existing marriage-related statutes.¹¹⁹ But registration schemes can be a separate regime from marriage altogether, and thereby attach a different package of legal consequences.¹²⁰ This segregated regime is achieved by creating a new set of rights, duties, and benefits, which are usually less extensive than those associated with marriage.¹²¹

Unlike a contractual arrangement, registration saves parties time and effort because it can be based on a regime of certain benefits and obligations being packaged together by default.¹²² But like the contractual model, it is a “formal” model for determining parties’ rights and duties.¹²³ It is also respectful of personal autonomy in that it requires parties to take affirmative steps to publicly express their commitment and articulate their expectations, unlike functional regimes that ascribe a status regardless of the will of the parties.¹²⁴

The chief critique of the registration model is that it is excessively rigid, particularly as far as public law benefits are concerned.¹²⁵ Registration essentially confers a bundle of benefits to replicate those of

117. See LAW COMM’N OF CAN., *supra* note 57, at 117.

118. See Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 591–94 (2013).

119. This is the case in Italy. Art. 20 LEGGE 20 MAGGIO 2016, n. 76 at ¶ 33. The law is entitled “Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze” [Rules concerning civil unions between same-sex partners and the legal framework of cohabitation]. Art. 20 LEGGE 20 MAGGIO 2016, n. 76.

120. Aloni, *supra* note 118, at 591–94.

121. See *infra* Figure 2 and Section II.B. This is also true for countries outside the purview of this Article. For instance, in Italy, same-sex and opposite-sex couples can enter a civil partnership through registration, which, notwithstanding a clause equating their status to that of married couples, does not confer a duty of fidelity, nor a right to adopt children. See also Art. 20 LEGGE 20 MAGGIO 2016, n. 76, “Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze” [Rules concerning civil unions between same-sex partners and the legal framework of cohabitation].

122. LAW COMM’N OF CAN., *supra* note 57, at 117.

123. See Leckey, *supra* note 53, at 12.

124. LAW COMM’N OF CAN., *supra* note 57, at 117.

125. See, e.g., Elizabeth Brake, Book Review, 30 PHIL. REV. 418, 420 (reviewing TAMARA METZ, *UNTYING THE KNOT* (2010)).

marriage—the traditional means of allocating social goods. Critics note that registration schemes fail to account for all the possible forms that adult relationships might take.

I argue that there are two forms of registration: (1) what I will call “registration by default,” where given benefits are automatically attached to the legal status, and (2) “registration by design,” where parties designate the beneficiaries of their benefits (with each benefit potentially conferred upon different beneficiaries).¹²⁶

1. Registration by Default

The most common form of a registration scheme is one where pre-determined benefits are automatically attached to a given status.¹²⁷ Examples of registration by default schemes in comparative perspective are many and range from domestic partnerships to civil unions.¹²⁸ The most significant examples for purposes of the present Article are the reciprocal and designated beneficiary schemes in the U.S., as will be discussed in Section II.¹²⁹ Registration by default schemes, in the most common form, are “comprehensive,” such that a range of benefits accrue to the parties. They can also be narrowly focused in the sense that the pre-determined consequences of registration concern only the specific benefits that a government agency administers.¹³⁰

Many innovative proposals for protecting new kinship unions are comprehensive registration by default schemes. One example is the “intimate caregiving union” (“ICGU”) scheme proposed by Tamara

126. The selected terminology echoes the privacy-by-default/privacy-by-design dichotomy, coined by the Canadian Privacy Commissioner of Ontario in the 1990s. It by no means intends to refer to the legal meaning acquired by these locutions in the field of privacy. It merely recalls its *prima facie* meaning, which seems applicable to registration models as well.

127. Leckey, *supra* note 53, at 12 (defining registration itself as a “legislatively established framework of rights and obligations that the parties to a relationship can take on.”).

128. See William N. Eskridge, *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1935–40 (2012). The trend of adding new options to the menu of relationships is widespread in Western legal systems. For European examples, see generally JENS M. SCHERPE, EUROPEAN FAMILY LAW VOLUME III: FAMILY LAW IN A EUROPEAN PERSPECTIVE (2016).

129. See *infra* Section II.A.

130. This system is in force in the Canadian province of Manitoba, and it allows non-married conjugal couples to register with the government agency to gain a few marital benefits, such as property division rules. Family Property Act, C.C.S.M. c. F25 (Can.).

Metz.¹³¹ She suggests introducing a new legal framework in the U.S. whereby marriage is replaced with an ICGU status.¹³² The newly created status would remove the state from the ethically-driven choice of extending marriage and would instead recognize all intimate caregiving units.¹³³ She also contends that marriage should be disestablished:

Against suggestions that the state's legitimate welfare concerns with respect to intimate associational life are best treated by reforming marriage or replacing it with a system of private contract, an intimate caregiving union status, narrowly and carefully tailored to recognize, protect, and support intimate caregiving in its many forms, would most effectively balance liberal commitments to liberty, equality, and stability.¹³⁴

Metz's account is premised on the assumption that recognition of caregiving units through status, as opposed to contract, is the only viable way to remedy social injustice and protect these unions. According to Metz, adult-adult intimate caregiving relationships need "the special recognition and protection that only a status can afford."¹³⁵ For Metz, defining what constitutes a "caregiving" union and what benefits will accrue to them are questions that remain open.¹³⁶

2. Registration by Design

The chief critique of the registration by default model is that it is excessively rigid, particularly as far as public law benefits are concerned. This registration essentially confers a bundle of benefits to replicate the traditional means of allocating social goods through marriage. Registration by design differs from registration by default in that parties can, after registering their relationship, freely choose the beneficiary (or

131. Professor Metz provides a lucid account of acceptable goals vis-à-vis marriage within the context of a liberal state. Provided that the state cannot perform duties as an ethical authority, it must limit its action to promote social goals not driven by ethics, such as public health. In order to limit the ethical role of states in this field, the preferred option is that of separating marriage from the state. *See* METZ, *supra* note 22, at 14.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 140.

136. *See generally* METZ, *supra* note 22.

beneficiaries) upon whom they wish to confer benefits. Each benefit need not be assigned to the same beneficiary. Put differently, parties can “customize” the allocation of their subsidies and designate different beneficiaries. In this way, the registration by design scheme prizes personal autonomy.

But a registration by design system creates additional administrative burdens because there are no default rules, as with marriage and registration by default. Accordingly, the system does not excel in clarity or simplicity, as evinced by the following two examples.

In her piece “Friends with Benefits,” Professor Laura A. Rosenbury analyzes the way people provide care outside of the home, particularly among friends.¹³⁷ She starts from the fundamental premise that people can perform multiple caregiving functions over time, and that fluidity is inherent in family formations (other than marital or marital-like relationships).¹³⁸ In order to protect and reflect these shifting networks of reciprocal care, she argues, family law has to introduce a mechanism that permits a person to assign some of the benefits traditionally attached to marriage to individuals of their choice.¹³⁹ For example, a person could decide that she wanted her health insurance benefits to be shared with a sibling, her family and medical leave be given to a grandmother, and that hospital visitation rights be assigned to a dear friend.¹⁴⁰

The main benefit of such an approach is that there need not be a comprehensive bundle of benefits and obligations that parties must accept as such and then allocate to only one partner.¹⁴¹ Rosenbury also requires that the allocation of the benefit(s) be done on a mutual basis, such that one receives caregiving benefits only as long as he or she accepts caregiving responsibilities.¹⁴² This clearly makes the system more workable.

The benefits of self-designation are undoubted from an autonomy perspective. A registration by design (or similar system allowing for multiple, symmetrical designations that do not come in the form of registration) would be beneficial to the flourishing of queer formations that are nomadic and can hardly find legal categories to reflect their complexi-

137. Rosenbury, *supra* note 60.

138. *Id.* at 229.

139. *Id.* at 230–31.

140. *Id.*

141. *Id.* at 231. A proposal from Steve Sugarman concerning the Short Term Paid Leave plan in the employment context echoes a similar approach. See Stephen D. Sugarman, *Short Term Paid Leave: A New Approach to Social Insurance and Employee Benefits*, 75 CAL. L. REV. 465, 466–73 (1987).

142. Rosenbury, *supra* note 60, at 232.

ty.¹⁴³ A flexible model like Rosenbury's would allow parties in more atypical arrangements to think of themselves as a "family," as opposed to thinking of their relationship as a mere happenstance. Legal scholarship has long acknowledged the dynamic interplay between social facts and legal categories.¹⁴⁴ This type of model would provide parties to queer assemblies with more malleable concepts to frame their relationships. Furthermore, in allowing for multiple beneficiaries, registration by design schemes effectively eliminate legal definitions of "family," as long as they are no longer necessary for conferring rights.¹⁴⁵ In this sense, the system reduces the risk of assimilation inherent in legal definitions.¹⁴⁶

Professor Aloni has a similar proposal, which he calls "registered contractual relationships" ("RCRs").¹⁴⁷ Professor Aloni believes that future information technology will facilitate the introduction of a system with multiple legal designations because it will enhance the government's ability to check who has been designated and for what purpose, thereby overcoming the main shortcoming of designation by design systems: their administrability.¹⁴⁸

Professor Rosenbury and Professor Aloni both leave open questions about designing a workable proposal. How should beneficiaries be designated? How could someone designate different beneficiaries for different benefits? How could the government check which person has been designated as the beneficiary of a specific benefit? Should parties still be allowed to have multiple beneficiaries for the same benefit; if so, to what extent?¹⁴⁹ While viable for non-costly benefits, such as hospital visitation, major concerns could surely be raised for costly programs, such as

143. See Frederik Swennen & Mariano Croce, *Family (Law) Assemblages: New Modes of Being (Legal)*, 44 J. OF L. & SOC'Y 532 (2017).

144. *Id.* at 556.

145. *Id.*

146. See, e.g., Swennen & Croce, *supra* note 49; Lauren Berlant & Micheal Warner, *Sex in Public*, in *QUEER STUDIES: AN INTERDISCIPLINARY READER* 170 (Robert J. Corber & Stephen Valocchi eds., 2003); Stacey Young, *Dichotomy and Displacement: Bisexuality in Queer Theory and Politics*, in *PLAYING WITH FIRE: QUEER POLITICS, QUEER THEORIES* (Shane Phelan ed., 1997).

147. Notwithstanding the proposal's alleged "contractual" nature, Professor Aloni refers to the possibility of registering based either on a contract or on a form prearranged by the administration. Aloni, *supra* note 118, at 608.

148. *Id.* at 608–09.

149. I believe that the main objection to polygamy is that there are financial constraints that prevent the possibility of conferring the same benefit to several people. Giving different benefits to different people, as long as you give them just to one person at a time, is a different situation which does not implicate this problem.

survivor pensions or health care benefits. These practicalities advise against considering this option at present.

I believe that the registration by design model is underdeveloped in its answers to these questions. While the model is appealing for its emphasis on flexibility and personal autonomy, it requires further research.

3. A tertium genus?

If one thinks of registration by default and registration by design as two Manichean opposites, it makes sense to inquire into whether a third option exists within the macro-category “registration.” Indeed, I suggest thinking of the registration by default and registration by design models as the two extremes of a continuum. An ideal system could be somewhere in the middle—for example, a system with default rules that are supplemented by a robust opt-out regime. Such a system could allow parties to choose which benefits to confer but restrict the designation to only one beneficiary. This system, despite being closer to a registration by default model, shares some valuable characteristics of registration by design models, especially the flexibility of the assigned benefits.

This middle-ground option was implemented in the Designated Beneficiary Act in Colorado¹⁵⁰ that I discuss further below.¹⁵¹ While the Designated Beneficiary Act does not allow two parties to designate multiple beneficiaries, it does allow them to tailor the partnership agreement by choosing which benefits to confer upon their beneficiary.¹⁵² This intermediate category strikes a reasonable balance between flexibility and administrability.

D. *Mixed Systems*

Another way to recognize aspiring family units is to merge two general models into a hybrid one. This section will first address a system, developed in legal scholarship, that is based on registration and transformative redistribution through ascription. It will then briefly

150. COLO. REV. STAT. ANN. § 15-22-105 (Westlaw through 2018, 2d Reg. Sess. of 71st Gen. Assemb.).

151. *See infra* Section II.A.

152. COLO. REV. STAT. ANN. § 15-22-105 (3) (Westlaw through 2018, 2d Reg. Sess. of 71st Gen. Assemb.) (“A designated beneficiary agreement shall entitle the parties to exercise the following rights . . . unless specifically excluded from the designated beneficiary agreement . . .”).

discuss the scheme currently in force in Alberta, Canada, which is also based on a hybrid of registration and ascription.¹⁵³ Both systems adopt a formal and a functional approach to legal recognition.

Professor Polikoff developed the first proposal for providing benefits to new families, and it draws on both registration and redistribution through ascription. Like Professor Rosenbury,¹⁵⁴ Polikoff asserts that people who want to formalize their relationship must be able to do so outside the narrow boundaries of marriage and conjugality.¹⁵⁵ Under Polikoff's "valuing all families" approach, someone without a spouse or domestic partner could still register for benefits and indicate a "designated family member" to be the recipient.¹⁵⁶ Her registration scheme, however, does not confer onto new families the same rights, obligations, and benefits that flow from marriage.¹⁵⁷ Polikoff identifies Vermont's law protecting "reciprocal beneficiaries"—a scheme that will be considered in depth in Section II.A.2.—as the one that most resembles her approach. Accordingly, for Polikoff and under the Vermont statute, registration benefits would be limited to health-related rights and abuse prevention.¹⁵⁸

Polikoff's proposal differs from the Vermont regime in a several ways. First, the Vermont law limited eligible beneficiaries to blood relatives, but Polikoff has proposed expanding that to allow a person to designate a non-relative beneficiary.¹⁵⁹ Second, unlike the Vermont law, Polikoff has added that when someone dies intestate, his beneficiary could inherit his estate, just the same as if the person were a spouse.¹⁶⁰ If a person dies without having designated a family member, Polikoff argues that the government should investigate which beneficiary the person *would* have designated, had he envisaged the possibility of doing so.¹⁶¹ This is a positive, rather than deprivative, example of pure ascription. Finally, Polikoff argues that wrongful death statutes should be based on the beneficiary's actual dependency on the deceased worker.¹⁶²

153. Adult Interdependent Relationships Act, S.A. 2002, c A-4.5 (Can.).

154. Rosenbury, *supra* note 60.

155. POLIKOFF, *supra* note 5, at 126.

156. *Id.* at 134-35.

157. *Id.*

158. See 15 VT. STAT. ANN. §§ 1301-1306 (Westlaw, repealed 2013, Adj. Sess. No, 164).

159. POLIKOFF, *supra* note 5, at 135; see also 15 VT. STAT. ANN. § 1301 (Westlaw, repealed 2013, Adj. Sess. No, 164).

160. *Id.* at 134-35.

161. *Id.* at 135-36.

