If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage"

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ARTICLES

IF NOT MARRIAGE?
ON SECURING GAY AND LESBIAN
FAMILY VALUES BY A
"SIMULACRUM OF MARRIAGE"†

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† The benefits of [homosexual] marriage may outweigh the costs. Nonetheless, since the public hostility to homosexuals in this country is too widespread to make homosexual marriage a feasible proposal even if it is on balance cost-justified, maybe the focus should be shifted to an intermediate solution that would give homosexuals most of what they want ....

... What is called registered partnership and ... homosexual cohabitation [in some countries] is in effect a form contract that homosexuals can use to create a simulacrum of marriage.


Simulacrum ... 1. an image; likeness 2. a vague representation; semblance 3. a mere pretense; sham.


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Imagine, if you can, a protracted struggle for civil rights, the most far-reaching legal victory in its history seemingly within grasp. More practiced over the years in lamenting defeats than in celebrating victories, the movement has begun to experience a shift in the balance of judicial favor. Long ignored by much of mainstream legal academe, of late the struggle has attracted the attention—more supportive than not—of growing numbers of legal scholars. Yet, on the
threshold of new legal triumph, some of the movement's most articulate advocates voice grave reservations about the prospective win, favoring an incremental course, albeit to a potentially more radical end. And highly regarded members of the academy cogently advance the merits of the momentous legal claim, but simultaneously propose that courts vindicate the rights at stake through more gradual and cautious means.

The arena, of course, is lesbian and gay rights. The cause célèbre, the same-sex marriage case that is slowly wending its way through the courts—and the political processes—of the State of Hawaii. The confluence of other circumstances (about which more presently) is by no means imaginary.

Whether or not Ninia Baehr and Genora Dancel ever secure the marriage license that was denied to them in April 1991, the lawsuit brought by them and two other same-sex couples against the State of Hawaii has inexorably thrust the protection of family rights to the forefront of the gay rights agenda. And the theretofore barely remote possibility that gay and lesbian family life might actually be organized around the institution of state-sanctioned marriage is no longer nearly so remote.

The unexpected 1993 decision of the Supreme Court of Hawaii in *Baehr v. Lewin*—that denying “same-sex couples access to the marital status” is a “sex-based classification” and is “presumed to be un-


constitutional” unless shown to be “justified by compelling state interests” gave renewed legitimacy to an issue that had appeared moribund for most of the preceding two decades. Three years later, the state’s unsuccessful effort to mount a persuasive case of compelling interests was in stark contrast to the cursory acceptance of state justifications in previous same-sex marriage cases.\(^7\) The state had failed to prove, the Hawaii Circuit Court held, “that the public interest in the well-being of children and families . . . would be adversely affected by same-sex marriage.”\(^9\)

Kenneth Karst had accurately predicted the state’s difficulty years earlier in his classic 1980 essay, *The Freedom of Intimate Association*, in which he made one of the earliest scholarly arguments to appear in the literature in support of legally recognizing same-sex couple relationships.\(^10\) Finding a right of “intimate association” in the confluence of substantive due process, equal protection, and the First Amendment, Karst asserted that the denial of marriage to homosexuals “must be justified by the same sort of heroic state interests that would be necessary to justify forbidding heterosexual marriage.”\(^11\) That is “a

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7. Id. at 67 (plurality opinion).
8. See *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973) (“A license to enter into a status or a relationship which the parties are incapable of achieving is a nullity.”); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (declaring that marriage is a fundamental right only in the context of a “union of man and woman, uniquely involving the procreation and rearing of children within a family”); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974) (finding that the prohibition of same-sex marriage is justified by the “public interest in affording a favorable environment for the growth of children”).
11. Karst, supra note 10, at 685. Karst’s essay sought to synthesize and provide further content to the body of law regarding marriage, procreation, and family relationships flowing from *Griswold v. Connecticut*, 381 U.S. 479 (1965). His prediction that “the current revival of substantive due process . . . is here to stay,” id. at 665, predated the Supreme Court’s refusal in *Bowers v. Hardwick*, 478 U.S. 186 (1986), to extend the *Griswold* line of cases to preclude state sodomy laws. Nevertheless, the direction of modern equal protection law taken in *Romer v. Evans*, 517 U.S. 620 (1996), was foretold by Karst’s emphasis on the significance of state-imposed stigma in the denial of homosexual rights. “[S]tigma,” he wrote, “is the one ‘status harm’ that is most clearly forbidden by the Fourteenth Amendment’s principle of equal citizenship . . . .” Karst, supra note 10, at 686 (footnotes omitted). He dismissed as “makeweight” and “a mechanical view of the issue [that] is unhelpful” the argument
burden government will have a hard time meeting," Karst surmised,
because "governmental restrictions on homosexuals are very largely
the product of folklore and fantasy rather than evidence of real risk of
harm."\footnote{12}

Supportive of gay relationships though he was, Karst fell short of
claiming constitutional protection for fully equal same-sex marital
rights. "[T]he freedom of intimate association," he declared, "dem-
ands some important justification for the state's offering the marital
status to heterosexuals and denying any comparable status to homo-
sexuals."\footnote{13} Thus, Karst foresaw the possibility of an alternative "for-
malized legal status" that affords same-sex couples "the same
opportunity as heterosexual couples to make the public self-identifying
statements implicit in marriage," and that "recognize[s] their sta-
tus as an acceptable one in society rather than one deserving of stigma."\footnote{14} Bowing to the realities of "majoritarian morality,"\footnote{15} how-
ever, Karst speculated that even remedies short of same-sex marriage
"may take a while to arrive," though "arrive they surely will."\footnote{16}

Far more robust defenses of same-sex marriage have appeared in
the rapidly-expanding legal literature of gay and lesbian rights since
Karst's tepid endorsement. To mention only a few, William Es-
kridge's excellent book, \textit{The Case for Same-Sex Marriage}, examines
the constitutional vulnerability of same-sex marriage prohibitions
from a variety of doctrinal perspectives,\footnote{17} as does Mark Strasser's fine
new volume, \textit{Legally Wed}.\footnote{18} Nan Hunter introduces a feminist per-
spective, discussing marriage as a socially constructed institution
whose rigid gender structure could be dismantled by means of same-
sex unions.\footnote{19} Andrew Koppelman makes a compelling case that same-

\footnote{12. Karst, \textit{supra} note 10, at 684-85.}
\footnote{13. \textit{Id.} at 684.}
\footnote{14. \textit{Id.}}
\footnote{15. \textit{Id.} at 691.}
\footnote{16. \textit{Id.} at 686. Acknowledging the "influence [of] conventional morality over the
Supreme Court's management of its institutional role," \textit{Id.} at 692, Karst conceded that
his essay had reached "conclusions that no one can realistically expect courts to adopt
in the near future," \textit{Id.} at 666. "A judge faced with [a homosexual rights] question ... may be excused for feeling a momentary enthusiasm for 'the passive virtues,'" Karst
sympathized, citing Alexander Bickel's famous encomium to judicial discretion in re-
viewing politically sensitive social issues. \textit{Id.} at 691 (citing Alexander M. Bickel, \textit{The
Least Dangerous Branch: The Supreme Court at the Bar of Politics} 111-98 (1962)).}
\footnote{17. William N. Eskridge, Jr., \textit{The Case for Same-Sex Marriage: From Sexual Lib-
ertiy to Civilized Commitment} 123-82 (1996).}
\footnote{18. Mark Strasser, \textit{Legally Wed: Same-Sex Marriage and the Constitution} (1997).}
Sexuality} 9 (1991); see also Catharine A. MacKinnon, Feminism Unmodified: Dis-
courses on Life and Law 27 (1987) ("[I]t might do something amazing to the entire
institution of marriage to recognize the unity of two 'persons' between whom no su-
periority or inferiority could be presumed on the basis of gender."). \textit{But see} Nancy D.
Polikoff, \textit{We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage}
sex marriage restrictions are a form of sex discrimination, a rationale that was developed in only the most simplistic terms by the Hawaii court in *Baehr*.