162. See POLIKOFF, *supra* note 5, at 195. Proof of dependency refers to the need to provide proof that the claimant was financially dependent upon the deceased worker. It thus differs from the presumption of dependency that often attaches to spouses and chil-

Polikoff asserts that under a “valuing-all-families” approach, all possible family members (including parties to non-normative families) could show dependency.¹⁶³

A second example of a hybrid system comes from a law in Alberta, Canada, called the Adult Interdependent Relationships Act (AIRA).¹⁶⁴ The system is a mixed one based on both a contractual and ascriptive model. It will be further analyzed in Section II. In brief, AIRA sets forth two different models for recognition. Parties can either sign a written agreement (contractual model),¹⁶⁵ or they can acquire legal status as a family if they either: (1) live in a three year-long interdependent relationship; or (2) are in a relationship “of some permanence,” while raising a child (ascription).¹⁶⁶ AIRA is more limited than Polikoff’s proposal in that under Section (3)(2) of AIRA, persons related to each other by blood or adoption are not eligible for ascription and may only become adult interdependent partners by entering into a written agreement.¹⁶⁷ Under AIRA, close friends and roommates who meet the eligibility criteria can have legal status ascribed.¹⁶⁸ As discussed previously, the downside of ascription is the limitation on personal freedom to decide whether to formalize a relationship.¹⁶⁹

SECTION II LEGAL INITIATIVES

The distinction between “philosophically-driven” and “politically-driven” legal initiatives has special significance in the field of marriage

dren in such statutes, including the California statute (Cal. Civ. Proc. C. § 377.60 (b),(c) (2007)).

163. POLIKOFF, *supra* note 5, at 5.

164. Adult Interdependent Relationships Act, S.A. 2002, c A-4.5 (Can.).

165. Adult Interdependent Relationships Act, S.A. 2002, c A-4.5, § 3(1)(b) (Can.).

166. Adult Interdependent Relationships Act, S.A. 2002, c A-4.5, § 3(1)(a) (Can.).

167. Adult Interdependent Relationships Act, S.A. 2002, c A-4.5, § 3(2) (Can.). Since these partnerships are formalized through a private contract, there are no statistics on the number of contracted AIPs since the enactment of the law.

168. Adult Interdependent Relationships Act, S.A. 2002, c A-4.5, § 3(1)(a) (Can.).

169. The Consultation Report on the law voiced concerns that an ascriptive system applying across the board would impinge on the freedom of choice of two cohabiting relatives or friends unwilling to make a long-term commitment. Anu Nijhawan, *Alberta’s New Adult Interdependent Relationships Act*, 22 EST. TR. & PENSIONS J. 157, 171 (2003). However, contrary to the recommendations of the Consultation Report on the reform, Section (3)(2) of AIRA, setting out a duty to enter an agreement to become an AIP, only concerns relatives. Adult Interdependent Relationships Act, S.A. 2002, c A-4.5, § 3(2) (Can.).

and status recognition. “Philosophically-driven” initiatives are essentially political movements grounded in progressive concerns that have emerged in socio-legal or political scholarship.¹⁷⁰ By contrast, “politically-driven” laws are developed primarily by conservative politicians who aim to preserve the *status quo*.¹⁷¹ The legal initiatives examined below are politically-driven, with the exception of the scheme in Colorado, which was pushed forward by progressive social groups.¹⁷²

Conservative groups who wanted to shift the public’s focus away from the LGBT marriage equality struggle began to enact laws like those below in 1997.¹⁷³ They range from bills inspired by outright homophobia (as in the cases of Alberta, Canada; Alabama; and Missouri) to initiatives that simply diluted protection for same-sex couples by offering the protections through a wider, and thus more ideologically neutral, registration scheme (as in Hawaii and Vermont).¹⁷⁴ Subsection A will explore the reciprocal and designated beneficiary schemes in the United States. Subsection B will be devoted to Canada, and particularly to the scheme in force in Alberta. Subsection C will deal specifically with the conservative bills in Alabama and Missouri that lay out an original variation of the contractual model, featuring publicly-binding contracts.

A. *Designated and Reciprocal Beneficiary Schemes in the U.S.*

As discussed above, designated and reciprocal beneficiary schemes are registration schemes for consenting adults who meet certain eligibility criteria. The difference between designated and reciprocal beneficiary schemes mainly consists in the former being “tailor-made” (*i.e.* giving the parties the opportunity to choose which benefits to confer upon each other) and the latter conferring a definite set of rights.¹⁷⁵

As for the scope of eligibility, the parties that can take advantage of the scheme vary from state to state. In some states (like Vermont and

170. Nicholas Bala, *Controversy over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships*, QUEEN’S L.J. 41, 88–89 (2003); see also COUNCIL ON FAMILY LAW, *THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA* 27 (2005).

171. Nicholas Bala, *supra* note 170, at 88–89; see also COUNCIL ON FAMILY LAW, *supra* note 170, at 27.

172. The scheme constitutes the most flexible and comprehensive scheme enacted so far to protect non-normative unions. It’s been included in the analysis for that reason despite being promoted by LGBT groups, not conservative groups.

173. POLIKOFF, *supra* note 5, at 69–72.

174. See *infra* Section I.A.

175. DOUGLAS E. ABRAMS, ET AL., *CONTEMPORARY FAMILY LAW*, 281 (4th ed. 2015).

Hawaii) the scheme reaches only couples who are legally unable to marry;¹⁷⁶ in others (Colorado and Washington, D.C.) the scheme reaches all sorts of non-normative relationships, including blood relatives; others still (Maine and Maryland) split the difference, allowing access to a number of relationships, but denying it to blood relatives, such as siblings.¹⁷⁷

FIGURE I. FAMILIES ELIGIBLE TO ENTER INTO DESIGNATED/RECIPROCAL BENEFICIARY SCHEMES

	Same-sex couples	Other unmarried conjugal partners	Relatives	Friends	Eligibility
Colorado	x	x	x	x	Any two unmarried, consenting adults of sound mind
Hawaii	x*		x		Any two adults unable to marry
Vermont			x		Any two people unable to marry (or enter a civil union) and related by blood or by adoption
Maine	x	x		x	Any two individuals except within some specified degrees of consanguinity
Maryland	x	x		x	Two cohabiting individuals of any gender in a mutually caring relationship
D.C.	x	x	x	x	Any two unmarried individuals in a committed relationship

* Before the introduction of same-sex marriage in the Hawaii Marriage Equality Act.¹⁷⁸

As to the material scope of the laws, they can range from very narrow (a law that confers on family members only the right to make health-related decisions)¹⁷⁹ to very broad (laws which give non-traditional families near-comprehensive protection under both private and public law).¹⁸⁰ As shown in Figure 2, new families have not been equated with married families under any of these schemes: They can only access *some* private law entitlements or public law benefits through each scheme.¹⁸¹

176. See *infra* Figure 1.

177. *Id.*

178. HAW. REV. STAT. ANN. § 572-1 (Westlaw through 2013 Act 4 2d Spec. Sess.).

179. See, e.g., 15 VT. STAT. ANN. § 1301(a), (b) (Westlaw, repealed 2013, Adj. Sess. No. 164).

180. See, e.g., COLO. REV. STAT. ANN. § 15-22-105(3)(c) (Westlaw through 2018, 2d Reg. Sess. of 71st Gen. Assemb.).

181. See *infra* Figure 2.

FIGURE 2. MATERIAL SCOPE OF DESIGNATED/RECIPROCAL BENEFICIARY SCHEMES FOR NEW FAMILIES

	Social security, welfare, or tax benefits	Workers' compensation	Health-related rights	Intestate rights	Property rights	Wrongful death compensation	Other
Colorado	x*	x	x	x	x	x	
Hawaii			x**	x	x	x	Family and funeral leave, miscellaneous provisions
Maine			x	x			
Maryland	x***		x				
D.C.			x				Family and funeral leave
Vermont [repealed]			x				Abuse prevention

* Colorado only gives pensions to public employees, or private employees if the employer elects to do so. C.R.S. 15-22-105(3)(c).

** Only visitation rights.

*** Tax exemption for property transfers.

1. Hawaii

The Hawaii Supreme Court's decision in *Baehr v. Lewin* (1993) was the first time a U.S. court ruled that excluding same-sex couples from marriage was unconstitutional.¹⁸² The case was then remanded to the trial court to determine whether the state action passed muster under strict scrutiny, and the Court found it did not.¹⁸³ Pending the appeal of that decision, Hawaii voters passed a referendum that amended the state constitution to restrict the definition of marriage to opposite-sex spouses.¹⁸⁴ That litigation was a catalyst for the enactment of Hawaii's

182. Dee Ann Habegger, *Living in Sin and the Law: Benefits for Unmarried Couples Dependent on Sexual Orientation?*, 33 IND. L. REV. 1000 (2000) (discussing *Baehr*); see *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

183. *Baehr v. Miike*, No. 91-CV-1394, 1996 WL 694235, at *21–22 (Haw. Ct. App. Dec. 3, 1996).

184. HAW. CONST. art. 1, § 23.

Reciprocal Beneficiary Act of 1997.¹⁸⁵ The law was passed as a concession to conservatives, who hoped that the introduction of a neutral scheme open to a wider array of couples would satisfy the complaints of same-sex couples.¹⁸⁶

Hawaii's law allows any two individuals (who cannot enter into a valid legal marriage) to designate each other as "reciprocal beneficiaries," and thus receive some benefits usually attached exclusively to marriage.¹⁸⁷ The law was meant to apply to couples unable to marry, namely relatives and same-sex couples.¹⁸⁸ By registering with the Department of Health through a simple form, parties can access a number of benefits which are typically only enjoyed by married couples, including:

- (1) Legal standing to sue for wrongful death and under domestic violence statutes;
- (2) Property and inheritance rights;
- (3) Hospital visitation rights;
- (4) Family and funeral leave; and
- (5) Miscellaneous benefits under state law, such as government vehicle emergency use, use of the facilities of the University of Hawaii, etc.¹⁸⁹

Not only does this scheme include insurance benefits and health decision-making rights, but it also lists other spousal-like unitive benefits,¹⁹⁰ such as some limited property rights¹⁹¹ and rights under succession law (including the right to an elective share upon death).¹⁹² The family health insurance benefits (both private and public) and the right

185. Ian Curry-Sumner & Scott Curry-Sumner, *Is the Union Civil? Same-sex Marriages, Civil Unions, Domestic Partnerships & Reciprocal Benefits in the USA*, 4 UTRECHT L. REV. 236, 243 (2008).

186. *Id.* at 243; Eskridge, *supra* note 128, at 1938.

187. Hawaii Reciprocal Beneficiaries Act, Laws 1997, ch. 383, § 1 (codified in part in HAW. REV. STAT. ANN. § 572C) (Westlaw through 2018 Act 220).

188. HAW. REV. STAT. ANN. § 572C-4 (Westlaw through 2018 Act 220) (listing the requisites of a valid reciprocal beneficiary relationship); HAW. REV. STAT. ANN. § 572C-2 (Westlaw through 2018 Act 220) (explaining that non-marital relationships, such as a widowed mother and son, can now receive rights and benefits).

189. H.B. 118, 119th Leg., Reg. Sess. (Haw. 1997).

190. Eskridge, *supra* note 128, at 1910 (defining unitive rules as rules that enforce the assumption that the parties in a marriage act as a unit as opposed to separate persons).

191. HAW. REV. STAT. ANN. § 509-2 (Westlaw through 2018 Act 220). Property rights include benefits and obligations related to jointly held property, but do not include distribution of property or support upon breakdown of the relationship.

192. HAW. REV. STAT. ANN. § 560:2-202 (elective share), § 560:2-301 (entitlement of spouse), § 560:2-802, § 560:2-804 (Westlaw through 2018 Act 220).

to workers' compensation benefits to reciprocal beneficiaries were the least favorable to employers.¹⁹³

This ambitious scheme was curtailed almost immediately after its enactment by Hawaii's Attorney General (who interpreted the worker medical insurance provision as only applicable to insurance companies, although the majority of employees are not insured through these companies),¹⁹⁴ the state legislature (who refused to fund the medical insurance program) and the courts (who deemed some state private sector benefit plans preempted).¹⁹⁵ As a result, the law's most groundbreaking provisions were almost immediately rendered inapplicable to many of its intended beneficiaries.¹⁹⁶

2. Vermont

The Vermont reciprocal beneficiaries scheme, which was repealed in 2013,¹⁹⁷ applied to any two people who were unable to marry (or enter into a civil union) and were related by blood or adoption.¹⁹⁸ The scheme was more limited in scope than Hawaii's.¹⁹⁹ It did not include intestate succession or legal standing to sue for wrongful death.²⁰⁰ Likewise, social or tax benefits were not included in the scheme.²⁰¹ It also expressly prevented courts from construing the statute in such a way as "to create any spousal benefits, protections or responsibilities for reciprocal

193. Catherine L. Fisk, *ERISA Preemption of State and Local Laws on Domestic Partnership and Sexual Orientation Discrimination in Employment*, 8 UCLA WOMEN'S L.J. 267, at 271 (1998).

194. Hawaii Attorney General, Legal Opinion Letter 97-05 (Aug. 14, 1997) (available at <https://ag.hawaii.gov/wp-content/uploads/2013/01/97-05.pdf>); Hawaii Attorney General, Legal Opinion Letter 97-10 (Dec. 2, 1997) (available at <https://ag.hawaii.gov/wp-content/uploads/2013/01/97-10.pdf>); Curry-Sumner & Curry-Sumner, *supra* note 185, at 244.

195. Fisk, *supra* note 193, at 271.

196. *Id.*

197. 15 VT. STAT. ANN. § 1301(a) (Westlaw, repealed 2013, Adj. Sess. No. 164).

198. 15 VT. STAT. ANN. § 1301 (Westlaw, repealed 2013, Adj. Sess. No. 164).

199. *See supra* Figure 2; *see also* Martha M. Ertman, *The Ali Principles' Approach to Domestic Partnership*, 8 DUKE J. GENDER L. & POL'Y 107, 110 n.10 (2001).

200. *See id.*

201. Interestingly, the Supreme Court of Vermont explained in *Embree v. Balfanz* that the reciprocal beneficiary is a "family," not merely a household member for purposes of the applicability of the Vermont's Abuse Prevention Statute. This shows a gradual judicial evolution on the notion of family. *See* 817 A.2d 6, 9 (2002).

beneficiaries not specifically enumerated herein.”²⁰² Upon registration, two persons were entitled to the following:

- (1) Hospital visitation and medical decision-making rights;
- (2) Decision-making rights relating to anatomical gifts;
- (3) Decision-making rights relating to disposition of remains;
- (4) Patient’s bill of rights, which conferred the right to be informed of a loved one’s diagnosis and prognosis, as well as visitation rights;
- (5) Nursing home patient’s bill of rights, which recognized the right to privacy during visits; and
- (6) Access to the state domestic abuse prevention program and connected reliefs.²⁰³

The genesis of the Act differed from Hawaii’s Reciprocal Beneficiary Act. In 1999, the Vermont Supreme Court ruled that the exclusion of same-sex couples from the “statutory benefits, protections, and security incident to marriage” infringed the equal protection clause of the Vermont Constitution, but the court left the appropriate remedy to the discretion of the legislature.²⁰⁴ The government eventually opted for civil unions, restricted to same-sex couples, in an attempt to preserve the purity of marriage.²⁰⁵ The legislature also added another layer of protection to confer minimal rights to “residual unions”—those unmarried non-gay couples—as “a polite gesture to conservatives.”²⁰⁶ The aim was to reduce the symbolism of recognizing same-sex couples through civil unions.²⁰⁷

In the context of reciprocal beneficiary schemes, the Vermont law stands out because it was limited only to health-related choices and protection against domestic violence.²⁰⁸ In any case, the statute did not

202. 15 VT. STAT. ANN. § 1301(b) (Westlaw, repealed 2013, Adj. Sess. No, 164).

203. 15 VT. STAT. ANN. § 1301 (Westlaw, repealed 2013, Adj. Sess. No, 164). The list does not include advanced directives for health care and end of life. 18 VT. STAT. ANN. §§ 5263–5278 (Westlaw, repealed 2005, No. 55, § 9).

204. *Baker v. State*, 744 A.2d 864, 886–89 (1999).

205. Thomas F. Coleman, *Reciprocal Beneficiary Laws Mask a Larger Political Battle*, UNMARRIED AMERICA (Mar. 13, 2006), <http://www.unmarriedamerica.org/column-one/3-13-06-reciprocal-beneficiaries.htm>.

206. *Id.* (“Because they had a judicial gun to their heads, moderate legislators felt compelled to vote in favor of the comprehensive domestic partnership law, which they renamed ‘civil union.’ The ‘reciprocal beneficiary’ bill also passed as a polite gesture to conservatives.”).

207. *Id.*

208. *See* 15 VT. STAT. ANN. § 1301 (Westlaw, repealed 2013, Adj. Sess. No, 164).

prove to be very popular, and few people benefitted from it before its repeal.²⁰⁹

3. Useful Exceptions: Colorado, Maryland, Maine, and Washington, D.C.

This Article contends that new families should form alliances with conservative groups to advance their rights, since conservatives are often behind the introduction of alternative regimes to marriage.²¹⁰ The following examples are schemes that did not originate from conservative fringes, yet are worth mentioning as valuable examples of models for protecting new families.

Colorado's Designated Beneficiary Act of 2009 ("DBA") confers on any two unmarried people important protections in estate- and health-related decisions,²¹¹ as well as public law benefits.²¹² Pursuant to the law, a person can be named a "designated beneficiary" by an agreement known as a Designated Beneficiary Agreement, or DBA.²¹³ Unlike Hawaii's statute, where the parties must be legally unable to enter a valid marriage in order to register, Colorado has no such restriction.²¹⁴ The law only requires that the two parties be consenting adults of sound mind (*i.e.*, legally competent to enter a valid contract).²¹⁵ Although the scheme has been viewed as an estate-planning tool for intimate (opposite-sex or same-sex) couples who have decided to not marry or enter a civil union, its reach is much broader: the agreement can be entered into by two unmarried friends or with any relative, including an adult child.²¹⁶

Unlike the schemes in Hawaii and Vermont, the reform in Colorado constituted a stepping stone to enhancing protections for same-sex

209. Aloni, *supra* note 118, at 592–93.

210. *See supra* Introduction.

211. COLO. REV. STAT. ANN. § 15-22-105(1)(a), (c), (d) (Westlaw 2d Reg. Sess. of 71st Gen. Assemb.).

212. COLO. REV. STAT. ANN. § 15-22-105(3)(c) (Westlaw 2d Reg. Sess. of 71st Gen. Assemb.).

213. COLO. REV. STAT. ANN. § 15-22-105(1) (Westlaw 2d Reg. Sess. of 71st Gen. Assemb.).

214. COLO. REV. STAT. ANN. § 15-22-105(1) (Westlaw 2d Reg. Sess. of 71st Gen. Assemb.).

215. COLO. REV. STAT. ANN. § 15-22-105(1) (Westlaw 2d Reg. Sess. of 71st Gen. Assemb.).

216. *See* John G. Culhane, *After Marriage Equality, What's Next for Relationship Recognition?*, 60 S.D. L. REV. 375, 384–85 (2015).

couples, and the LGBT state advocacy group Equal Rights Colorado urged its introduction.²¹⁷ Its protections are relatively cheap and easy to access, as parties can enter into a DBA by completing one easy form that does not require the assistance of an attorney.²¹⁸ Upon designation, the parties to a DBA can exercise some rights and be entitled to some marriage-like protections, as specified in the agreement.²¹⁹ The scheme is also highly flexible: parties can tailor it to their needs and expectations and confer benefits or privileges without a duty of reciprocity to each other.²²⁰

The DBA's default regime—the array of protections that automatically attach to designated beneficiaries—is also the broadest of any current scheme.²²¹ The Colorado law offers legal protections in both private

217. Nancy D. Polikoff, *Colorado Designated Beneficiary*, in *THE SAGE ENCYCLOPEDIA OF LGBTQ STUDIES* 245 (Abbie E. Goldberg ed., 2016).

218. See John G. Culhane, *After Marriage Equality, What's Next for Relationship Recognition?*, 60 S.D. L. REV. 375, 385 (2015).

219. A sample beneficiary agreement can be found on the website of the City and County of Denver. See CITY AND COUNTY OF DENVER, <https://www.denvergov.org/content/dam/denvergov/Portals/777/documents/MarriageCivilUnions/Designated%20Beneficiary%20Agreement.pdf> (last visited Nov. 11, 2018). It should be noted that the DBA can be superseded by any other valid document concerning the specific right/entitlement: “This designated beneficiary agreement is operative in the absence of other estate planning documents and will be superseded and set aside to the extent it conflicts with valid instruments such as a will, power of attorney, or beneficiary designation on an insurance policy or pension plan.” *Id.* This aspect brings it much closer to a contractual model for recognition.

220. *Id.*

221. Unless otherwise provided, pursuant to the Colo. Rev. Stat. § 15-22-105(3), the DBA conveys the following: (1) “The right to acquire, hold title to, own jointly, or transfer inter vivos or at death real or personal property,” COLO. REV. STAT. ANN. § 15-22-105(3)(b) (Westlaw through 2018, 2d Reg. Sess. of 71st Gen. Assemb.); (2) the right to receive “(I) Public employees’ retirement systems pursuant to articles 51 to 54.6 of title 24, C.R.S.; (II) Local government firefighter and police pensions; (III) Insurance policies for life insurance coverage; and (IV) Health insurance policies or health coverage if the employer of the designated beneficiary elects to provide coverage for designated beneficiaries as dependents,” COLO. REV. STAT. ANN. § 15-22-105(3)(c) (Westlaw through 2018, 2d Reg. Sess. of 71st Gen. Assemb.); (3) The right to visitation by the other designated beneficiary in a hospital, nursing home, hospice, or similar health care facility, COLO. REV. STAT. ANN. § 15-22-105(3)(e) (Westlaw through 2018, 2d Reg. Sess. of 71st Gen. Assemb.); (4) The right to act as a proxy decision-maker or surrogate decision-maker to make medical treatment decisions, as well as to act as a legal guardian, COLO. REV. STAT. ANN. § 15-22-105(3)(f) (Westlaw through 2018, 2d Reg. Sess. of 71st Gen. Assemb.); (5) The right to inherit real or personal property through intestate succession, COLO. REV. STAT. ANN. § 15-22-105(3)(i) (Westlaw through 2018, 2d Reg. Sess. of 71st Gen. Assemb.); (6) The right to receive benefits pursuant to the “Workers’ Compensation Act of Colorado,” COLO. REV. STAT. ANN. § 15-22-105(3)(j) (Westlaw through 2018, 2d Reg. Sess. of

and public law.²²² Not only does it include health-related decisions and hospital visitation rights, as in Vermont, but the Act also covers intestate prerogatives, property rights, workers' compensation benefits, wrongful death compensation, and a specified list of public benefits, including health coverage and possible retirement benefits for public employees.²²³

Maryland, Maine, and Washington, D.C. have enacted statutes on "domestic partnerships" that can also be considered reciprocal beneficiary schemes.²²⁴ In Maryland, two cohabiting individuals of any gender who are in a mutually caring relationship can register for benefits.²²⁵ The couple's interdependence is defined under the law by economic interdependence,²²⁶ which can be shown through a variety of evidence, such as a joint bank account statement or a property deed.²²⁷

Unlike Colorado and Hawaii, Maryland's law prevents individuals who are related to each other by blood or marriage, within four degrees of consanguinity, from registering: It thus extends to a non-conjugal two-person friendship, but not to a family made up of two relatives or siblings.²²⁸ The statute confers a limited set of rights, including hospital visitation rights, funeral and burial decisions, and tax exemptions upon property transfer.²²⁹

71st Gen. Assemb.); (7) The right to have standing to sue for wrongful death on behalf of the other designated beneficiary, COLO. REV. STAT. ANN. § 15-22-105(3)(k) (Westlaw through 2018, 2d Reg. Sess. of 71st Gen. Assemb.).

222. See *supra* Figure 2.

223. *Id.*

224. S.785, 2009 Leg., 426th Sess. (Md. 2009); 18-A ME. REV. STAT. ANN. § 5-910 (Westlaw through 2017); D.C. CODE § 32-701 (Westlaw through Oct. 11, 2018). Wisconsin had a similar statute, but has shelved it since the *Obergefell* decision guaranteed the right of same-sex marriage. *Obergefell* chronicles the genealogy of these schemes to provide an alternative to same-sex marriage. With the passage of the Wisconsin 2017-2019 biennial budget, WIS. STAT. § 66.0510 was introduced, preventing all municipalities, counties, and school districts from "offering employee benefit plan coverage to domestic partners of employees as of January 1, 2018." See *Wisconsin Budget Imposes Changes to Domestic Partner Coverage*, EMPLOYEE BENEFITS CORPORATION (Oct. 10, 2017), <http://www.ebcflex.com/Education/Compliance/Buzz/tabid/1140/ArticleID/528/Wisconsin-Budget-Imposes-Changes-to-Domestic-Partner-Coverage-January-1-2018.aspx>.

225. MD CODE ANN., HEALTH § 6-101(a) (Westlaw through 2018 Regular Sess.) ("two individuals who . . . (4) Agree to be in a relationship of mutual interdependence in which each individual contributes to the maintenance and support of the other individual and the relationship.").

226. MD CODE ANN., HEALTH § 6-101(a) (Westlaw through 2018 Regular Sess.).

227. MD CODE ANN., HEALTH § 6-101(b)(2) (Westlaw through 2018 Regular Sess.).

228. MD CODE ANN., HEALTH § 6-101(a)(2) (Westlaw through 2018 Regular Sess.).

229. S. 785, 2009 Gen. Assemb., 426th Sess. (Md. 2009).

In a similar vein, Maine's domestic partnership law allows any two individuals to register but maintains existing statutory prohibitions on polygamy and partnership between two people within specified degrees of consanguinity.²³⁰ The statute grants only some prerogatives in case of death of the partner, namely rights of inheritance²³¹ and decision-making about the disposal of human remains.²³²

Finally, D.C.'s domestic partnership regime is open to any two unmarried individuals in a committed relationship and extends to non-romantic relationships.²³³ This broader reach (relative to marriage) was stressed by the D.C. Committee on the Judiciary in response to attempts to repeal the scheme.²³⁴ The status confers limited rights, especially health-related rights and privileges, such as visitation rights,²³⁵ the right for D.C. government employees to request funeral and family leave,²³⁶ and the right to opt for self-financed family health insurance coverage.²³⁷

4. Summary

All of the described schemes would offer legal protections for new families. Colorado's DBA offers the best protections due to its broad application and the wide array of benefits it confers. Laudably, all of the schemes seem to shift the focus away from romantic, sexual relationships in that they do not list fidelity duties. Instead they tend to offer a set of rights centered on health-related decision-making and succession.²³⁸ But since they rarely include social security or tax benefits, the schemes stop short of fully addressing the problem of redistributive justice that is possible through government programs and only partially protect new families.²³⁹

230. See H.B. 1152, 2004 121st Leg., 2d Reg. Sess. (Me. 2004), citing to 19-A ME. REV. STAT. ANN. § 701.2 (Westlaw through 2017).

231. See 18-A ME. REV. STAT. ANN. §§ 2-102, 5-311(b)(2-A) (Westlaw through 2017).

232. 18-A REV. ME. STAT. ANN. § 2843-A(5) (Westlaw through 2017).

233. See D.C. CODE ANN. § 32-701 to 710(4) (Westlaw through July 27, 2018).

234. See Letter from Phil Mendelson, Councilmember, Comm. on Pub. Safety & the Judiciary, to All Councilmembers (Nov. 10, 2009) (<http://www.glaa.org/archive/2009/b18-482committeereport1110.pdf>).

235. See D.C. CODE ANN. § 32-704.

236. See generally D.C. CODE ANN. § 32-705.

237. See generally D.C. CODE ANN. § 32-706.

238. See *supra* Figure 2.

239. Leckey, *supra* note 53, at 3.

Many of these schemes include benefits that are free, such as medical decision-making prerogatives or visitation rights.²⁴⁰ By contrast, only half the schemes examined above also offer rights under private law, such as intra-familial transfer of property.²⁴¹ Because this benefit costs the state a loss in tax revenue (and thus is not free), it is a bolder reform. The need to recognize public law benefits, in addition to the foregoing, looms large in this analysis and will be a decisive factor in assessing future policies. The tendency in current schemes is not to include direct outlays to subsidize new family networks through social security, welfare, and tax benefits, but the path forward will need to include these in order to offer all families equal status.

B. *The Adult Interdependent Relationships Act of Alberta*

In 2002, Alberta introduced a new legal status for couples through the Adult Interdependent Relationships Act (“AIRA”).²⁴² The status—as “adult interdependent partners” or “AIPs”—can be conferred either by contractual agreement or ascription, and is open to any two adults in an interdependent relationship.²⁴³ AIRA confers on new families many of the rights, obligations, and benefits of marriage.²⁴⁴ The phrase “adult interdependent partners” (AIPs) is now added to many Canadian laws and provincial programs, and it continues to offer these couples benefits—both public and private—that were previously reserved to spouses.²⁴⁵

In the public sphere, AIPs receive the same extended health care benefits as married couples, where one partner’s age is above 65 years old.²⁴⁶ Under the Alberta Workers Compensation Act, compensation following the death of a worker is owed to AIPs as well as spouses.²⁴⁷ In the private law sphere, AIPs are given the right to inherit property from

240. See *supra* Figure 2 (showing that all schemes check the box of health-related rights, although Hawaii only allows hospital visitation rights).

241. *Id.*

242. See generally Adult Interdependent Relationships Act, S.A. 2002, c. A-4.5 (Can.).

243. *Id.*

244. See ALBERTA LAW REFORM INSTITUTE, *supra* note 36, at ¶ 186.

245. *Id.* (“More than 130 different Alberta statutes and regulations now include the words ‘adult interdependent partner.’ Generally, legislation extends the same rights, benefits, and obligations to adult interdependent partners and spouses. Adult interdependent partners and spouses have the same rights and obligations relating to support, intestate succession, maintenance and support from an estate, and for many other purposes.”).

246. *Id.* at ¶ 186.

247. See, e.g., Workers’ Compensation Act, R.S.A. 2000, c W-15, §§ 49, 71 (Can.).

a deceased partner under the same circumstances as a spouse.²⁴⁸ AIPs also have the right to inherit a share of an estate assigned by law, irrespective of the content of the will.²⁴⁹ An AIP can also claim “spousal” support obligations.²⁵⁰ However, a major gap between married couples and AIPs persists in the division of property upon dissolution of the relationship. Unlike spouses, AIPs do not enjoy a right to equal property division of “non-exempt” property upon separation.²⁵¹

The enactment of the law followed the Canadian Supreme Court decision that discrimination based on sexual orientation was constitutionally impermissible under the Canadian Charter of Rights and Freedoms.²⁵² Shortly thereafter, an Alberta surrogate court²⁵³ held that a separate law, denying survivorship benefits for LGBT partners, was unconstitutional.²⁵⁴ The two decisions fueled a massive mobilization by socially conservative Christians in Alberta.²⁵⁵ The groups coalesced to pass AIRA in order to dilute protection for same-sex couples by creating a registration system that would be open to a wide range of non-marital couples.²⁵⁶ It is thus ironic that AIRA, which was originally intended to marginalize a subset of non-normative families (LGBT families), has become a guarantor of the rights of nearly all non-normative families.