However well reasoned these and other scholarly endorsements of same-sex marriage, many of Karst's reservations are still much in evidence in today's mainstream scholarly commentary. Ever the economic pragmatist, Judge Richard Posner questions the utility of state regulation of gay relationships in his provocative book, *Sex and Reason*, in which he advocates the repeal of sodomy laws. By the same logic, he acknowledges, the burden of proof should be on those who would limit same-sex marriage. "[T]he costs seem slight," he says, and "[t]he benefits of such marriage"—including raising "homosexuals' self-esteem" and contributing "to the stability of homosexual relation-

Will Not "Dismantle the Legal Structure of Gender in Every Marriage," *79 Va. L. Rev.* 1535, 1536 (1993) (arguing that efforts to obtain the right to marry for homosexuals "betrays the promise of . . . lesbian and gay liberation").


21. The court found that "on its face and . . . as applied, [the marriage statute] denies same-sex couples access to the marital status and its concomitant rights and benefits . . . on the basis of the applicants' sex." *Baehr v. Lewin*, 852 P.2d 44, 60 (Haw. 1993) (Levinson, J., plurality opinion). The dissenting opinion's assertion that the statute "applies equally to both sexes" because "[a] male cannot obtain a license to marry another male, and a female cannot obtain a license to marry another female," *id.* at 71 (Heen, J., dissenting), was summarily dismissed by the plurality. *id.* at 67-68.


ships”—“may outweigh the costs.” Nevertheless, he worries that legalization would be to declare that “homosexual marriage is a desirable, even a noble, condition in which to live.” This is “a false picture of the reality of homosexuals’ lives,” he declares, and it “is not what most people in this society believe.” For Posner, the societal heckler’s veto is enough to tip the balance. “[S]ince the public hostility to homosexuals in this country is too widespread to make homosexual marriage a feasible proposal,” he says, “the focus should be shifted to an intermediate solution,” perhaps modeled on Denmark’s “registered partnership” or Sweden’s “homosexual cohabitation,” which is “in effect a form contract that homosexuals can use to create a simulacrum of marriage.”

No mainstream scholar has gone as far as Cass Sunstein in embracing the constitutional imperatives of same-sex marriage while declining to endorse judicial vindication of the right. As early as 1988, Sunstein had argued that the Equal Protection Clause should be construed to prohibit discrimination on the basis of sexual orientation. By 1994, he was elaborating the doctrinal basis for that conclusion as applied to the ban on same-sex marriage. Agreeing with Karst, Sunstein characterizes state justifications for the ban as “crude” and “weak.” Apparently disagreeing with Posner, he dismisses as

24. Id. at 311, 313.
25. Id. at 312.
26. Id. Because “marriage is a status rich in entitlements,” he is also troubled that incidents of marriage “designed with heterosexual marriage in mind, more specifically heterosexual marriages resulting in children” are unlikely to be a perfect fit for same-sex marriage. Id. at 313. But see infra notes 212-13 and accompanying text.
27. In a 1997 review of William Eskridge’s book, The Case for Same-Sea Marriage, Posner concedes that “[t]he argument that Eskridge mounts in favor of [legislative] reform [permitting people of the same sex to marry] is . . . a powerful one, and it would not trouble me if a state were persuaded by it and adopted such a law.” Richard A. Posner, Should There Be Homosexual Marriage? And if so, Who Should Decide?, 95 Mich. L. Rev. 1578, 1578 (1997). Nevertheless, he finds “unconvincing” the argument that “courts in the name of the Constitution should force acceptance of same-sex marriage on all the states at once.” Id. at 1579. Although acknowledging the logic of Eskridge’s constitutional arguments, Posner says “it is a mistake to suppose that legal reasoning alone can underwrite so profound a change in public policy”; and that judicially-mandated same-sex marriage would entail “a tightrope act that without a net constituted by some support in public opinion is too perilous for the courts to attempt.” Id. at 1585.
28. Posner, supra note 23, at 313. The Scandinavian statutory models for registered domestic partnerships are discussed infra notes 278-85 and accompanying text.
30. See supra note 12 and accompanying text.
31. Cass R. Sunstein, Homosexuality and the Constitution, 70 Ind. L.J. 1, 6 (1994) [hereinafter Sunstein, Homosexuality]. The ban on same-sex marriages is not easy to support . . . . Perhaps [it] could be justified as a means of restricting the benefits of
“fragile” the contention that the granting of marriage licenses by the state would falsely ‘advertise’ that same-sex relations can be happy, healthy, and successful.33

Sunstein concedes that the present Court is unlikely to expand “strict scrutiny” to encompass discrimination against homosexuals, and that “almost any argument” traditionally has been sufficient to pass muster under a “rationality” standard of review.34 However, he claims there is a more “interesting and powerful argument” involving Equal Protection—namely, that discrimination on the basis of sexual orientation is a form of gender discrimination.35 Elaborating on a theory first articulated by Andrew Koppelman and Sylvia Law,36 Sunstein argues that the social taboo and accompanying legal ban on same-sex marriage can be seen as part of a system of sex-role stereotyping and gender hierarchy which is “as deeply connected with male supremacy as the prohibition on racial intermarriage is connected with White Supremacy.”37 Thus, he contends, the Supreme Court’s invalidation of antimiscegenation laws in *Loving v. Virginia*,38 “is a relevant or perhaps even decisive precedent for the view that the prohibition on same-sex relations is impermissible sex discrimination.”39

Sunstein’s powerful endorsement of the case for same-sex marriage is severely undermined by his unexpected conclusion that, even if its