The system created by AIRA is a mixed one. It sets forth two different models of recognition for non-married couples:

248. See Vogel LLP Lawyers, *Adult Interdependent Relationships and Estates*, 114 ACTLA’S “THE BARRISTER” MAGAZINE, (Dec. 1, 2014) <https://www.vogel-llp.ca/resources/>.

249. *Id.*

250. *Cohabiting Relationships and Adult Interdependent Partners*, CALGARY LEGAL GUIDANCE, <http://clg.ab.ca/programs-services/dial-a-law/cohabiting-relationships-and-adult-independent-partners-2/> (last visited Nov. 11, 2018).

251. The automatic right to equal property division is established under the Matrimonial Property Act, R.S.A. 2000, c M-8 (Can.), which only applies to married couples.

252. Reference Re Same-Sex Marriage, (2004) 3 S.C.R. 698; Canadian Charter of Rights and Freedoms, R.S.C. 1985, app II, no 44.

253. A surrogate court typically has jurisdiction over the wills and estates of deceased people. In Alberta, The Court of Queen’s Bench oversees surrogate matters. The Court of Queen’s Bench, *Jurisdiction and Governance*, ALBERTA COURTS, <https://albertacourts.ca/qb/about/jurisdiction-and-governance> (last visited Nov. 11, 2018).

254. Johnson v. Sand, (2001) 91 Alta. L.R. 3d 249 (Alta. Surr. Ct.) (citing to M v. H, (1999) 2 S.C.R. 3 (Can.)) (finding that the exclusion of same-sex couples from the definition of “common law spouse” is unconstitutionally contrary to Section 15 of the Canadian Charter of Rights and Freedoms).

255. Bala, *supra* note 170.

256. *Id.*; see also ALBERTA LAW REFORM INSTITUTE, *supra* note 36, at 208 (“A few respondents opposed [the recommendation that property division rules should apply to adult interdependent partners] because they consider AIRA as a whole to be flawed. In their view, AIRA was designed to avoid explicitly recognizing same sex relationships for political reasons. They believe AIRA is not based on sound policy.”)

1. Contractual model: parties can sign a written agreement to become adult interdependent partners;²⁵⁷
2. Ascription model: parties acquire the AIP status if they live in a three-year, interdependent relationship or a relationship “of some permanence” where there is a child—as long as there is no formal, written intent to not acquire the AIP status.²⁵⁸ As previously noted, however, persons related to each other by blood or adoption are not eligible for ascription and may only become adult interdependent partners by written agreement.²⁵⁹

As a general matter, to become AIPs there must be a “relationship of interdependence.”²⁶⁰ The condition is met where parties “(i) share one another’s lives, (ii) are emotionally committed to one another, and (iii) function as an economic and domestic unit.”²⁶¹ At this point, despite the neutral language seen above, the Legislature of Alberta added conjugality in the scheme.²⁶² To determine when parties “function as an economic and domestic unit,” the following elements must be taken into account:

- (a) whether or not the persons have a *conjugal* relationship;
- (b) the degree of *exclusivity* of the relationship;
- (c) the conduct and habits of the persons in respect of household activities and living arrangements;
- (d) the degree to which the persons hold themselves out to others as an economic and domestic unit;
- (e) the degree to which the persons formalize their legal obligations, intentions and responsibilities toward one another;
- (f) the extent to which direct and indirect contributions have been made by either person to the other or to their mutual well-being;

257. Adult Interdependent Relationships Act, S.A. 2002, c A-4.5, §3(1)(b) (Can.).

258. Adult Interdependent Relationships Act §3(1)(a).

259. Since these partnerships are formalized through a private contract, there are no statistics on the number of contracted AIPs since the enactment of the law.

260. Adult Interdependent Relationships Act, S.A. 2002, c A-4.5, §1(1)(f), 3-4 (Can.).

261. Adult Interdependent Relationships Act §1(1)(f).

262. Adult Interdependent Relationships Act §1(2). This move was perhaps unintentional and the result of the passivity with which the Legislature relied on the previous case law to establish a common law marriage.

- (g) the degree of financial dependence or interdependence and any arrangements for financial support between the persons;
- (h) the care and support of children;
- (i) the ownership, use, and acquisition of property.²⁶³

The Alberta Legislature's drafting decisions—specifically, the decision to include conjugality as an element of a domestic unit—seem to constrain what qualifies as an AIP to the realm of the romantic, conjugal couple.²⁶⁴ While criteria (c) through (i) tend to be applicable to non-conjugal interdependent relationships, criteria (a) and (b) clearly point to conjugality as the marker of familyhood. This aspect is worrisome in that it excludes non-conjugal couples by definition.

However, the interpretation of conjugality in Alberta's courts indicates that “conjugality” is not synonymous with “sexual activity.”²⁶⁵ In Alberta, conjugality has been interpreted to include a range of relationships, including a less intimate, non-sexual relationship.²⁶⁶ Pursuant to this case law, the absence of a “physical relationship” or a shared bed was not determinative; courts have been satisfied that conjugality existed when parties “enjoyed each other's company, dined together, sometimes slept together, traveled together and visited mutual friends together.”²⁶⁷

As in the case of conjugality, the Legislature's condition that a relationship have a high degree of “exclusivity” is borrowed from the semantics of marriage.²⁶⁸ Exclusivity has little heuristic value for non-conjugal couples; it also does little to identify non-traditional conjugal couples, whose parties can be deeply committed and yet non-exclusive.²⁶⁹ As a purely textual matter, the choice to list these criteria at

263. Adult Interdependent Relationships Act §1(2) (emphasis added).

264. Adult Interdependent Relationships Act §1(2).

265. See, e.g., *Riley Estate (Re)*, (2014) 603 A.R. 1 (Can. Alta. Q.B.) (claiming relief as the beneficiary of the deceased estate based on the existence of an exclusive relationship); *Kiernan v. Stach Estate*, (2009) 465 A.R. 261 (Can. Alta. Q.B.).

266. See, e.g., *Riley Estate (Re)*, (2014) 603 A.R. 1, at ¶ 96 (Can. Alta. Q.B.) (claiming relief as the beneficiary of the deceased estate based on the existence of an exclusive relationship); *Kiernan v. Stach Estate*, (2009) 465 A.R. 261, at ¶ 45 (Can. Alta. Q.B.).

267. *Riley Estate (Re)*, 603 A.R. at para. 95.

268. See Jane Adolphe, *The Principles and the Canada's "Beyond Conjugality" Report: The Move Toward Abolition of State Marriage Laws*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 355 (Robin Fretwell ed., 2006) (citing Cormac Burke, *Object of Matrimonial Consent – A Personalist Analysis*, 9 F. 39, 70 (1998)).

269. *Rosenbury*, *supra* note 60 at 229–30.

the top of the list is controversial in that these requirements essentially percolate down—they can affect the interpretation of the remaining ones. However, lower courts have laid out a holistic approach to determining whether parties constitute an economic and domestic unit, with no single factor carrying more weight than the others.²⁷⁰ This approach helps mitigate the effects of this drafting decision and should, in principle, allow courts to extend the scheme to families other than conjugal families. Still, from the face of the text, it is clear that the “ideal” adult interdependent partnership would be an opposite-sex or same-sex conjugal couple, either raising a child or cohabitating for three years.²⁷¹

That concern that only conjugal couples would take advantage of the scheme has been realized.²⁷² A legal analysis I conducted over a sample of 50 cases that address the Alberta courts’ application of AIRA reveals that lawsuits have exclusively been brought by conjugal couples. The results of this analysis are confirmed by a recent survey conducted by the Alberta Law Reform Institute, which found essentially no evidence of non-conjugal AIPs.²⁷³ This might be evidence that Canadian courts emphasize a specific romantic, conjugal notion of partnership. If so, it suggests that there is an incentive for couples to frame themselves as if they were conjugal, romantic couples—even if they are not. The trend could also be linked to a lack of awareness that it’s possible for non-conjugal couples to enter formal relationships. While this Article is

270. *Kiernan v. Stach Estate*, 2009 ABQB 150, para 42 (Can.).

271. ALBERTA LAW REFORM INSTITUTE, *supra* note 36, at ¶ 243 (“Whether or not sexual relations are a necessary part of a conjugal relationship, it is likely that the vast majority of adult interdependent relationships are between partners who have or had sexual relations.”).

272. *See, e.g., Knight v. Wowk*, 2015 ABPC 286 (Can.) (plaintiff seeking an order requiring the former common-law partner to pay spousal support); *R.F.T. v. O.K.G.*, 2007 ABPC 70 (Can.) (plaintiff filing an application for child support from the conjugal partner and biological parent of the child).

273. ALBERTA LAW REFORM INSTITUTE, *supra* note 36, at ¶¶ 215, 241:

“At many of our presentations and roundtables, we asked lawyers about their experience with non-conjugal adult interdependent partners. We asked whether anyone had encountered a case where a non-conjugal relationship was alleged or found to be an adult interdependent relationship. Many lawyers with years of experience in family law or wills and estates attended our presentations and roundtables, but almost no one indicated they had encountered such a case. . . . There are no reported cases where unrelated roommates who did not have sexual relations were found to be adult interdependent partner. When we asked lawyers at our meetings and roundtables whether they were aware of non-conjugal adult interdependent partners, they did not identify any cases involving unrelated roommates.”.

not the proper venue to engage in inquiries over causation, it is still worth flagging this trend and the ways in which the AIRA is not serving non-conjugal unions.

Despite these findings, I believe AIRA contributes to a healthy culture of non-conjugality because it makes these relationships visible in the eyes of the law. The law can change the way the parties themselves think of their relationships—not as something aberrant or incidental but as relationships that enjoy social and juridical relevance. AIRA can help to foster the culture it seeks to regulate.

A recent case in Alberta is instructive for the fostering of such culture. There, two interdependent siblings in Alberta sought an extension of the federal Canada Pension Plan survivor's pension—a public benefit—to their relationship.²⁷⁴ Although rejected on jurisdictional grounds, the case shows the increased visibility of new families. Laws like AIRA can help these relationships self-identify as one group, capable of advancing its own agenda.

C. *Conservative Bills in Alabama and Missouri Move Toward a Contractual Model*

When the United States Supreme Court handed down *Obergefell v. Hodges* in 2015, many probate judges across the country responded by refusing to issue marriage licenses entirely.²⁷⁵ They argued for doing away with state-sponsored marriage altogether and leaving in its place civil contracts.²⁷⁶ The goal was to expand the availability of civil contracts and make marriage a private institution.

To that end, many state legislatures began to introduce socially conservative bills²⁷⁷ including Oklahoma's (which proposed replacing marriage licenses with common law marriage affidavits),²⁷⁸ Alabama's

274. *E. H. v. Minister of Emp't & Soc. Dev.*, 2017 SSTGDIS 3, No. GP-16-2741 (Can.).

275. Michael C. Dorf, *Does the Constitution Permit a State to Abolish Marriage?*, VERDICT (Mar. 21, 2018), <https://verdict.justia.com/2018/03/21/constitution-permit-state-abolish-marriage>.

276. *Id.*

277. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). See Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CAL. L. REV. 1207 (2016), for a discussion on the ruling; see also Kenji Yoshino, *The Supreme Court, 2014 Term – Comment: A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 162–79 (2015).

278. H.B. 1125, 2017 Sess. (Okla. 2017), <http://www.oklegislature.gov/BillInfo.aspx?Bill=HB1125&Session=1600>.

(which proposed replacing marriage licenses with civil contracts),²⁷⁹ and Missouri (which proposed replacing marriage licenses with civil unions).²⁸⁰ None of the bills passed.²⁸¹ Although motivated by conservative animus to same-sex marriage and reluctance to implement the Supreme Court's *Obergefell* decision, the bills also offered a possible solution to the lack of protections for new families.

The Oklahoma legislation aimed to replace civil marriage with common law marriage affidavits or marriage certificates.²⁸² The proposal passed in the House and then received a second reading in the Senate, but never got off the ground.²⁸³ In the version of the bill approved by the Oklahoma House of Representatives, the state would no longer issue marriage licenses.²⁸⁴ Instead, it would only "record" marriage certificates²⁸⁵ or common law marriage affidavits²⁸⁶ through its clerks, provided that the couple met all the legal conditions for entering into a valid marriage.²⁸⁷ The officiating of marriage ceremonies would therefore be left to private actors and religious communities.²⁸⁸

In Alabama, Senate Bill 143 was approved by the Senate on March 25, 2016,²⁸⁹ but it did not come to a vote in the Alabama House before the end of the legislative session.²⁹⁰ It was revived as Senate Bill 20 in 2017, but suffered the same fate.²⁹¹ In the original version, marriage

279. S. 13, 2018 Sess. (Ala. 2018), <https://legiscan.com/AL/bill/SB13/2018>; see also S.B. 20, 2017 Sess. (Ala. 2017), <https://legiscan.com/AL/bill/SB20/2017> for the previous version of the bill.

280. H.B. 1434, 2018 Sess. (Mo. 2018), <https://legiscan.com/MO/bill/HB1434/2018>; see also H.B. 62, 2017 Sess. (Mo. 2017), <https://legiscan.com/MO/text/HB62/2017> for the first version of the bill.

281. See Robin Fretwell Wilson, *Divorcing Marriage and the State Post-Obergefell*, in *THE CONTESTED PLACE OF RELIGION IN FAMILY LAW* 415 (2018).

282. The Oklahoma bill is therefore different from the bills proposed in Alabama and Missouri, which aimed to replace marriage licenses with civil contracts.

283. *Id.*

284. H.R. 1125, 2015 Sess. (Okla. 2015), http://webserver1.lsb.state.ok.us/cf_pdf/2015-16%20ENGR/hb/HB1125%20ENGR.PDF.

285. H.R. 1125.

286. H.R. 1125 § (7)(E).

287. *Id.* The bill would have made civil contracts available to all adult couples by erasing the requirement that marriage is between one person and "a person of the opposite sex."

288. Greg Horton, *Oklahoma Bill Would Give Clergy Power Over Marriage Licenses*, HUFFINGTON POST (Mar. 12, 2015, 4:18 PM), https://www.huffingtonpost.com/2015/03/12/oklahoma-gay-marriage_n_6858424.html.

289. S.B. 143, 2016 Sess. (Ala. 2016), <https://legiscan.com/AL/bill/SB143/2016>.

290. S.B. 143.

291. S.B. 20, 2017 Sess. (Ala. 2017), <https://legiscan.com/AL/bill/SB20/2017>. The new bill was reviewed and approved 9-0 on February 23, 2017 by the Senate Judicial

licenses would be replaced with “marriage contracts.”²⁹² The 2017 bill scaled back that proposal, and instead abolished the issuance of a license and solemnization as requisites for entering a valid marriage.²⁹³ Under the new bill, probate judges were required to accept affidavits—attesting that the parties were consenting, unmarried, unrelated adults—as official records of marriage.²⁹⁴

This reform, like that in Oklahoma, was likely driven by the desire “to excuse government officials who oppose same-sex marriage on religious or other grounds from having to issue marriage licenses to same-sex couples.”²⁹⁵ The battle over refusing to issue marriage licenses post-*Obergefell* was particularly heated in Alabama, and reached its peak in June 2016, when Chief Justice Roy S. Moore of the Supreme Court of Alabama issued an administrative order to Alabama lower court judges directing them to disobey the Supreme Court’s ruling in *Obergefell*.²⁹⁶ The order led to the Chief Justice’s suspension for ethics violations.²⁹⁷

Ahead of the legislative session in 2017, Missouri representatives filed House Bill 62, which replaced the word “marriage” with the term “contract of domestic union” everywhere it appeared in the state code.²⁹⁸ When it failed to get approval, the representatives pre-filed a similar bill for 2018.²⁹⁹ At the time of publication of this Article, that bill was again stalled in the House.³⁰⁰ The law omitted any reference to parties’ genders, and allowed any two consenting adults to have their “contract of domestic union” registered for notification purposes.³⁰¹ As in Oklahoma and Alabama, the law was driven by the desire to relieve clerks from of-

Committee. It was later approved by the state senate on March 8, 2017, by a 22-6 vote. Again, it did not gain the final approval of the state house.