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32. See supra notes 25-26 and accompanying text.
34. *Id.* at 6, 9. The latter observation predates the Court’s decision in *Romer v. Evans*, 517 U.S. 620 (1996), invalidating Colorado’s ban on sexual orientation antidiscrimination laws, purportedly using rational basis review. Commenting on the state of the law after *Romer*, Sunstein calls rationality review “a kind of magical trump card . . . to invalidate badly motivated laws.” Cass R. Sunstein, *The Supreme Court 1995 Term—Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4, 61 (1996) [hereinafter *Sunstein, Undecided*]. And the “heart of the matter,” he adds “must be that, at least for purposes of the Equal Protection Clause, it is no longer legitimate to discriminate against homosexuals as a class simply because the state wants to discourage homosexuality or homosexual behavior.” *Id.* at 62.
36. See supra note 20.
37. *Sunstein, Homosexuality, supra* note 31, at 16, 20-21. “[T]he social opprobrium against male homosexuality,” Sunstein argues “comes largely from the perceived unnaturalness of male passivity in sex,” and “opposition to male homosexuality stems largely from the desire to stigmatize male sexual passivity.” *Id.* at 22. “[T]he ban on lesbian relations,” he says “appears to stem from quite different concerns. Part of the purpose of such bans may be to ensure that women are sexually available to men”; and “[a]lthough part of the concern may be the fact that lesbianism also complicates gender differences by creating a sexually active role for women.” *Id.* (footnotes omitted).
39. Sunstein, *Homosexuality, supra* note 31, at 20. Sunstein describes his analysis as “speculative and brisk,” and says that it would take “far more support” to “provide[ ] the full defense that would be needed to translate this argument into constitutional law.” *Id.* at 23.
prohibition violates the Equal Protection Clause, “courts should be cautious and selective in vindicating that principle.” Even more forcefully than Karst or Posner, Sunstein grounds his reticence in the perceived public hostility to same-sex marriage. If the Supreme Court accepted his “quite adventurous” argument any time soon, he fears, “it might cause a constitutional crisis, a weakening of the legitimacy of the Court, an intensifying of homophobia, a constitutional amendment overturning the Court’s decision, and much more.” Comparing gay rights to abortion rights, he cautions that the “precipitous vindication” of the privacy principle in *Roe v. Wade* “prematurely committed the nation to a principle toward which it was in any case steadily moving,” but with a range of “harmful consequences.” For Sunstein, the lesson here is that “judicial minimalism” — to use his recently coined phrase — is called for when “the Court is dealing with an issue of high complexity about which many people feel deeply and on which the nation is in flux (moral or otherwise).” As applied to the constitutional attack on the same-sex marriage ban, the Court should not embrace it, he says, “because of the need for prudence in asserting even a correct principle against a democratic process that is not ready for it.”

What is important here is not whether reservations of the kind expressed by Sunstein, Posner, and Karst are well taken on the merits.

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40. Id. at 25.
41. Id. at 26.
42. 410 U.S. 113 (1973).
43. Sunstein, *Homosexuality*, supra note 31, at 25. Such consequences included, according to Sunstein, “the creation of the Moral Majority, the death of the Equal Rights Amendment, the galvanizing of general opposition to the women’s movement, ... and the general transformation of the political landscape in a way deeply damaging to women’s interests.” Id. In this regard, Sunstein agrees with then-Judge Ginsburg’s controversial appraisal of the *Roe* decision as having been a “[h]eavy-handed judicial intervention” that “provoked, not resolved, conflict” by “ventur[ing] too far in the change it ordered.” Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375, 376, 385-86 (1985); see also Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 175-201 (1991) (discussing the impact of *Roe v. Wade* on women’s rights). But see Wolfson, *supra* note 22, at 592-94 (arguing that complacency and the organizational collapse of the women’s rights movement were responsible for setbacks in the aftermath of *Roe*).
44. Sunstein, *Undecided*, supra note 34, at 7.
45. Id. at 8. According to Sunstein:
   When a democracy is in moral flux, courts may not have the best or the final answers. ... Courts do best by proceeding in a way that is catalytic rather than preclusive, and that is closely attuned to the fact that courts are participants in the system of democratic deliberation. It is both inevitable and proper that the lasting solutions to the great questions of political morality will come from democratic politics, not the judiciary.
46. Id. at 97; see also Posner, *supra* note 27, at 1585-87 (arguing that “public opinion is not irrelevant to the task of deciding whether a constitutional right exists”).
Others have amply critiqued those questions. More remarkable for present purposes is the ease with which the doubters assume that compromising the principle at stake entails no significant costs, that the harm in being denied access to marriage is of modest consequence to gay and lesbian families.

The "homosexual couple have each other's society," Karst observes, "including whatever sort of sexual intimacy they want; they care for each other, and they are committed to each other, in the degree they choose." What is chiefly lacking in this benign view is "the dignity of identification as . . . equal citizens," a void that apparently can be filled short of marriage by a "legal status that recognizes their union and commitment." The stakes are even less compelling in Posner's vision of gay and lesbian family life. "[I]t would be misleading to suggest that homosexual marriages are likely to be as stable or rewarding as heterosexual marriages," he grandly divines, and permitting same-sex unions "would place government in the dishonest position of propagating a false picture of [this] reality." It is thus relatively easy for him to conclude that "a simulacrum of marriage" would be enough to "give homosexuals most of what they want."

Sunstein allows that "[a] relatively radical attack on the prohibition of same-sex marriages might come many years down the road, when the basic principle has been vindicated in many other less controversial contexts." And in the meantime? "[F]ar better for the Court to start cautiously and to proceed incrementally," he says, although gay and lesbian family needs might be addressed here and there by "ex-


49. Id. at 683-84.

50. Posner, supra note 23, at 312. "The greatest inherent . . . disadvantage of homosexuality is the impact on family life in a culture of companionate marriage," Posner opines. Id. at 305. "A pair of men is inherently less likely to form a companionate marriage-type relationship than a man and a woman," he says, but "[s]ince there is less sexual strain in a lesbian union, the prospects for stable lesbian marriages are better." Id. at 305-06.

51. Id. at 313.

52. Sunstein, Homosexuality, supra note 31, at 27.

53. Id. at 26.
experiments in constitutional law at the state level.”54 Unlike Karst and Posner, Sunstein proposes no specially-crafted substitute for marriage, though he charts the way for one. “Constitutional law is not only for the courts,” he contends; “elected officials should have a degree of interpretive independence” to “fill the institutional gap created by the courts’ inferior factfinding ability and policymaking competence,” and “[i]n the area of same-sex marriages, this would be a good way to proceed.”55 Courts should act “in the most egregious cases”56 to protect gays and lesbians against “discrimination by political majorities,”57 Sunstein says. But it is clear that he foresees no such need as likely to arise from a legislative solution to the marriage dilemma—even one crafted by the very elected officials whose likely revulsion at any judicial decision favorable to same-sex marriage would, he predicts, create a constitutional crisis.58

Lest these scholars’ doubts seem too mean-spirited, it should be remembered that some of the most strident attacks on the legalization of same-sex marriage have come from committed gay rights advocates. “[T]he desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society,” writes Nancy Polikoff, “an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism.”59 “I do not want to be known as ‘Mrs. Attached-To-Some-
body-Else,"” proclaims Paula Ettelbrick.60 “[M]arriage will not liberate us as lesbians and gay men. In fact, it will constrain us, make us more invisible, [and] force our assimilation into the mainstream . . . .”61 Nor is the skeptics’ only concern about identification with what is seen as an historically-flawed institution. Marriage is also perceived as a model that is too narrow to accommodate an adequate range of gay and lesbian family relationships,62 that compels an unnecessary linkage between sexual intimacy and economic dependency,63 and whose availability to same-sex couples would further marginalize those choosing not to marry.64 Demands for marriage reinforce its


61. Id. Ettelbrick’s essay, written while she was legal director of the Lambda Legal Defense and Education Fund, helped revive the same-sex marriage debate, paired with an essay by Tom Stoddard, then Lambda’s executive director, which was highly supportive of gay marriage. Thomas B. Stoddard, Why Gay People Should Seek the Right to Marry, Out/Look, Fall 1989, at 9, reprinted in Rubenstein, supra note 3, at 716. Ettelbrick has since published a lengthier and more nuanced analysis of the pros and cons of same-sex marriage and the alternatives she advocates for protecting lesbian and gay family rights. Paula L. Ettelbrick, Wedlock Alert: A Comment on Lesbian and Gay Family Recognition, 5 J.L. & Pol’y 107 (1996) [hereinafter Ettelbrick, Wedlock Alert].

62. “[G]ay families are not structured through hierarchically ordered categories of relationship . . . . Rather than being organized through marriage and childrearing, most chosen families are characterized by fluid boundaries, eclectic composition, and relatively little symbolic differentiation between erotic and nonerotic ties.” Kath Weston, Families We Choose: Lesbians, Gays, Kinship 206 (1991).

If the laws change tomorrow and lesbians and gay men were allowed to marry, where would we find the incentive to continue the progressive movement we have started that is pushing for societal and legal recognition of all kinds of family relationships? . . . To recognize the family relationship of the lesbian couple and two gay men who are jointly sharing childrearing responsibilities? To get the law to acknowledge that we may have more than one relationship worthy of legal protection? Ettelbrick, Since When, supra note 60, at 17.

63. We know, as gays and lesbians, that love is not always erotic and that what is erotic is not always love, and that the two of these in turn can be separate issues from questions of support and companionship. Yet these links are precisely what a two-person, monogamous model of marriage imposes. . . . “Marriage” tangles questions of eros and love and economic dependency in a way that leaves us with little vocabulary for any relationship in which these are not present in heavy doses.


64. “If gay men and lesbians were given the right to marry . . . a replication would occur of the discriminatory two-tier system already existing among married and unmarried straight couples; legalized gay marriage, then, would make gays who don’t marry outliers among outliers.” Frank Browning, The Culture of Desire: Paradox and Perversity in Gay Lives Today 153 (1993); see also Ettelbrick, Since When, supra note 60, at 16.
institutional primacy, it is argued, thereby undermining other legal strategies for securing same-sex family rights.65

And what might be those strategies? Litigation to secure family benefits,66 for one, as by “gradually, but steadily, challeng[ing] the government and private industry” to treat equally all those “who share in the burden of caring for each other, whether married or not.”67 Acknowledging that “courts have been slow in interpreting family terms according to function,”68 the advocates concede that this approach requires settling for “the gradual accumulation of a series of small gains.”69 But there is more to the strategy, and that is to embrace as an alternative to marriage the concept of “domestic partners” now enshrined in many local laws and employer fringe benefit programs.70 “Domestic partnership has had a powerful social impact,” Paula Ettelbrick insists, by “rais[ing] the visibility of non-marital relationships” and “creat[ing] an identifiable third social category of family.”71

If all of this sounds vaguely reminiscent of Sunstein’s call for gradualism72 or Posner’s “simulacrum of marriage,”73 it should be acknowledged that the objective here is far more radical. What is sought by Ettelbrick and other marriage critics is a complete dismantling of society’s reliance on marital unions as the central organizing principle around which families are formed. “The norm in this society should be recognizing families in the way that they are self-defined,” says Et-

65. “Advocating lesbian and gay marriage will detract from, even contradict, efforts to unhook economic benefits from marriage and make basic health care and other necessities available to all.” Pollakoff, supra note 19, at 1549; see also Christensen, supra note 2, at 1414-16 (discussing the tensions between advocacy for same-sex marriage and gay family claims based on other theories); Ettelbrick, Wedlock Alert, supra note 61, at 122 (same).
66. Enforcement of private cohabitation and parenting agreements, reliance on local antidiscrimination laws, and construing statutory entitlements as extending to functional “families,” “parents,” and “spouses,” are all parts of the benefits-by-litigation strategy. Elsewhere, I have examined the range of alternative approaches taken by the courts and commentators to the legal ordering of gay and lesbian family life, suggesting a conceptual framework for this emerging body of family law. See Christensen, supra note 2.
67. Ettelbrick, Wedlock Alert, supra note 61, at 139; see also Nitya Duclos, Some Complicating Thoughts on Same-Sex Marriage, 1 Law & Sexuality 31, 59 (1991) (describing “litigation for specific benefits” as providing “legal acknowledgment of same-sex relationships in [a] more gradual way”).
68. Ettelbrick, Wedlock Alert, supra note 61, at 142.
69. Duclos, supra note 67, at 60.
70. See infra notes 214-22, 334 and accompanying text.
71. Ettelbrick, Wedlock Alert, supra note 61, at 144.
72. See supra note 53 and accompanying text.
73. See supra note 28 and accompanying text.
And the state should have "no authority to sanction, to reward, or even to approve one set of family relations over another."

The present task is not to inquire whether this non-marital vision of gay and lesbian family life should dissuade those in the community who favor same-sex marriage. Rather, the purpose of this essay is to examine the skeptics' premise: that uncoupling gay and lesbian family life from marriage is likely to be far more effective than wedded union in redressing a broader array of the familial concerns of gay people. It is also to explore whether the complementary assumptions of the scholarly critics are firmly grounded: that no egregious harm will come from the gradualist approach, and that a status in lieu of marriage will reasonably meet the needs of same-sex couples.

And so the question, if not marriage, what? It is the marriage-centered nuclear family that traditionally has served as the bastion for securing American family values. To what extent can the legitimate family values of gay people be protected by means other than marriage? If gay and lesbian family life is to be centered on some new status, how must it be shaped to resolve the recurring family problems confronted in America by same-sex couples and their children?

Part II begins the examination of these questions by probing the family values that historically have been deemed worthy of societal protection in America, discussing the stereotype of gays and lesbians as antithetical to family, as well as the self-identification by many gay people with core family values. Parts III and IV explore the prospects for securing these values in gay and lesbian family life without state-sanctioned marriage. Part III examines the support of companionate cohabitation, both through the provision of benefits and by the security that comes from commitment. The nurturing of children is the subject of part IV, which discusses the use and abuse of the autonomy principle in creating and extinguishing parental rights. Part V consists of some concluding reflections on family values and marriage simulacrums.

II. American Family Values

The dominant model of the American family—both as a matter of emotive symbolism and legal paradigm—has always been the marriage-centered nuclear family, comprised of husband and wife living together in the same household with their immediate offspring. Yet in the history of western civilization this is a relatively youthful model. The idea of nuclear family as values repository is a social construct of even more recent vintage.

75. Id; see also Ruthann Robson, Lesbian Out(Law): Survival Under the Rule of Law 124-27 (1992) (concluding that lesbians should not embrace the law's rule of marriage and rejecting marriage as a state institution).
A. Historic Family Models

1. The Evolving Nuclear Family

Family historian Edward Shorter says the American family was "born modern," by which he means that the nuclear family had already displaced its forebears as the predominant model by the time of the American revolution.76 Most histories of the western family, beginning with Philippe Aries' classic, Centuries of Childhood, place the origins of the modern family as an idealized social institution in about the fifteenth and sixteenth centuries.77 According to Aries, the only family concept known to the Middle Ages was the lineal kinship line, extending to the "ties of blood without regard to the emotions engendered by cohabitation and intimacy."78 It was not until well into the sixteenth century that "a value was attributed to the family" in which it became "the social cell" that is the forerunner of the modern family.79

Although historians differ sharply about some aspects of the family's development in the intervening centuries, there is widespread agreement as to its general contours.80 The characteristic European model of the sixteenth and seventeenth centuries was of the family bound primarily by ties of extended kinship. In Lawrence Stone's influential history of the family, the form is denominated the "Open Lineage Family," its most striking features being "its permeability by outside influences, and its members' sense of loyalty to ancestors and to living kin."81