292. Fretwell Wilson, *supra* note 281. The term “contract is not synonymous with “license.” With licenses, the state confers the status and polices access to it. With contracts, parties can freely decide to accept the status once eligibility conditions are met.

293. S.B. 13, 2017 Sess. (Ala. 2017), <http://alisondb.legislature.state.al.us/ALISON/SearchableInstruments/2018RS/PrintFiles/SB13-int.pdf>.

294. *Id.* at § 2.

295. Dorf, *supra* note 275.

296. See Campbell Robertson, *Roy Moore, Alabama Chief Justice, Suspended Over Gay Marriage Order*, N.Y. TIMES (Sept. 30, 2016), <https://www.nytimes.com/2016/10/01/us/roy-moore-alabama-chief-justice.html>.

297. *Id.*

298. H.B. 62, 99th Gen. Assem., 1st Reg. Sess (Mo. 2017), <https://legiscan.com/MO/text/HB62/2017>.

299. H.B. 1434, 99th Gen. Assem., 2d Reg. Sess. (Mo. 2017), <https://legiscan.com/MO/bill/HB1434/2018>.

300. *Id.*

301. H.B. 62; H.B. 1434.

ficiating marriages that went against their personal and religious convictions.³⁰²

In all three states, the act of registering the relationship with the government was only for notification purposes; the registration itself did not confer any rights or obligations.³⁰³ This limited role of registration was a crucial change. Under the contractual models like those proposed in Alabama and Missouri, a new couple becomes legally partnered or “married” upon stipulation of the contract.³⁰⁴ The legal status attaches not at the moment the state approved the transaction, as is the case with marriage, but at the moment the contract is executed (Missouri) or the marriage is executed (Alabama).³⁰⁵ It is thus the contract/affidavit alone that triggers the legal consequences of “being married.”

These bills establish a path forward for new families. In particular, the bills in Missouri and Alabama establish a variation on the traditional contractual model that is notable for two reasons:

- (1) Unlike a pure contractual model, the private law instruments proposed in Missouri and Alabama would bind not just the parties themselves but also the government and third parties, such as insurance companies and employers.³⁰⁶ It is the state that confers upon the parties the power to

302. See generally TJ Martinell, *Missouri Bill Would Eliminate State Marriage Licenses*, 10TH AMEND. CTR.: TENTHER BLOG (Dec. 14, 2016), <http://blog.tenthamentendmentcenter.com/2016/12/missouri-bill-would-eliminate-state-marriage-licenses/>; see also Dorf, *supra* note 275.

303. For Missouri, see H.B. 62, 99th Gen. Assem., 1st Reg. Sess (Mo. 2017), <https://legiscan.com/MO/text/HB62/2017> (providing certain provisions relating to all private law entitlements, which are triggered by the contract, and stating that in order to be eligible for spouse benefits, “the surviving spouse and the deceased member *shall have been parties to a contract of domestic union* on the date of the personal injury resulting in the member’s death or on the date of onset of the disease resulting in the member’s death.”) (emphasis added). For Alabama, see S.B. 20, 2017 Sess. (Ala. 2017), <https://legiscan.com/AL/bill/SB20/2017> (clarifying that the marriage is valid on the date the marriage is executed by both parties, and that registration comes only later). For Oklahoma, see H.B. 1125, 2017 Sess. (Okla. 2017), <http://www.oklegislature.gov/BillInfo.aspx?Bill=HB1125&Session=1600> (providing that the clerk of the court “shall make a complete record of the marriage certificate or affidavit.”).

304. S. 13, 2018 Sess. (Ala. 2018), <https://legiscan.com/AL/bill/SB13/2018>; H.B. 1434, 2018 Sess. (Mo. 2018), <https://legiscan.com/MO/bill/HB1434/2018>.

305. S. 13, 2018 Sess. (Ala. 2018), <https://legiscan.com/AL/bill/SB13/2018>; H.B. 1434, 2018 Sess. (Mo. 2018), <https://legiscan.com/MO/bill/HB1434/2018>.

306. See H.B. 62, 99th Gen. Assem., 1st Reg. Sess (Mo. 2017), <https://legiscan.com/MO/text/HB62/2017> (providing a host of public law entitlements).

acquire the status of “married couple” and the benefits that follow;³⁰⁷ and

(2) It saves the parties the trouble of articulating a comprehensive regime, as they can enjoy the default legal framework of marriage. This overcomes many of the problems associated with private contracting, such that the benefits flowing from the contract could be as flexible, efficient, and comprehensive as that of traditional marriage.³⁰⁸

Formal recognition of non-traditional families, such as same-sex couples and polyamorous relationships, is a source of heated debate.³⁰⁹ The decision to dignify some relationships and not others is delicate and ideologically driven, and it involves essential choices that touch on issues of law, public policy, moral philosophy, and political theory.³¹⁰ When the state accords statuses, it sanctions familyhood and confers the expressive benefits of recognition.³¹¹ It is therefore an added benefit of these contractual models that they avoid seeking the state’s express approval of the relationship. This approach dodges the social conflict that is intrinsic in the highly contentious decision about which relationships to recognize.³¹²

I understand the tensions with embracing laws that are designed with oppression in mind. But queer activists should be mindful of Wundt’s “heterogony of ends” principle, which argues that a group of people—even one with different or changing motivations—can still advance one goal.³¹³ The laws proposed in Missouri, Oklahoma, and Ala-

307. By contrast, a pure private law model does not bind the government or third parties. See Leckey, *supra* note 53, at 12.

308. *Id.* (“A difficulty with private ordering in the family setting is that the ordinary rules of contract may prove less adaptable than legislated family regimes. For example, legislated regimes provide a means to vary support obligations where circumstances have changed, whereas a private agreement to pay support may not have provided a way to respond to changes.”).

309. See, e.g., ELIZABETH BRAKE, *MINIMIZING MARRIAGE* 135–39 (2012); SEX, PREFERENCE, AND FAMILY (David M. Estlund & Martha C. Nussbaum eds., 1997); see also METZ, *supra* note 22.

310. See generally, Nussbaum, *supra* note 13.

311. *Id.* at 671–72.

312. See *id.*

313. The expression “heterogony of ends” (in the original German version, *Heterogonie der Zwecke*) was coined by the psychologist Wilhelm Wundt. Wundt argues that human behavior has ever-changing goals, and thus, that which was the original purpose for engaging in certain conduct can be complemented or replaced by a later purpose. See Voce “eterogenesi dei fini” in TRECCANI DICTIONARY (2009), <http://www>.

bama have certain positive attributes. They confer a legal status without regard to the gender of the parties. They preserve the default regime, and thereby avoid some of the most onerous aspects of private contracts. They exalt individual autonomy by leaving entirely to the parties the decision of whether to enter into a marriage and when a partnership should trigger legal effects.³¹⁴

These laws were not perfect. If enacted, recognition would still have been restricted to couples “eligible to marry,” such that two blood relatives would not have been protected. They were also limited to relationships involving two individuals, but no more. These bills can therefore serve as models for the path forward, but need progressive amendments.

Section III responds to criticisms about recognition of new families, and offers some notes and recommendations on how the political action of queer activists should be reframed to foster family legal pluralism.

SECTION III

THE WAY FORWARD: REFRAMING POLITICAL ACTION

A. *Anticipating Criticisms to Recognition*

In grappling with legal solutions to protect new families, I have taken for granted that these families ought to obtain legal recognition. But should they? Recognition often comes with a cost—either actual (financial) or metaphorical (the cost of assimilation)—to both the family and society. This is one of a handful of objections to legally recognizing new families.³¹⁵ I will anticipate these potential objections and pose counterarguments to them.

The first of these objections can be abstracted from the debate within feminist legal scholarship on the privatization of care, which posits an argument about the risk that recognition might transfer care duties from the state to private individuals. A second criticism warns against the financial cost associated with recognition. A third one flags

treccani.it/enciclopedia/eterogenesi-dei-fini_%28Dizionario-di-filosofia%29/ (last visited Nov. 11, 2018).

314. Again, registering a relationship with the state clerk does not, itself, produce legal effects, but instead serves only to inform the government of the existence of the relationship.

315. See *infra* Section III.A.1–A.5.

the problems associated with normalization and assimilation of new families into existing family categories. A fourth raises concerns that people will exploit existing regimes to strategically gain benefits. Finally, I will examine the argument that recognizing new families, especially non-conjugal ones, would not be in the best interest of any children in such a family.

1. Does Recognition Mean that Care is “Privatized”?

One camp in the debate around the recognition of new families opposes recognition of new families on the theory that doing so would result in a shift in caregiving responsibilities from the state onto family members.³¹⁶ Critics are concerned that the burden to care for elderly or dependent individuals—a burden that would otherwise be borne by the state—would shift to the newly-recognized family member(s).³¹⁷ I understand this concern, but I believe that the dangers associated with recognition are outweighed by the advantages that flow from it.

Privatization of care is not unique to the question of new families, and refers generally to the externalization of caregiving duties from the public to the private sphere.³¹⁸ This is widely acknowledged as a problem in feminist literature, political philosophy, and family law scholarship.³¹⁹ This side of the debate is focused on the state’s financial incentives to recognize new families and enforce key private law consequences of recognition, like spousal support.³²⁰ Under this line of thinking, policymakers are interested in extending private obligations between citizens in order to avoid additional government outlay.³²¹ Thus, the more types of families that are legislatively recognized, the more providers of informal care are called on to provide private law support obligations.³²²

316. See generally Susan B. Boyd & Claire F.L. Young, *From Same-Sex to No Sex?: Trends Towards Recognition of (Same-Sex) Relationships in Canada*, 1 SEATTLE J. SOC. JUST. 757, 784 (2003); BRIAN SLOAN, *INFORMAL CAREERS AND PRIVATE LAW* 213 (2013).

317. SLOAN, *supra* note 316 at 136–206.

318. See e.g., BRENDA COSSMAN & JUDY FUDGE, *PRIVATIZATION, LAW, AND THE CHALLENGE TO FEMINISM* 18 (2002).

319. *Id.*

320. Boyd & Young, *supra* note 316, at 784 (2003) (“offload[ing] responsibility onto those private relationships . . . result[s] in more expectations being made of those relationships in terms of taking care of ‘their own’.”).

321. *Id.*

322. See e.g., Ivana Isailovic, *Same Sex but Not the Same: Same-Sex Marriage in the United States and France and the Universalist Narrative*, 66 AM. J. COMP. L. 267, 295 (2018) (making the argument with respect to recognition of same-sex couples through marriage).

From time to time this concern is realized. For instance, in enacting the Designated Beneficiary Act, the Colorado legislature openly acknowledged that the goal of wider recognition was to “reduc[e] reliance on public programs and services.”³²³ Another example is the Supreme Court of Canada’s decision in *M v. H*,³²⁴ delivered by Justice Frank Iacobucci: “[T]he objectives of the statute were to provide for the equitable resolution of economic disputes when intimate relationships between financially interdependent individuals break down, and to *alleviate the burden on the public purse to provide for dependent spouses*.”³²⁵

Of course, it is more complex than that. Many scholars have argued that the financial incentives flow the other way: that the state has a financial interest to *ignore* new families so that it does not have to provide tax breaks, social assistance, and other subsidies.³²⁶ Often upon recognition there are a number of public law benefits that flow to the relationship.³²⁷ In *Egan v. Canada* (1995), the Supreme Court of Canada found that withholding old-age security allowance to a gay couple was constitutionally permissible.³²⁸ In so concluding, Justice Sopinka argued that the “government must be accorded some flexibility in extending social benefits and does not have to be proactive in recognizing new social relationships. It is not realistic for the Court to assume that there are unlimited funds to address the needs of all.”³²⁹

The problem is that both sides of the debate are right. Recognition entails both the privatization of care through the enforcement of private obligations and an increase in public expenditures through the extension of social benefits. However, the increase of public outlays is often counterbalanced by a commensurate increase in tax revenue and a reduction

323. COLO. REV. STAT. ANN. § 15-22-102(1)(d) (2009) (“The power of individuals to care for one another and take action to be personally responsible for themselves and their loved ones is of tremendous societal benefit, enabling self-determination and reducing reliance on public programs and services.”).

324. *M. v. H.*, [1999] 2 S.C.R. 3 (Can.).

325. *M. v. H.*, 2 S.C.R. 3 (emphasis added).

326. For an overview of this side of the debate, see Harder, *supra* note 2, at 652–53; see also Katherine Spensieri, *Proxy-mate: Revitalizing the Spousal Support Regime for Non-conjugal Adult Personal Relationships and the Case of Caregiving*, 36 CAN. FAM. L.Q. 107, 112 (2016).

327. In the wake of the *Windsor* and *Obergefell* decisions extending legal protections to same-sex couples, the Social Security Administration (“SSA”) is slowly widening the notion of family through interpretative guidance documents. See *United States v. Windsor*, 570 U.S. 744 (2013); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). SOC. SEC. ADMIN., GN 00210.004—SAME-SEX RELATIONSHIPS—NON-MARITAL LEGAL RELATIONSHIPS (2016), <https://secure.ssa.gov/poms.nsf/lnx/0200210004>.

328. *Egan v. Canada*, [1995] 2 S.C.R. 513, 516 (Can.).

329. *Egan*, 2 S.C.R. at 516.

in social welfare benefits as a result of the increased income of the parties.³³⁰

The “private-public responsibility dichotomy” deserves a separate and much deeper discussion.³³¹ I am unpersuaded by arguments that legal recognition should not be conferred because it would result in privatized care. The caregivers who seek legal recognition as a family do so intentionally. If they believe that they would be better off by gaining recognition—or that recognition is vital to their equality and dignity in the public space—then I do not think abstract ideas about duties of care are sufficiently compelling to withhold recognition. The concern that private law obligations would privatize care is valid, but not substantial.

2. The Cost of Recognition to New Families: A Pragmatic, Autonomy-Driven Approach

Legal recognition often comes with a price.³³² Sometimes, legal recognition will make families financially worse-off.³³³ This is frequently the case with government programs that are means-tested, as in the case of Medicaid or Supplemental Security Income (SSI) in the U.S.³³⁴ In such programs both spouses’ finances are considered to determine eligibility, such that a couple’s married status might cause them to be ineligible (they make too much money), where before, as two individuals, they might have qualified.³³⁵ Extending recognition to new families could similarly cost them their welfare or social security benefits.

It matters also if the benefit is conferred through a default regime. Without a default regime, parties bear the burden of protecting themselves through contracts, power of attorney documents, and other legal tools. By the same token, a default regime imports certain presumptions from traditional marriage, such as mutual trust (in the context of evi-

330. See *infra* Section III.A.2. Kim Brooks reports that taxpayers in Canada often argue that they are not in a spousal relationship because such status would “reduce access to child tax benefits, the goods and services tax credit, or the equivalent-to-spouse credit, all of which require consideration of the income of the taxpayer’s spouse.” See Kim Brooks, *Cameos from the Margins of Conjugalities*, in *AFTER LEGAL EQUALITY* 111 (Robert Leckey ed., 2015).