Marriage was less an intimate association than an arranged means of tying together kinship groups for economic advantage (among the upper classes) or an economic necessity for partnership and division of labor (among peasants and laborers). The household in which the married couple lived was characterized by its lack of well-defined boundaries and the absence of physical privacy. Indeed, neither privacy nor individual autonomy were regarded as desirable ideals within the family. It was a highly authoritarian and patriarchal society in

76. Edward Shorter, The Making of the Modern Family 22-44, 241-51 (1975). "North American society sprang full-blown modern from the head of Zeus . . . ." Id. at 24. "The American family was probably 'born modern' because the colonial settlers seem to have seized privacy and intimacy for themselves as soon as they stepped off the boat." Id. at 242.
78. Id. at 356.
79. Id.
80. See Jan E. Dizard & Howard Gadlin, The Minimal Family 227 n.13 (1990); Lee E. Teitelbaum, Family History and Family Law, 1985 Wis. L. Rev. 1135, 1138-39. But see Ferdinand Mount, The Subversive Family (1992) (arguing that the nuclear family is a historic natural phenomenon and that virtually all modern family historians are wrong about its evolutionary development).
which the interests of the group—whether kin, village, or state—took priority over those of the family’s nuclear sub-units. As a result, relations among its nuclear members were not much closer (and often less so) than with neighbors and other kin.  

If spouses were not especially bonded to one another by strong affective ties, relationships between parents and children were no less detached. Channeling the potentially disruptive force of sexual desire into propagating the race and legitimating offspring was an important practical function of the traditional family. But mortality rates were high, and most children of all classes left the parental home at an early age. In Aries’ account of family history, it is the stark absence of any real parentally-nurtured “transition between the world of children and that of adults” that most distinguishes the ancient from the modern family. “[C]hildren were mixed with adults as soon as they were considered capable of doing without their mothers,” he writes. “They immediately went straight into the great community of men . . . .”

In sum, the traditional family was “an open-ended, low-keyed, unemotional, authoritarian institution.” So far as its individual members were concerned, it “was neither very durable, nor . . . very demanding.” The transition from this model to the modern nuclear family form was gradual and uneven, extending over a period of more than two centuries. Although the traditional form was to endure well into the nineteenth century in some places, the ascendency of living patterns organized around the nuclear family was starting to become secure by the late eighteenth century.

Stone calls the new form the “Closed Domesticated Nuclear Family,” its predominant attribute the “intensified affective bonding of the nuclear core at the expense of neighbors and kin.” Marriage was

82. See id. at 4-7; see also Shorter, supra note 76, at 22-39 (discussing households during the 1700s and 1800s).
83. See Stone, supra note 81, at 6.
84. Aries, supra note 77, at 411-12.
85. Id. at 411.
86. Stone, supra note 81, at 7.
87. Id. The traditional family model has sometimes been described primarily in terms of its multi-generational extended family living arrangements. See, e.g., Germaine Greer, The Female Eunuch 219-21 (1971); Alvin Toffler, The Third Wave 44-45 (1980). While the large, stem-family clan household was common in parts of Europe—more typical in the southeast than in the northwest, and more in rural than in urban areas—at many times and places the conjugal nuclear family was the predominate living unit in terms of numbers. See Shorter, supra note 76, at 23-39; P. Laslett & Richard Wall, Household and Family in Past Time 40-62 (1972). Even when that was so, however, the average person was more likely to be socialized in an extended than in a nuclear family. Stone notes, for example, that the typical “European family expanded and contracted like a concertina, moving from the extended stem family to the nuclear and back again, as it passed through various stages.” Stone, supra note 81, at 24.
88. See Dizard & Gadlin, supra note 80, at 12; Shorter, supra note 76, at 20-21.
89. Stone, supra note 81, at 7-8. “The key definition of the nuclear family,” according to Stone, “is that the ties that bind its members together are stronger than
becoming more a matter of personal choice than of parental arrangement. The care and nurturing of children was of more pronounced importance, the child having "won a place beside his parents to which he could not lay claim at a time when it was customary to entrust him to strangers." A growing desire for privacy was reflected in the physical arrangements of households. Associated with the family, for the first time, were a sense of individual autonomy, the right to personal freedom in the pursuit of happiness, and a weakening of the identification of sexual pleasure with sin and guilt. As emotional attachments intensified within the nuclear family, it began to hold the rest of society at a greater distance.

Although many of these characteristics of the nuclear family were transported to America from the earliest days, the colonial period also retained vestiges of the traditional form. The predominant living arrangement was the single nuclear family household; the extended kinship family was never a dominant form. If not structurally traditional, however, the colonial family's functional place in society had much in common with its traditional forebears. The household was authoritarian and patriarchal, a reflection of the community at large. The family was the central economic unit of society; family formation was strongly encouraged and solitary living forbidden in the interests of the larger social order; and a homogenous population facilitated community responsibility for enforcing conventional moral standards.

These throwbacks to tradition did not prove long-lasting, however, as the nuclear family became the increasingly dominant model in nineteenth century America. It was a dominance that coincided with rapid population growth, the dispersion of settlements, and the emergence of cities. Increased mobility and the growth of commerce meant that families were no longer essential units of production. A market economy, offering a means of exchanging goods and services independent of kinship, was able to support a middle class. Additionally, the capacity for increased independence among the middle

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90. See Dizard & Gadlin, supra note 80, at 13; Shorter, supra note 76, at 17.
91. Aries, supra note 77, at 403.
92. See id. at 398-99; Shorter, supra note 76, at 3-21; Stone, supra note 81, at 4-9.
95. See Dizard & Gadlin, supra note 80, at 15-21.
class helped weaken the interlocking control that community, church, and kin had exerted over nuclear family relationships.  

As in Europe, the pace of family change was accelerated by changing work patterns. If a rural agricultural economy necessarily centered on the family as a unit of production, so too did the early industrial period. Entire families were hired to work in factories, the male head of household became in effect the foreman of his wife and children. The abandonment of this practice in favor of the employment of individual laborers also changed the patterns of family life. As men sold their labor in exchange for wage, women assumed greater responsibility for child-rearing and maintenance of the home as a locus of refuge. The demanding and competitive world of work became a place from which refuge was seen as necessary; and the nuclear family became "the private domain, the only place where a person could legitimately escape the inquisitive stare of industrial society."  

2. Nuclear Family as Values Repository  
What then were the essential attributes of this inherited and evolved model of the nuclear family which was to stake such an important claim in shaping family law and policy? It is clear that the answer lies far less in the structure of its living arrangements than in the functions it came to serve. At least three functional characteristics were to identify the nuclear family as a bastion of domestic solidarity separating it from the rest of the world. And it is these characteristics, more than any other, that possess the strongest historical claims to defining American family values.  
The first of these involves the nuclear family as the locus of "companionate cohabitation." If marriage in the traditional family was a

96. See id. at 22-23; Law, supra note 94, at 598.  
97. See Dizard & Gadlin, supra note 80, at 14.  
98. See Law, supra note 20, at 200.  
99. Aries, supra note 77, at 33; see also Teitelbaum, supra note 80, at 1140-41 (noting the changes in the internal relationships and the external functions of families by the beginning of the nineteenth century).  
100. See Shorter, supra note 76, at 205-27. According to Shorter: "The nuclear family is a state of mind rather than a particular kind of structure or set of household arrangements. It has little to do with whether the generations live together or . . . with kinship diagrams." Id. at 205. Shorter goes on to argue that:  
What really distinguishes the nuclear family . . . is a special sense of solidarity that separates the domestic unit from the surrounding community. Its members feel that they have much more in common with one another than they do with anyone else on the outside—that they enjoy a privileged emotional climate they must protect from outside intrusion.  
Id.  
101. "Companionate marriage" is the descriptive phrase adopted by Shorter, who calls it the "hallmark of contemporary family life, the husband and wife being friends rather than superordinate and subordinate, sharing tasks and affection." Id. at 227. The usage was popularized by the writings of family sociologist Ernest W. Burgess
matter of convenience, parentally-arranged and controlled, it was to become very much a matter of personal choice and romantic attachment in the nuclear family. Parental mate selection emphasized the quality of the “family stock” and the advantages of alliance to the larger family system. It was emotional ties that bound the nuclear couple, beginning with personal attraction and compatibility as preludes to marriage. The belief that love and affection would continue to deepen after marriage fostered the expectation of more egalitarian patterns of living; husbands and wives were idealized as “companions, lovers, and partners in an emotional enterprise.”

Though procreation continued to be important to the nuclear companionate couple, it was by no means indispensable. Sexual satisfaction came to be seen as legitimately valuable in its own right, apart from reproduction. Contraception was more widely practiced as nuclear couples began to make family size a matter of choice. Marital formalities became less critical to the commencement of the conjugal relationship, as premarital sex was more tacitly condoned and the incidence of premarital pregnancy sharply increased. Common law marriages received widespread recognition, and formal conditions for legal marriage diminished in importance.

The second defining characteristic of the nuclear family relates to the place of children in it, to the terms of their relationship with parents. Like their mothers, children in the evolving American family had a declining economic value as they withdrew from the world of work. And the return of the child to the home became a significant element of everyday life. Society attached greater importance to the nurturing of children; parents became increasingly concerned about education, training, and the social development of their offspring. Unlike the ancient household, the nuclear family recognized that “the child was not ready for life, and that he had to be subjected to a special treatment, a sort of quarantine, before he was allowed to join the adults.”

about both “companionate marriage” and the “companionate family.” Ernest W. Burgess & Harvey J. Locke, The Family: From Institution to Companionship 651 (1953). Jan E. Dizard and Howard Gadlin also speak of “companionate marriage,” but they emphasize that the concept is more accurately one of “companionate cohabitation,” because solemnization by marriage often has been of limited importance in creating the functional nuclear family. Dizard & Gadlin, supra note 80, at 13, 139-42.

102. Dizard & Gadlin, supra note 80, at 13; cf. Law, supra note 94, at 598-99 (noting the increase of premarital and extramarital sex); Stone, supra note 81, at 656-57 (stating that the glorification of the sexual aspects of love in the post-1800s increased the occurrence of adultery among the higher aristocracy).

103. See Shorter, supra note 76, at 20, 245-50; Stone, supra note 81, at 657.
104. See Law, supra note 94, at 599.
105. See id. at 598; Shorter, supra note 76, at 80-98.
106. See Teitelbaum, supra note 80, at 1158.
107. See id. at 1142-43; Law, supra note 94, at 602-03.
108. Aries, supra note 77, at 412.
As the family became more than an institution for the transmission of life, property, and names, emotional bonds between parents and children became as much an attribute of nuclear family life as the ties between spouses. Perhaps more so, even. If romantic sentiments were unable to survive unchanged from jarring marital reality, the parent-child relationship was to become the most durable indicia of nuclear family life.

The third and final distinguishing characteristic of the nuclear family involves its claim to autonomous privacy. As the parent-child conjugal unit became increasingly resistant to extended family demands, the home itself became more private, closed off from prying kin and neighbors. Community controls over various aspects of family life became less tolerable, acquiescence in public surveillance of family morality less common.

The association between privacy and the nuclear family came to have two related aspects. The first was that the “family’s awareness of itself as a precious emotional unit” meant that it demanded isolation from outside intrusion. The second was that domestic privacy took on an objective meaning; the family not only experienced itself as private, it became private as a societally recognized bastion of autonomy.

It was these three attributes, then—companionate cohabitation, parental nurturing, and autonomous privacy—that were to be associated with the nuclear family as the dominant American family model. Historically, it was the attributes, and not the model, that were value laden. The stability of the companionate couple and the sustenance of parental nurturing were to become the quintessential American “family values.” As a necessary corollary, in aid and protection of the values, came recognition of the family as an autonomous bastion of privacy. Although the nuclear family was merely the perceived repository of these valued characteristics, eventually it came to be viewed by many as though it represented a value in its own right.

B. Gay and Lesbian Family Values

Homophobia, it has been said, is “the last respectable prejudice of the century.” Unwritten cultural rules that have long forbidden the public expression of other biases often seem inapplicable to stereotypes and epithets aimed at gays and lesbians. Nowhere is this phe-

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109. See id. at 365-69, 403-12; Stone, supra note 81, at 22.
110. See Shorter, supra note 76, at 206.
111. See id. at 17, 44-53, 227-28; Stone, supra note 81, at 8.
112. Shorter, supra note 76, at 227.
113. See Teitelbaum, supra note 80, at 1144.
nomenon more in evidence than in the gap that separates perception and reality in the case of gay and lesbian family values.

1. Perceived Models and Values

The American family has long been a venerated icon, defense against perceived threats to its vitality a staple in public discourse. If the 1990s has been especially rancorous in this regard, the decade is also notable for the heightened prominence of a formerly marginal villain: the gay menace to “traditional family values.” Although often reviled by social conservatives as antithetical to the family, gays and lesbians had seldom before the 1990s figured prominently as an issue in mainstream national politics.115

In a memorable address launching the “family values” theme early in the 1992 presidential campaign, then Vice President Dan Quayle decried the “breakdown of family structure” in America.116 But his first direct target wasn’t gay people; rather it was television character “Murphy Brown,” a single professional woman “mocking the importance of fathers by bearing a child alone and calling it just another lifestyle choice.”117 As single mothers and their defenders rallied to the cause of the fictional Ms. Brown, however, the focus of Quayle’s attack shifted. His real disagreement, the vice president said, was with “the cultural elite” who “seem to think the family is an arbitrary arrangement of people who decide to live under the same roof . . . and that parents need not be married or even of opposite sexes.”118

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115. See John Gallagher & Chris Bull, Perfect Enemies: The Religious Right, the Gay Movement, and the Politics of the 1990s (1996) (exploring the simultaneous rise in political prominence of the religious right and the heightened visibility of gay issues); see also Bruce Bawer, A Place at the Table: The Gay Individual in American Society 53-56 (1993) (discussing Anita Bryant’s “Save Our Children” crusade in the late 1970s); D’Emilio, Sexual Politics, supra note 1, at 40-53, 129-48 (discussing the vilification of gays and lesbians in the 1950s and 1960s).


117. Id. Although the speech itself did not address gay and lesbian families, Quayle did broach the subject in a related interview:

What one does in the privacy of one’s home is their business and as a conservative, I’ll keep the government out of their home and out of their private lives. . . . [But] I will argue with those that want to take the point that homosexual activity is a preferred lifestyle. In my opinion, it is not. The preferred lifestyle is marriage, heterosexual activity and raising children and having a family.