331. Spensieri, *supra* note 326.

332. See Aloni, *supra* note 91, at 1285–86.

333. Polikoff, *supra* note 26, at 548.

334. SOC. SEC. ADMIN., SOCIAL SECURITY HANDBOOK § 2102 (2017), https://www.ssa.gov/OP_Home/handbook/handbook.21/handbook-toc21.html.

335. *Id.* at § 2113, 2122.3 (B).

dentiary privileges), income pooling (in the field of tax law), social benefits, and parenting responsibilities.³³⁶

This argument has more or less traction depending on if the recognition is sought, as in the case of a contractual model, or is ascribed onto the partners. When recognition is the result of a deliberate choice, it might well be the case that parties are ready to lose a public benefit—because they anticipate they will gain others, or because they perceive that recognition will be better for them long-term. Likewise, financial costs are particularly troublesome when neither partner chooses to gain recognition, as in the case of pure ascription. Recognition is not synonymous with protection. I am in favor of according more legal benefits to non-traditional families, but I am concerned about reckless progressivism that would confer a legal status onto parties who do not seek it.³³⁷

Therefore, concerns about costs should be reframed as one touching upon issues of personal autonomy. An approach more respectful of personal autonomy must acknowledge the possible adverse effects of legal recognition and let families decide whether to take on these consequences. Of course, it is the state's responsibility to enable parties to make this decision by providing a formal scheme into which they can freely enter.

3. The Assimilation Conundrum³³⁸

Marriage is a normalizing force.³³⁹ As more individuals decide to get married, the choice to not get married becomes more “abnormal,” which can be detrimental to unmarried couples.³⁴⁰ Critics argue that legal recognition of new families has the same result. In seeking recognition, a non-normative relationship risks being drawn into the sphere of

336. Courtney G. Joslin, *Marriage Equality and Its Relationship to Family Law*, 129 HARV. L. REV. FORUM 197, 202 (2016).

337. *See supra* Section I.B.

338. The next three subsections are named after episodes of the seventh season of the CBS television show *The Big Bang Theory* (broadcast Sept. 26, 2013 through May 15, 2014).

339. I use Foucault's notion of normalization here. For further discussion, see Janet Halley, *Recognition, Rights, Regulation, Normalization: Rhetorics of Justification of the Same-Sex Marriage Debate*, in *THE LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW* 97, 100 n.7 (Robert Wintemute & Mads Andenas eds., 2001).

340. *See, e.g.*, Feinberg, *supra* note 25, at 272.

influence of the heterosexual marriage, and thereby losing its distinctive qualities.³⁴¹

While this concern about assimilation has been frequently voiced in regards to same-sex couples seeking access to marriage,³⁴² it is not yet clear that recognition through a marriage alternative would yield similar normalizing effects. I believe that it would, albeit to a lesser extent. Non-conjugal relationships such as cohabiting relatives provide an illustrative example: While these relationships suffer from comparative invisibility in the legal space, in the few cases where they have gained official recognition, they had to comply with marriage-like criteria.³⁴³ Consider Alberta's Adult Interdependent Relationships Act of 2003, which permits any two people to be recognized as Adult Interdependent Partners (AIPs) through an agreement or ascription.³⁴⁴ As outlined above, for a couple to be recognized as such a partnership, they must bear the following characteristics:

- (i) share one another's lives,
 - (ii) [be] emotionally committed to one another, and
 - (iii) function as an economic and domestic unit,³⁴⁵
- which includes a conjugal relationship and a "degree of exclusivity."³⁴⁶

As previously discussed, under the holistic approach of the Alberta family courts, lack of marital-like features such as conjugality or fidelity need not prevent formal recognition where other relevant criteria are present.³⁴⁷ However, the inclusion of these factors, along with the mandatory dyadic structure—that an adult interdependent partnership can only be between two people—suggests that the legislation drafters could hardly do without the traditional features of marital relationships.³⁴⁸

341. See SYCAMORE *supra* note 25; Cossman *supra* note 27; Ettelbrick *supra* note 25; Feinberg *supra* note 25; Polikoff *supra* note 26; Robson & Valentine *supra* note 30; Scott *supra* note 20.

342. See Cossman, *supra* note 27 ("The radical pluralist position argues that our relationships do not fit the model of the heterosexual family. Gay and lesbian relationships are not functionally equivalent to heterosexual relationships—they are not necessarily based on sexual monogamy or emotional exclusivity.")

343. This is especially evident in the case of the Alberta's scheme, *infra* Section B.

344. Adult Interdependent Relationships Act, S.A. 2002, c A-4.5, §1 (Can.).

345. Adult Interdependent Relationships Act, S.A. 2002, c A-4.5, §1(1)(f) (Can.).

346. Adult Interdependent Relationships Act, S.A. 2002, c A-4.5, §1(2) (Can.).

347. Kiernan v. Stach Estate, 2009 ABQB 150, para 42 (Can.).

348. This includes factors such as conjugality, exclusivity, etc. See *infra* Section II.B.

From this example we can conclude that the danger of assimilation into the marital norm is always present. But it is not a lost cause, and with some awareness on the part of the legislature, this concern can be mitigated. Lawmakers should craft legal remedies so that they avoid including unnecessary and normative eligibility criteria, such as conjugality and exclusivity.

4. The Adverse-Selection Problem

Some critics are concerned that expanding recognition to new families could increase fraud. Their worry is that more parties will self-identify as families to claim government or employment benefits, or else refuse to self-identify as families when recognition could impose obligations.³⁴⁹

This problem has been acknowledged in determining social assistance eligibility for unmarried conjugal couples in Canada.³⁵⁰ The likelihood of fraud, however, can be more or less extreme depending on the model of protection adopted. Canada's model is ascriptive.³⁵¹ An ascriptive model nudges parties into adverse selection because the model assesses the family's status at each point of offering a government benefit or obligation, rather than in one permanent determination, according to the conditions of eligibility for each government benefit.³⁵² Thus, a couple could be considered a family for one benefits scheme but not a family for another. This encourages families to game the system in a manner most strategic for them.

This drawback of the ascriptive model is not present in more formalist models of recognition such as registration or contracts. Under those schemes, once parties have been recognized through a comprehensive approach, their status is fixed until dissolution. They cannot modify their associated obligations in order to game the system.

The potential for fraud is therefore offset in cases where there is a complete package of rights and obligations that flow from status

349. Bala, *supra* note 170 at 94 n.140.

350. *Id.* ("The adverse selection issue is already a problem with informal (i.e. non-marital) conjugal relationships, for example in determining social assistance (in)eligibility, though there will generally be more indicia and records available to help make this determination than for non-conjugal relationships.")

351. Christine Davies, *The Extension of Marital Rights and Obligations to the Unmarried: Registered Domestic Partnerships and Other Methods*, 17 CAN. FAM. L.Q. 248, 256 (1999).

352. *See* Bala, *supra* note 170, at 94 n.140.

recognition, including private law obligations of support, rather than various rights and obligations assigned piecemeal. By contrast, any benefit-by-benefit approach that attaches legal status for one purpose only, such as the current ascriptive regime in Canada, presents a risk of fraud.³⁵³ This is another reason to resist the ascriptive model.

Other versions of fraud—where individuals hold themselves out to be a family when they are not—are still present under formal recognition models. But the danger of fraud in these contexts is no more or less pronounced than the risk of fraudulent marriage—a problem that has existed and been dealt with for as long as benefits have accrued to marital status.

Of course, courts know that there are several reasons aside from romantic ones that may motivate a person's decision to marry, such as family approval or favorable tax laws, and that policing entry into marriage is impossible.³⁵⁴ To that end there is an ongoing debate on how the welfare system in the United States impacts people's marital choices.³⁵⁵ For instance, anecdotal findings suggest that the decision to get married (as opposed to the decision to cohabit but not marry) is profoundly affected by the income tax penalty associated with marriage.³⁵⁶ Professors Whittington and Alm have extensively studied the issue, and have shown that the greater the marriage tax penalty, the more pronounced

353. *Id.*

354. For an example in the United States, see *United States v. Hall*, 74 M.J. 525, 530 (A.F. Ct. Crim. App. 2014). For an example in Canada, see *Nova Scotia (Attorney Gen.) v. Walsh*, [2002] 4 S.C.R. 325, 355 (Can.).

355. See, e.g., Leslie A. Whittington & James Alm, *The Effects of Public Policy on Marital Status in the United States*, in *MARRIAGE AND THE ECONOMY* 76 (Shoshana A. Grossbard-Shechtman ed., 2003) (“The U.S. welfare system has probably generated more controversy about how public policy affects human behavior than any other program.”).

356. More often than not, married couples filing jointly receive a bonus: they pay less than the sum of their taxes due if each had filed separately. Only occasionally, their joint filing is more than the sum of the respective bills. This is known as the “marriage penalty.” It occurs only when the married couple is composed of two income earners, and only in the extreme situations where the double-earner family is particularly low-income or high income. See Lily Kahng, *The Not-So-Merry Wives of Windsor: The Taxation of Women in Same-Sex Marriages*, 101 *CORNELL L. REV.* 325, 332 (2016); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 *UCLA L. REV.* 983, 991 (1993); see generally BROOKINGS INSTITUTE & URBAN INSTITUTE, *Marriage Penalties and Bonuses*, TAX POLICY CENTER, <http://www.taxpolicycenter.org/topic/individual-taxes/marriage-penalties-and-bonuses> (last visited Nov. 11, 2018).

the impact on relationship decisions: an unmarried couple is less likely to marry and a married couple is more likely to divorce.³⁵⁷

U.S. v. Hall sets forth a test for fraud that requires proof of a specific illicit purpose, either in a marriage context or under a scheme that recognizes new families:

It is not the absence of a perfect or ideal “love, honor, and cherish” motivation of the parties that renders the consequences . . . criminal; rather, it is the affirmative presence of a singularly focused illicit one—an intent to fraudulently acquire a government payment stream—that does so.³⁵⁸

Even with this test, however, some amount of fraudulent marriages would likely continue to go undetected and, we can infer, so too with new families.³⁵⁹ In this sense, fraud is a natural byproduct of the system.

5. The Transmogrification of the “Child’s Best Interest” Argument

Finally, scholars have argued that recognition of new families is harmful to children’s best interests.³⁶⁰ For example, Professor Nicholas Bala has expressed the concern that children can be reared only in a normative, conjugal environment:

[W]hile society can no longer equate conjugality with procreation, there is still a strong relationship between conjugality and children. Conjugality is relevant to both psychological and biological parenthood, and there are few

357. James Alm & Leslie A. Whittington, *Does the Income Tax Affect Marital Decisions?*, 48 NAT’L TAX J. 565, 570 (1995); James Alm & Leslie A. Whittington, *For Love or Money? The Impact of Income Taxes on Marriage*, 66 ECONOMICA 297, 311 (1999); James Alm & Leslie A. Whittington, *Income Taxes and the Timing of Marital Decisions*, 64 J. PUB. ECON. 219, 238 (1997).

358. *Hall*, 74 M.J. at 530.

359. LEG. COUNCIL, REPORT OF THE VERMONT CIVIL UNION REVIEW COMMISSION 14 (2001), available at https://www.sec.state.vt.us/media/689618/ReviewComm2002_LC-01048.pdf.

360. See Mohammad Al-Sharfi, Karen Pfeffer, & Kirsty A. Miller, *The effects of polygamy on children and adolescents: a systematic review*, 22 J. FAM. STUD. 272 (2016) (finding “more mental health problems, social problems and lower academic achievement for children and adolescents from polygynous than monogamous families.”); Bala, *supra* note 170, at 97 (stating that “[t]he commitment inherent in a conjugal relationship is . . . desirable in establishing an environment in which to raise children.”).

people who would consider (as a first choice) raising a child with a partner who was not in a conjugal relationship with them. The commitment inherent in a conjugal relationship is also desirable in establishing an environment in which to raise children.”³⁶¹

But I believe that this argument overlooks two points. First, non-conjugal families can engage in responsible parenting as much as other families. In February 2017, an Ontario court issued a declaration of parentage to Lynda Collins, the best friend and colleague of Natasha Bakht, regarding Bakht’s biological son, Elaan, a profoundly disabled boy with spastic quadriplegia.³⁶² Collins had supported Elaan both financially and emotionally since his birth, accompanying him to medical visits and making crucial decisions about his health, welfare, and education with his biological mother.³⁶³ The court was thus satisfied that it was in the child’s best interest to recognize Collins as a “mother” and issued a declaration of parentage (vertical dimension), regardless of whether Collins and Bakht were partnered (horizontal dimension).³⁶⁴ The court correctly understood that conjugality is not an inherent feature of childrearing, and that Elaan’s best interests were served by considerations of a number of factors—none of which involved the nature of the relationship between Collins and Bakht.

Second, I believe this argument misses the mark, and confuses the vertical and horizontal dimensions of familyhood. The socially-accepted, state-subsidized notion of the nuclear family has, among other things, effectively linked the worthiness of familyhood to the adults’ willingness to raise children.³⁶⁵ This is what families are made for, the thinking goes, and hence the will to raise children becomes a clue to the stability and commitment of the (conjugal) family bond.³⁶⁶ Undoubtedly, the link

361. *Id.*

362. Julie Ireton, *Raising Elaan: Profoundly Disabled Boy’s ‘Co-Mommas’ Make Legal History*, CBCNEWS (Feb. 21, 2017), <http://www.cbc.ca/news/canada/ottawa/multimedia/raising-elaan-profoundly-disabled-boy-s-co-mommas-make-legal-history-1.3988464> (last visited Nov. 11, 2018).

363. Application for Declaration of Parentage, *Collins v. Deputy Registrar Gen.* (2016), No. FC-16-862-0 (Can. Ont. Sup. Ct. of J.).

364. Ireton, *supra* note 362.

365. See DAN CERE, COUNCIL ON FAMILY LAW, *THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA* 13 (2005) (“Another characteristic of conjugal marriage is that it is fundamentally child-centered, focused beyond the couple towards the next generation.”).

366. For a snapshot of the arguments on the importance of marriage in child development, as well as some of the reasons to question it, see Martha Garrison, *The Chang-*

between marriage and childrearing has been altered as a result of the same-sex marriage struggle, which stressed the functional and intentional attributes of parenthood over those rooted in biology³⁶⁷—but one could hardly submit that the link between marriage and childrearing has weakened.³⁶⁸ Justice Roberts' view in *Obergefell*—that “[m]arriage is a socially arranged solution for the problem of getting people to stay together and care for children. . . .”³⁶⁹—still has a grip on our collective consciousness.

But families are formed for lots of reasons, many of which have nothing to do with children.³⁷⁰ Extending legal protections to committed adult relationships (horizontal) is a separate inquiry entirely.

ing Face of Marriage, in ROUTLEDGE HANDBOOK OF FAMILY LAW AND POLICY 9 (John Eekelaar & Rob George eds., 2014) (providing that research shows that “[m]ost of the marital advantage can . . . be explained by partner characteristics that precede family formation.”).