118. Elaine Herscher, Family Values Rhetoric—Gays Under Fire in Presidential Race, San Francisco Chron., Jun. 26, 1992, at A5 (quoting Quayle’s speech before the Southern Baptist Convention, Indianapolis, Ind.). Although “family values” was largely abandoned as a campaign theme after the divisive Republican National Convention in August, Quayle returned briefly to the subject late in the campaign. Attending a fundamentalist church service in Savannah, Georgia, on October 25, the
Other family defenders were more pointed in their indictments. Evangelist Pat Robertson denounced homosexual rights as part of "a radical plan to destroy the traditional family." And presidential candidate Patrick J. Buchanan declared that family rights for homosexuals should not be "tolerate[d] in a nation that we still call God's country." Proclaiming a "religious war . . . for the soul of America," he promised to do battle with "the amoral idea that gay and lesbian couples should have the same standing in law as married men and women." President Bush, though far less virulent in his rhetoric, announced that he too could not "accept as normal lifestyle people of the same sex being parents" or marrying one another. To help vouchsafe such threats to family values, the Republican party platform opposed these as well as other rights for gays and lesbians.

Even Democrats—whose platform pledged to "ensure that no Americans suffer discrimination or deprivation of rights on the basis of . . . sexual orientation"—were unprepared to venture far into the domain of gay and lesbian family rights. Candidate Clinton explained that he had merely advocated "the absence of discrimination in employment" and that "status alone should not be enough to kick someone out of the military." Insisting that he did not advocate recognition of homosexual marriages, Clinton castigated his critics for "these bogus issues that they keep bringing up."

vice president listened to a sermon condemning homosexuality as "satanic." At a rally following the service, Quayle praised the sermon's "very positive message," and promised that he would "continue to talk about traditional values . . . I don't care what they say, I'll never, ever back down." John F. Harris, Quayle Revisits "Family Values" Theme, Wash. Post, Oct. 26, 1992, at A10.


120. Excerpts from Other Addresses to the Republican National Convention, 52 Facts on File 609 (1992) (containing excerpts from Buchanan's address to the Republican National Convention).

121. Id.


124. The platform declared the party's opposition to the recognition of same-sex marriages, to allowing gays and lesbians to adopt children, to extending federal civil rights laws to prohibit sexual orientation-based discrimination, and to lifting the ban on gays in the military. See Anne Willette, Gay Issue a Tight Wire for GOP, Gannett News Service, Aug. 19, 1992.


127. Id.
The great family values crusade of 1992 was to recede from prominence as the campaign progressed, a victim of its own excesses. Too strident and moralizing in tone, it was a theme with too many targets that offended too broad a segment of the population.\textsuperscript{128} Anti-gay rhetoric did not return to national prominence until well after the election, and then in a context only tangentially related to family rights—President Clinton's ill-fated attempt to deliver on his promise to permit gays and lesbians to serve openly in the military.\textsuperscript{129}

As to family values, Clinton was eventually to sound many of the same themes as his campaign critics,\textsuperscript{130} and he had long since distanced himself from public support for most gay and lesbian rights issues by the time he sought reelection in 1996.\textsuperscript{131} As that campaign began, Pat Buchanan was again proclaiming that "the gay lifestyle is morally wrong and personally ruinous,"\textsuperscript{132} and all Republican presidential hopefuls were endorsing the National Campaign to Protect the Sanctity of Marriage, a movement formed to oppose the legalization

\begin{footnotes}
\item[128] Conservative theorist and former chief Quayle aide William Kristol conceded that the family values issue was handled with "clumsiness" in the 1992 campaign and made to sound "like harsh moralizing or just empty feel-good." However, he predicted that "the public policies we pursue regarding homosexuality [and] the family" would reemerge in future campaigns. Robin Toner, \textit{A Conservative Cheerfully Argues that 'Family Values' Has a Future}, N.Y. Times, Jun. 27, 1993, § 4 (Week in Review), at 7; see also Gallagher & Bull, \textit{supra} note 115, at 63-96 (providing an in-depth report regarding gay issues in the 1992 campaign).
\item[129] See Gallagher & Bull, \textit{supra} note 115, at 125-60 (providing a detailed account of 1993 gays in the military controversy); see also Richard L. Berke, \textit{Clinton in Crossfire}, N.Y. Times, July 20, 1993, at A16 (discussing Clinton's "compromise" on homosexuals in the military); Margaret Carlson, \textit{Then There Was Nunn}, Time, July 26, 1993, at 40 (discussing the White House's "admitted defeat" with the military ban on gays in the armed forces).
\item[130] "I thought there were a lot of good things in that speech." Clinton was eventually to say of Quayle's famous address. "I think he got too cute with 'Murphy Brown,' but it is certainly true that this country would be better off if our babies were born into two-parent families." Paul Bedard, \textit{Clinton: Quayle Was Right on Families}, Wash. Times, Dec. 4, 1993, at A1. Quayle welcomed the President as a convert. "Now that Clinton has entered the fray, discussing moral issues and values in public," wrote the former vice president, "the opportunity for rational discussion of family breakdown improves." Dan Quayle, Editorial, \textit{Murphy Brown Revisited}, Wash. Post, Dec. 12, 1993, at C7.
\item[132] Cathleen Decker, \textit{Buchanan Tours L.A., Acts the Part of “Happy Warrior,”} L.A. Times, June 28, 1995, at A7 (quoting Buchanan's comments during a radio call-in show). "[America of the 1950s] . . . was a good country," said Buchanan, because "there was voluntary prayer in schools, abortion was outlawed and homosexuality was frowned upon." \textit{Id}.
\end{footnotes}
of same-sex marriage.133 Gay rights was never to resonate as a campaign issue in the way it had four years earlier, however, as Clinton effectively co-opted the opposition's argument by announcing early in the campaign that he was willing to sign legislation denying federal recognition to same-sex marriages.134

Amidst much rhetoric that traditional marriage would be "demeaned or trivialized by same-sex unions"135—even that their recognition "may eventually be the final blow to the American family"136—the Defense of Marriage Act was adopted overwhelmingly by Congress137 and signed into law by the president six weeks before the election.138 Although of dubious constitutionality in the eyes of its critics,139 the act purports to authorize states to disregard same-sex marriages legalized in other states,140 and to define marriage for all


134. See Melissa Healy, Clinton Signals He'd Sign Anti-Gay Marriage Bill, L.A. Times, May 23, 1996, at A15; see also Nancy Gibbs, The Rough Politics of Virtue, Time, June 3, 1996, at 22 (describing the candidates' attempts to "out moralize" each other and noting Clinton's assertion that he would sign a federal bill saying that states will not be required to honor same-sex marriages performed in another state).