367. Cf. Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1213 (2016).
368. Same-sex couples fighting for the right to marry argued that they had the same capacity to love and raise children as opposite-sex couples, and that children could thrive where love, not just heterosexuality, existed. *See id.* at 1241. To this effect, they did not challenge the assumption that marriage is inherently child-centered. *But see Chapter 4: Marriage and Parenting*, PEW RESEARCH CENTER (June 13, 2013), <http://www.pewsocialtrends.org/2013/06/13/chapter-4-marriage-and-parenting/> (last visited Nov. 11, 2018) (presenting research which shows that LGBT respondents are far less likely to say that “having children” is an important reason for getting married (28%), as compared to non-LGBT respondents (49%)).
369. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2613 (2015) (Roberts, C.J., dissenting) (citing JAMES Q. WILSON, *THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES* 41 (2002)).
370. POLIKOFF, *supra* note 5, at 141 (“Adults build relationships for purposes other than childrearing.”). Scholars have argued that the very notion of marriage is now torn between two competing visions. On the one side is the “conjugal model” of marriage (a sexual union between a man and woman) that is essentially child-centered. *See* CERE, *supra* note 365, at 7. On the other side is the “close relationship model” of marriage, which sees marriage as “a private relationship between two people created primarily to satisfy the needs of adults.” *Id.* Under the latter approach, even if children do arise from the union they are not seen as an inherent or necessary part of the relationship. *Id.* at 7–8. The close relationship model’s vision of marriage has received constitutional aegis in both Canada and the U.S. *See Halpern v. Att’y Gen. of Canada*, [2003] O.J. No. 2268 (Can. Ont.); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961–64 (2003). For a brief discussion of the Demographic Transition Theory, see Dudley Kirk, *Demographic Transition Theory*, 50 POPULATION STUD. 361 (1996) (arguing that a decline in birth in modern times derives from the fact that living standards, medicine and technology improve mortality rates before—and quicker than—they influence fertility). Kirk’s argument was deemed unsatisfactory by many prominent feminist theorists. *See e.g.*, Alison Mackinnon, *Were Women Present at the Demographic Transition? Questions from a Feminist Historian to Historical Demogra-*

The rationale for protecting families with dependent children is wholly different from the rationale for protecting adult-adult horizontal relationships.³⁷¹ The two dimensions ought to be separated. I would thus discard all objections based on childrearing and procreation as off-topic, deserving of special—and separate—consideration.

B. Reframing Political Action

1. The Unsuitability of Marriage

As I argued in the introductory note, queer activists and new families should not seek to pattern their political action after the marriage equality movement. When considering legal options for protecting non-normative family units, marriage is an unsuitable option. I do not argue for the abolition of marriage, which would still be available to couples—both gay and straight—who are willing to marry. I merely contend that marriage is not well-suited to these non-normative relationships, and would suggest that activists spend their energy elsewhere.

At present in the U.S. bigamy is a crime.³⁷² Marriage between siblings or other close relatives—although defined by different degrees of consanguinity from state to state³⁷³—is also prohibited under incest laws.³⁷⁴ Under the current legal framework in the U.S., some non-normative dyadic couples such as friends or distant relatives could resort to marriage to gain state protection. However, because they lack a sexual component to their relationship, the couple would always face legal an-

phers, 7 GEND. & HISTORY 222, 224–25 (1995). For an overview of the psychological perspective on the declining birth rate, see e.g., Ellen Walker, *Childfree Trend on the Rise: Four Reasons Why!*, PSYCHOLOGY TODAY (Jan. 19, 2014), <https://www.psychologytoday.com/intl/blog/complete-without-kids/201401/childfree-trend-the-rise-four-reasons-why> (last visited Nov. 11, 2018).

371. See e.g. POLIKOFF, *supra* note 5, at 142–43 (noting the differing rationales for accord- ing public benefits to families).

372. See, e.g., *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1190, 1234 (D. Utah 2013) (up- holding Utah’s prohibition of bigamy in the “literal sense” and striking down the co- habitation prong of the Utah criminal statute as contrary to the free exercise of reli- gion under the First Amendment and due process under the Fourteenth Amend- ment).

373. See, e.g., *In re Estate of May*, 114 N.E.2d 4 (1953) (applying the “contrary to natural law” exception to the applicability of the *lex loci* to a marriage contracted in Rhode Island, and valid under the state law, between an uncle and a niece, then deceased in New York, where such marriage was incestuous).

374. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 180 (2016).

nulment on grounds of marriage fraud, because the state could argue that they married to get government benefits.³⁷⁵ Such a threat is not unheard of: Courts have deemed couples to be in fraudulent, spurious marriages that were not entered into in good faith.³⁷⁶ These decisions have arisen in the context of immigration proceedings,³⁷⁷ judicial inquiries into a spousal evidentiary privilege,³⁷⁸ and housing allowances.³⁷⁹ In these cases, the major test is whether the “couple intended to live together as husband and wife,” by which the court means that they engage in a sexual relationship.³⁸⁰ The state of marriage laws is therefore clearly inadequate to support new families, and even if they were radically updated, I believe that marriage would still not be the best solution.

To start, marriage has a vexed history of exclusion and discrimination.³⁸¹ The recent struggles over extending marriage to same-sex couples have revealed some of these deep structural flaws. By removing non-normative relationships from the marital space, we can side-step many of the most hurtful and pitched battles over culture, religion, and morality. Recognizing new families through a vehicle other than marriage can only help to make the process less controversial.

Furthermore, I believe that there are structural differences between non-normative relationships and those relationships that have sought recognition through marriage, namely conjugal couples.

First, new families are different from conjugal couples in many respects: They may not yearn for social recognition or for assimilation

375. Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 5–6 (2012) (referring not to the contract-based doctrine of marriage frauds, which leads to the annulment of the marriage, but to the different doctrines addressing “sham” marriages developed in welfare law, social security law, and immigration law, in the twentieth century in the United States.); cf. *United States v. Bolden*, 23 M.J. 852, 854 (A.F.C.M.R. 1987) (“If the spouses agree to a marriage only for the sake of representing it as such to the outside world, they have never really agreed to be married at all.”).

376. Abrams, *supra* note 375, at 5.

377. *Lutwak v. United States*, 344 U.S. 604, 615 (1953) (holding that in the immigration context of the case, “the common-law rule prohibiting anti-spousal testimony has no application.”).

378. *United States v. Apodaca*, 522 F.2d 568, 571 (10th Cir. 1975).

379. *United States v. Hall*, 74 M.J. 525, 529 (A.F. Ct. Crim. App. 2014).

380. *Lutwak*, 344 U.S. at 614. The *Obergefell* decision modifies the definition in the sense that the new definition of a non-fraudulent marriage is case in gender-neutral terms (wife and wife or husband and husband) in addition to husband and wife. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

381. See generally BARRY *supra* note 23; Hamilton *supra* note 23; Herman *supra* note 23; METZ *supra* note 22.

into a heteronormative relationship.³⁸² New families can be vastly different from each other, such that the parties are sexually involved or not, are related or not, are exclusive of other romantic partners or not, and are economically interdependent or not.³⁸³ Marriage is simply not built to accommodate such a diversity of family arrangements.

Second, given this heterogony, new families are unlikely to be able to develop a group identity. This is distinct from same-sex couples, who have successfully mobilized to form what political scientists and sociologists call “identity politics”—group political activism based on a sense of collective, shared identity, rather than an interest.³⁸⁴ Such identity-based claims are likely to be unserviceable for the many new family units. Since new families are extremely diverse, it is unlikely that new families feel they belong to an identifiable group, at least at present.³⁸⁵ Two elderly sisters who decide to seek legal recognition as a family unit in order to offer each other social security benefits are not likely to see themselves as fighting the same fight as a group of young people in a polyamorous relationship. As indicated above,³⁸⁶ I believe the same issue underlies the reason why non-conjugal families in Alberta seem to never bring suit under AIRA, despite their inclusion under the law.³⁸⁷ The disappearance of non-traditional families (in those cases, non-conjugal families) from the case law could be linked to a lack of awareness that they constitute a family at all.

382. The ideal of the romantic, heteronormative, dyadic relationship has been central in the critiques of the feminist, queer, and family law scholarship in the past decades. See Goldberg, *supra* note 22 at 224; see generally METZ, *supra* note 22.

383. See Rosenbury, *supra* note 60, at 229–30; BRENDA COSSMAN & BRUCE RYDER, THE LEGAL REGULATION OF ADULT PERSONAL RELATIONSHIPS: EVALUATING POLICY OBJECTS AND LEGAL OPTIONS IN FEDERAL LEGISLATION 193–94 (2000), <https://ssrn.com/abstract=1740122>.

384. See generally Mary Bernstein, *Identity Politics*, 31 ANN. REV. SOC. 47 (2005).

385. Leckey, *supra* note 53, at 31 (“Other kinds of relationship potentially relevant to family policy—for example, people “living together apart,” persons with disabilities and their caregivers—may have neither the group identity nor the desire to assimilate into existing categories.”).

386. See *infra* Section II.B.

387. I have reached the same conclusion elsewhere, in my Ph.D. dissertation, upon examination of a similar New Brunswick scheme concerning spousal support. Under Article 112(3) of the Family Services Act, “Two persons, not being married to each other, who have lived together (a) continuously for a period of not less than three years in a family relationship in which one person has been substantially dependent upon the other for support, or (b) in a family relationship of some permanence where there is a child born of whom they are the natural parents, and have lived together in that relationship within the preceding year, have the same obligation as that set out in subsection (1) [an obligation to provide support for himself or herself and for the other spouse].” Family Services Act, S.N.B. 1980, c F-2.2 (Can.).

For the foregoing reasons, it is hard to foresee new families developing identity-based claims in the near future.³⁸⁸ The marriage equality movement, while inspiring in its success, is therefore an unavailing model for most non-normative families.

2. Proposed Remedies

I believe that the best way to provide legal recognition to new families will be via the contractual model, through legislation patterned generally after the proposed bills in Alabama (2015–2016 version) and Missouri—but without their narrow conditions of eligibility. Before the introduction of same-sex marriage in the U.S., some legal scholars had the intuition that it would have been preferable for same-sex couples to keep civil marriage for heterosexual couples only, and to craft alternative regimes for same-sex couples.³⁸⁹ However, they largely focused on civil unions as the most viable alternative, mostly to elude the intense conflict sparked by the same-sex marriage debate.³⁹⁰ By contrast, I contend that a designated beneficiary scheme, particularly the version offered by Colorado, holds more potential for new families than traditional civil unions.

Both proposals are formal models of recognition; unlike ascription, both models require parties to take affirmative steps to have their union recognized. I agree with the chorus of voices—including the Supreme Court of Canada³⁹¹—that have argued that state recognition must be affirmatively chosen by the parties.³⁹² I believe this is critical to protecting the dignity and autonomy of the parties. And while this point applies to all relationships, it acquires special significance in the field of non-normative relationships, because their characteristics—which can in-

388. See generally Nausica Palazzo, *Identity Politics e il Suo Reciproco: Riflessioni Giuridico-Politiche Sull'attivismo Queer*, in *PROSPETTIVE INTERDISCIPLINARI SU FORMAZIONE, UNIVERSITÀ, LAVORO, POLITICHE E MOVIMENTI SOCIALI* 625 (Annalisa Murgia & Barbara Poggio eds., 2017). Likewise, Professor Leckey argued that a lack of group identity in these kinds of relationships could affect new families' ability to assert their rights though a conventional civil rights approach. See also Leckey, *supra* note 53, at 31.

389. Greg Johnson, *Civil Union, A Reappraisal*, 30 *VERMONT L. REV.* 891, 894 (2006); Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case For Abolishing Civil Marriage*, 27 *CARDOZO L. REV.* 1161, 1162 (2006).

390. Johnson, *supra* note 389, at 894; Zelinsky, *supra* note 389, at 1162.

391. ALBERTA LAW REFORM INSTITUTE, *supra* note 36, at ¶ 161.

392. *Nova Scotia (Attorney Gen.) v. Walsh*, [2002] 4 S.C.R. 325, 355 (Can.) (“Where the legislation has the effect of dramatically altering the legal obligations of partners, as between themselves, choice must be paramount.”).

clude fluidity and romantic non-exclusivity—stand at odds with functional recognition. Practically speaking, new kinship unions are simply harder for the state to identify than dyadic, conjugal unions.

One of the many benefits of both contractual and registration schemes is their relative simplicity. Under a contractual scheme, such as that in the proposed bills in Alabama and Missouri, parties need only sign a civil contract declaring that they are in a marital-like relationship, and then register it.³⁹³ Likewise, under the registration model, like the designated beneficiary scheme in Colorado, participants need only fill out a simple form, which can be completed without the assistance of an attorney.³⁹⁴ In doing so, parties choose which prerogatives and rights to assign and which to withhold, so the scheme is very flexible.³⁹⁵ Unfortunately, the system falls short of allowing parties to designate multiple beneficiaries, which could be a problem if multiple caregiving relationships co-exist.³⁹⁶ But this rigidity is partially offset by the opportunity for new families to customize the bundle of rights and obligations that come along with registration, albeit with respect to a single beneficiary.

The Colorado scheme has less narrow eligibility requirements than the contracts proposed in Missouri and Alabama, so the scheme shifts the focus away from a romanticized, sexual relationship by extending its reach to relatives and friends who seek to be in a committed family relationship.³⁹⁷ The law also excludes fidelity rights and duties and other marital-like obligations from its scope.³⁹⁸

I do not mean to disregard all the shortcomings associated with these regimes, especially their excessive rigidity. While a proper opt-out system in the case of registration can help parties tailor their bundle of rights, duties, and benefits, neither system allows for the designation of multiple beneficiaries or for the division of benefits. These flaws are correctable over time, however, and the process of recognizing new families will likely come in waves. Both proposals strike a balance between the need to recognize at least some new families and the states' interests.

393. *See infra* Section I.C.

394. A sample beneficiary agreement can be found on the website of the City and County of Denver. CITY & COUNTY OF DENVER, DESIGNATED BENEFICIARY AGREEMENT FORM, <https://www.denvergov.org/content/dam/denvergov/Portals/777/documents/MarriageCivilUnions/Designated%20Beneficiary%20Agreement.pdf> (last visited Nov. 11, 2018).

395. *Id.*

396. *See supra* Section I.C.2.

397. *See supra* Section I. A.1, 3.

398. *See supra* Figure 1.

3. The Strange Pairing: Notes on Forming Alliances

Queer activists and radical pluralist movements have fought marriage in the past as an undesirable tool for protecting non-normative relationships.³⁹⁹ However, the liberationist stances held by queer activists—opposing marriage on several grounds and even sometimes advocating for its abolition—have fallen short of advocating for the introduction of alternatives to marriage such as a designated or reciprocal beneficiary scheme.⁴⁰⁰

Non-normative family structures are on the rise, and the reforms outlined above are all viable legal paths to pursuing recognition of new families and accommodating family pluralism.⁴⁰¹ But in order to succeed, queer activists and new families should form strategic alliances with the conservative fringe groups that have shown an interest in exploring alternative regimes to marriage.⁴⁰²

It is highly likely that the motivation behind bills like those in Missouri and Alabama was to preserve the socially conservative idea of marriage as between one man and one woman. Queer activists would be

399. See *supra* text accompanying notes 24, 26, 29, 30.

400. *Id.*; Nussbaum, *supra* note 13, at 694–95.

401. The last available census in Canada is illustrative of the changing landscape of families in the country. The Vanier Institute, which processed the census data, noticed that only 66% of families in Canada include a married couple (while 18% live in a common-law marriage and 16% are lone-parent families), and also that family structures continuously evolve by achieving an unprecedented degree of complexity. NATHAN BATTAMS, THE VANIER INSTITUTE OF THE FAMILY, A SNAPSHOT OF FAMILY DIVERSITY IN CANADA (2018). While in 2010 only 5.9% of couples were in a non-marital conjugal union, these couples now account for one fifth of all conjugal (dyadic) couples in the country. STATISTICS CANADA, FAMILIES, HOUSEHOLDS AND MARITAL STATUS: KEY RESULTS FROM THE 2016 CENSUS, 1, 4 (Aug. 2, 2017), <https://www150.statcan.gc.ca/n1/daily-quotidien/170802/dq170802a-eng.htm> (last visited Nov. 11, 2018). The Institute also noticed that in 2016, 404,000 multi-generational households in Canada were registered, and that multi-generational families were the fastest-growing household type since 2001 (+38%). Likewise, in other Western countries, the emergency of non-normative families acts in tandem with the decline of marriage. JAY TEACHMAN ET. AL., *The Demography of Families*, in HANDBOOK OF MARRIAGE AND THE FAMILY 1, 39 (3d ed. 2013) (discussing the decline of marriage in the United States); Claire Miller, *Number of People Getting Married Is Falling — and Here's the Reason Why*, THE MIRROR (Apr. 27, 2016) <https://www.mirror.co.uk/lifestyle/sex-relationships/number-people-getting-married-falling-7844282> (referring to the decline of marriage in England and Wales).

402. Some activists proposed as much in the context of the same-sex marriage debate. See Jeffrey A. Redding, *Queer/Religious Potentials in U.S. Same-Sex Marriage Debates*, in QUEER THEORY: LAW, CULTURE, EMPIRE, 131 (Kimberley Brooks & Robert Leckey eds., 2010).

right to be hurt by such legislation, but it is in their interest to look beyond the motivation of the law to its possibly beneficial effects. When conservative groups bend so far to the right to protect traditional marriage, they unconsciously pursue some progressive objectives which are consistent with those on the left. For those who believe that marriage poses a threat to non-normative families, alternate schemes—even those generated out of animus—have promise.⁴⁰³

This unusual convergence of interests between radical-pluralist activists and conservatives has been pointed out in reference to certain Alabama judges' refusal to issue marriage licenses to gay couples.⁴⁰⁴ In that instance, one journalist noted the “strange pairing” of conservative groups and non-normative families.⁴⁰⁵ The intuition is on point. The conservative interest in protecting different familial arrangements alongside marriage is not different from the progressive desire to protect other non-normative families—only the motivations differ.

Importantly, however, it is also likely that alliances aimed at furthering the interests of non-normative conjugal couples would be complicated to form. Conservative groups maintain a strong opposition toward marriage-like relationships that defy the traditional notion of the nuclear family.⁴⁰⁶ This is not to say that such alliances are impossible,

403. If queer activists believe that marriage poses a serious threat to the freedom to decide the aspects one's familyhood, then they should be interested in schemes that pose a lesser threat to it. Of course, I do not contend that registration and contracts fully avoid normalization—what has been described as the “channelling [sic] function of family law.” Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 503 (1992). Extending civil statuses always entails the risk of legal labels reducing the “variety and pluralism of kinship practices.” Swennen & Croce, *supra* note 143, at 549–50. However, under either contract-based systems or registration systems with strong opt-out options, it is the parties themselves who become the “source[s] of their own classification[s].” *Id.* at 552.

404. Shane Ferro, *How Today's Supreme Court Ruling Brought Uber Conservatives and Radical Queers Together*, BUSINESS INSIDER (Jun. 26, 2015), <https://www.businessinsider.com/gay-marriage-ruling-brought-conservatives-and-radical-queers-together-2015-6>.

405. *Id.*

406. The reaction of social conservatives to same-sex marriage is one example of this opposition—another is their reaction to extending marriage to polygamous unions. For one example of a conservative Justice's resistance to plural marriages in constitutional doctrine, see *Obergefell v. Hodges*, 576 U.S. 2584, 2621 (2015) (Roberts, C.J., dissenting) (“It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage.”). These slippery-slope arguments can also slide into hurtful attacks. See FAMILY RESEARCH COUNCIL, *THE SLIPPERY SLOPE OF SAME-SEX MARRIAGE* (2004) (“Once marriage is no longer confined to a man and a woman, it is impossible to exclude virtually any relationship between two or more partners of either sex—even non-human ‘partners.’”).

but rather that the difference between the two parties will manifest in the details of a recognition scheme. I argue that the two groups could still find common ground on the point of introducing alternative regimes to marriage, as long as marriage as a traditional institution was maintained.

I believe that for any such alliance to work, the queer activists would need to concede that marriage is not the goal for non-normative families. Radical pluralist movements and queer activists should emphasize case law that entrenches marriage as a traditional and privileged institution—an institution that the state has a legitimate interest in furthering—in order to build such a broad coalition.⁴⁰⁷ Same-sex marriage advocacy has been central to entrenching the view that marriage alone can confer expressive benefits.⁴⁰⁸ In the U.S., for instance, before the Supreme Court issued the *Obergefell* decision, marriage equality advocates succeeded in striking down alternative regimes to marriage under a separate-but-equal narrative claiming that these statuses fell short of conveying the dignity and respect that only marriage confers.⁴⁰⁹

Therefore, it is crucial for queer activists pushing for the introduction of alternative regimes to marriage to communicate the following to other movements and to society at large:

- (i) marriage ought to be preserved as a traditional institution;
- (ii) alternative regimes to marriage are the most suitable vehicle to protect new families; and
- (iii) such alternative regimes are not second-class to marriage.

As to the first point, one could wonder what the interest of conservative groups is in preserving marriage now that *Obergefell* has made

407. *North Dakota Fair Hous. Council v. Peterson*, 625 N.W.2d 551 (N.D. 2001) (rejecting the contention that the state code prohibiting discrimination in housing applied to unmarried couples); *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013), *vacated*, 822 F.3d 1151 (10th Cir. 2016) (upholding the constitutionality of the Utah criminal law on bigamy, while rejecting the religious cohabitation prong of the statute); *Marvin v. Marvin*, 557 P.2d 106, 122 (1976) (“Lest we be misunderstood, however, we take this occasion to point out that the structure of society itself largely depends upon the institution of marriage, and nothing we have said in this opinion should be taken to derogate from that institution.”).

408. *See generally Obergefell*, 576 U.S. 2584.

409. *See, e.g., In re Marriage Cases*, 183 P.3d 384, 400 (Cal. 2008) (holding that exclusion from marriage amounted to a violation of the same-sex couples’ human dignity).

same-sex marriage available nation-wide.⁴¹⁰ I believe that polyamorous relationships are the next frontier in family law. It is not inconceivable that they will enter into a similar marriage equality “war” soon.⁴¹¹ Hence, the two groups could coalesce around those aspects that appeared to be sticking points in the marriage debate, such as preserving the label “marriage” for a limited array of relationships (thereby excluding polyamorous relationships from the institution) or, less radically, preserving the symbolic benefits of marriage, and its place in culture and society (yet not in public and private family law) as an archetypal institution with transcendent meaning.

As to the second point, alternative regimes could be better for the parties in several respects. They could accommodate family pluralism in ways that marriage is structurally unable to do. They avoid some of the costs of assimilation, which are at their zenith in marital arrangements. They can build in more flexibility.⁴¹²

This might sound like a difficult needle to thread. I am not arguing that queer activists simultaneously must convince conservatives that marriage *is* the best option, and then convince new families/progressive activists that marriage *is not* the best option. I operate from the presumption that social conservatives already believe that marriage has a special place in society and that it ought to be preserved as a traditional institution. Rather, I suggest that queer activists capitalize on many new families’ reduced interest in marriage *per se*. What I advocate is a trade: conservatives get to preserve traditional marriage for conjugal couples in exchange for the creation of alternative regimes for new families.

The third point is most crucial, since under the current constitutional doctrine, alternative regimes would always be at risk of being

410. Carl Tobias, *Implementing Marriage Equality in America*, 65 DUKE L.J. ONLINE 25, 44 (2015) (“[A] half year after the Justices issued *Obergefell*, practically every state and most local governments have fully implemented the Court’s mandate, even across much of the South, which initially appeared most resistant. Few localities have experienced resistance and for only a brief period.”).

411. See GILLIAN DOUGLAS, AN INTRODUCTION TO FAMILY LAW, CLARENDON LAW SERIES 30–31 (2001); Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. OF L. & SOC. CHANGE 277, 283 (2005); Christian Klesse, *Marriage, Law and Polyamory: Rebutting Mononormativity with Sexual Orientation Discourse?*, 6 OÑATI SOCIO-LEGAL SERIES 1348 (2016); Joanna L. Grossman & Lawrence M. Friedman, *Is Three Still a Crowd? Polygamy and the Law After Obergefell v. Hodges*, VERDICT, (July 7, 2015) <https://verdict.justia.com/2015/07/07/is-three-still-a-crowd-polygamy-and-the-law-after-obergefell-v-hodges>; see generally RONALD C. DEN OTTER, BEYOND SAME-SEX MARRIAGE: PERSPECTIVES ON MARITAL POSSIBILITIES (2016) (providing diverse perspectives on the possibilities for marriage after the legalization of same-sex marriage).

412. See *supra* Section II.A.3.

struck down in violation of a state constitution's equal protection clause. However, I believe there are defenses. When courts have struck these sorts of regimes in the past (such as domestic partnerships or civil unions), they have looked at the inequality of the system relative to marriage.⁴¹³ In doing so they took into account the individuals' feelings of social inferiority and rejection.⁴¹⁴ A well-designed alternative scheme could avoid feelings of social inferiority by providing new families with a robust scheme of protections. The idea that new families risk experiencing feelings of social inferiority overlooks the fact that they might see material benefits, rather than dignitary benefits, as the ultimate goal. This has been the case in the context of LGBT activism in Europe and the United States.⁴¹⁵

It is also important to note that the second-class status concern originated in contexts where domestic partnerships and civil unions were *identical to marriage* in terms of the benefits, rights and obligations set forth under state law.⁴¹⁶ They were not genuine alternatives; rather, they were functionally equivalent regimes that lacked only the label of marriage. This explains the feeling of discrimination and social inferiority on the part of same-sex couples. By contrast, truly alternative schemes would provide a different bundle of rights and obligations, would set different (hopefully much lighter) rules to police entrance and exit, and most of all, would not be limited to conjugal couples alone.⁴¹⁷

413. See, e.g., *Kerrigan v. Comm'r of Public Health*, 957 A.2d 407, 412 (Conn. 2008).

414. *In re Marriage Cases*, 183 P.3d 384, 443 (Cal. 2008); *Lewis v. Harris*, 908 A.2d 196, 226–27 (2006) (Poritz, C.J., concurring and dissenting) (stating that:

[b]y excluding same-sex couples from civil marriage, the [s]tate declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples. Ultimately, the message is that what same-sex couples have is not as important or as significant as “real” marriage, that such lesser relationships cannot have the name of marriage.).

415. See Erez Aloni, *Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage*, 18 DUKE J. GENDER L. & POL'Y 105, 109 (2010) (“In fact, it seems that the lesson that the theory of small change misses is that many European LGB organizations object to same-sex marriage and are *more interested in securing partnership rights* for same-sex couples.”) (emphasis added); KATHERINE FRANKE, *WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY: HOW AFRICAN AMERICANS AND GAYS MIISTAKENLY THOUGHT THE RIGHT TO MARRY WOULD SET THEM FREE* 144–45 (2015).

416. Edward Stein, *Marriage or Liberation?: Reflections on Two Strategies in the Struggle for Lesbian and Gay Rights and Relationship Recognition*, 61 RUTGERS L. REV. 567, 587 (2009).

417. For examples of alternative regimes that are open to both same-sex and cross-sex couples, see EUROPEAN FAMILY LAW VOLUME II 2 n.2 (Jens M. Scherpe ed., 2016).

CONCLUSION

The conservative response to the movement for marriage equality for LGBT couples has led to development of new legal alternatives to marriage.⁴¹⁸ The beneficiary schemes in Vermont and Hawaii were originally introduced by conservative groups (or as a compromise with conservative groups) in response to the gay marriage equality struggle.⁴¹⁹ The AIRA in Alberta, Canada, a hybrid ascriptive and registration system, was also pushed forward by Christian and conservative movements.⁴²⁰ Recently, the socially conservative groups⁴²¹ who resisted implementing same-sex marriage have pushed forward proposals for alternate regimes in Alabama, Oklahoma, and Missouri. In bending so far to the right, these groups have—ironically and unwittingly—reached solutions that are consistent with queer activists’ interest in radical pluralist family arrangements. I contend that these initiatives did more than enrich the menu of available options for protecting new families. They have also become some of the most viable options for protecting these families. In particular, I believe that new families and queer activists should pursue reforms patterned after the designated beneficiary scheme in Colorado or the proposed bills in Alabama and Missouri.

These movements are animated by hurtful notions, but they are headed in the right direction. New families and queer advocates should

418. *See supra* Section II.

419. In Hawaii, the introduction of a reciprocal beneficiary scheme was a tactic used by conservatives to avoid the introduction of a partnership or marriage law for same-sex couples. *See* Coleman, *supra* note 205. Democrats themselves were persuaded that marriage ought to be a union of a man and a woman, and yet that some protections should have been afforded to same-sex families. For instance, the co-chairman of the Hawaii Senate Judiciary Committee, Senator Avery B. Chumbley, explained, “On Wednesday, I agreed to support a constitutional amendment which would reserve marriage to opposite sex couples. I also agreed to support establishing reciprocal beneficiary relationships with certain governmental rights and benefits.” Senator Avery B. Chumbley, *Same-Sex Marriage and Reciprocal Benefits*, ALOHA, <http://www.aloha.net/-abc/samesex.html>; *see also* JASON PIERCESON, COURTS, LIBERALISM, AND RIGHTS: GAY LAW AND POLITICS IN THE UNITED STATES AND CANADA 124 (2005).

420. For instance, the most prominent moral conservative party supporting the reform was the Reform/Alliance Party. *See* LOIS HARDER, AFTER THE NUCLEAR AGE? SOME CONTEMPORARY DEVELOPMENTS IN FAMILIES AND FAMILY LAW IN CANADA 9 (The Vanier Institute for the Family 2011), http://vanierinstitute.ca/wp-content/uploads/2015/12/CFT_2011-10-00_EN.pdf.

421. Such as the Christian movements in Alberta behind the introduction of AIRA, S.A. 2002, and the conservative movements behind the bills in Oklahoma, Alabama, and Missouri. *See* Section II.C.

aim to build alliances with conservative groups and find common ground to introduce such alternative regimes. In doing so, they should capitalize on their shared interest in alternatives to marriage, and on those aspects that appeared to be sticking points in the marriage debate, such as preserving marriage as a traditional institution and preserving the label of “marriage” for conjugal couples only.

I predict that polyamorous relationships are the next frontier of family law in the U.S. and Canada. That means that now is the time to decide what legal regimes we need. “Defending” marriage as a dyadic institution is a concession that queer activists should be willing to make in order to introduce more flexible and ideologically-neutral regimes.

With formal recognition, new families could finally emerge in the eyes of the law. They could gain material benefits and reduced social stigma. This achievement would allow queer activists to fully challenge current narrow notions of who is deserving of state recognition. Formal recognition is a worthy goal for queer activists in the U.S. and Canada, and it would finally align family law with the diverse reality of love and commitment in the modern day.