139. See, e.g., Strasser, supra note 18, at 127-58 (arguing that the Defense of Marriage Act is contrary to the Full Faith and Credit Clause and therefore, unconstitutional); Sunstein, Undecided, supra note 34, at 97 n.492 (indicating that Congress's Defense of Marriage Act may be an unconstitutional form of impermissible selectivity); Christopher J. Hayes, Note, Married Filing Jointly: Federal Recognition of Same-Sex Marriages Under the Internal Revenue Code, 47 Hastings L.J. 1593, 1623-25 (1996) (discussing the constitutionality of the Defense of Marriage Act); Laurence H. Tribe, Toward a Less Perfect Union, N.Y. Times, May 26, 1996, § 4 (Week in Review), at 11 (contending that Congress does not have the power to create categorical exceptions to the Full Faith and Credit Clause).

federal law purposes as "only a legal union between one man and one woman as husband and wife." 141

Not surprisingly, the adoption of the act was condemned by gay activists as "one more sad example of the complete breakdown of political leadership in America." 142 If so, it was failed leadership dutifully reflective of the public will. Opinion polls consistently report that about six in ten Americans oppose the legalization of same-sex marriage. 143 Although recent polls reveal close division—and even majority support—for some gay rights issues, responses tend to be strongly negative on almost all questions regarding gay and lesbian family rights. 144

At least in this regard, gay people are not demonized in isolation. Almost any deviation from the nuclear family form tends to be viewed as a threat to family values. The form having displaced the values in symbolic significance, even the act of embracing accepted values in


142. Willman, supra note 137 (quoting Matthew Coles, director of the ACLU Lesbian and Gay Rights Project).


144. A recent Newsweek poll, for example, found 84% supporting equal employment opportunities for gays, 80% in favor of equal housing rights, and 62% for inheritance rights; by contrast, only 40% believed gays should be able to adopt children, and only 35% supported same-sex marriage. Newsweek Poll, supra note 143; see also Princeton Survey Research Associates, State of the Union Mother's Day Poll, May 9, 1997, available in Public Opinion Online (Roper Center for Public Opinion Research), DIALOG, File No. 468 (56% think it is a "bad thing" for society that more gay and lesbian couples are raising children); William A. Henry, III, Pride and Prejudice, Time, June 27, 1994, at 54-59 (64% against legalizing gay marriages; 53% think relationships between consenting gay adults morally wrong; but 62% favor equal rights laws to protect gays from employment discrimination); Joseph P. Shapiro, "Straight Talk About Gays," U.S. News & World Report, July 5, 1993 at 42-48 (65% support "equal rights" for gays; 60% oppose gay "legal partnerships"; 70% oppose allowing gays to adopt); How the Public Views Gay Issues, N.Y. Times, Mar. 5, 1993, at A14 tbl. (78% say homosexuals should have equal employment rights; 43% favor permitting gays in the military; 55% say homosexual relations between consenting adults are morally wrong); Job Rights for Homosexuals Backed in Poll, N.Y. Times, Sept. 7, 1992, § 1, at 10 (78% favor equal job opportunities for homosexuals; less than one-third approve of legally-sanctioned gay marriages; 32% support gay-lesbian adoptions; 45% consider gay rights a "threat to the American family and its values").
nontraditional living arrangements is regarded as an assault on the fragile institution of the family.\textsuperscript{145} It should not be surprising, then, that the highly-visible quest of gays and lesbians to solemnize relationships through same-sex marriage has drawn so much opprobrium. And for those whose legal analysis of the issue is tempered by a healthy dose of \textit{realpolitik}, it is understandable why judicial avoidance might be predicted, or backlash feared.\textsuperscript{146}

2. Real Models and Values

There was a time when it was fashionable in some gay circles to conform to stereotype by eschewing the very idea of family. Dennis Altman wrote approvingly that the liberated 1970s homosexual "represents the most clear-cut rejection of the nuclear family that exists."\textsuperscript{147} Lesbian author E.M. Ettore agreed, writing in 1980 that lesbian identity, by its very terms, denies the primacy of family.\textsuperscript{148} Recently, it has become more common for nonconformists to embrace the concept of family, but to redefine it. "[T]hrough the persistent exploration of love and lust and nurturing, gay people have helped to open up the territory of family meanings," argues gay commentator Frank Browning, "provid[ing] vital models for the remaking of all families, straight and gay."\textsuperscript{149}

\textsuperscript{145} See Dizard & Gadlin, \textit{supra} note 80, at 9, 181-92 (discussing family breakdown and competing conceptions of individualism); Martha L.A. Fineman, \textit{Masking Dependency: The Political Role of Family Rhetoric}, 81 Va. L. Rev. 2181, 2181-86, 2192-98 (1995) (exploring the continuing dominance of the traditional family model and so-called welfare reform as "a reactionary plan to discipline women who do not conform to the roles they are assigned within the traditional scheme of the family").

\textsuperscript{146} Cass Sunstein's concern—analogizing to \textit{Roe v. Wade}—that the public backlash from a Supreme Court decision legalizing same-sex marriage could lead to a constitutional crisis, see \textit{supra} notes 41-43 and accompanying text, may be buttressed by a comparison of public attitudes about abortion at the time of \textit{Roe} and those prevailing today regarding same-sex marriage. In contrast to only about one-third of the public favoring the legalization of gay marriage, see \textit{supra} notes 143-44 and accompanying text, opinion polls from the early 1970s generally show a closely divided public, but with more support than opposition for abortion rights. See, e.g., Louis Harris and Associates, \textit{Harris Survey}, Apr. 19, 1973 \textit{available in} Public Opinion Online (Roper Center for Public Opinion Research), DIALOG, File No. 468 (52% favor, 41% oppose, legalization of abortions); Gallup Organization, \textit{Gallup Poll}, Aug. 25, 1972, \textit{available in} Public Opinion Online (Roper Center for Public Opinion Research), DIALOG, File No. 468 (64% agree, 31% disagree, that abortion decision should be made solely by a woman and her physician); Jack Rosenthal, \textit{Survey Finds 50% Back Liberalization of Abortion Policy}, N.Y. Times, Oct. 28, 1971, at A1 (50% favor abortion legalization); see also Rosenberg, \textit{supra} note 43, at 183-84 (describing pre-\textit{Roe} support for abortion reform from influential opinion groups); Robert J. Blendon et al., \textit{The Public and the Controversy Over Abortion}, 270 JAMA 2871 (1993) (summarizing poll data on abortion from 1970s through early 1990s).

\textsuperscript{147} Dennis Altman, \textit{Coming Out in the Seventies} 47 (1979).


\textsuperscript{149} Browning, \textit{supra} note 64, at 157. "Precisely because homosexuals have resided outside the law, they have invented family forms that respond to late 20th-century
In her study of lesbian and gay kinship, *Families We Choose*, anthropologist Kath Weston describes the “chosen families” of gay people as “thoroughly individualistic affairs” with “[f]luid boundaries and varied membership.” She insists that such families are not merely what anthropologists call “fictive kin”—relationships perceived to be “like” family, or “just as real” as family. Instead, they reject the underlying premise that biological and marital relationships are the most authentic kinship ties. Thus, the self-defined families of gay people may be comprised of cohabiting partners, perhaps with children. But they may also cross household lines and encompass multiple connections with overlapping memberships. A lesbian couple and the gay man with whom they share child-raising responsibilities may consider themselves a family, as may elderly partners living together for companionship and economic convenience. Former lovers and close-knit friendship circles may be considered family, though not just “any friend” will do. “[F]amily members are people who are

needs,” Browning claims, and he worries that “[b]y rushing to embrace the standard marriage contract, we could stifle one of the richest and most creative laboratories of family experience.” Frank Browning, *Why Marry?*, N.Y. Times, Apr. 17, 1996, at A23.

Commentators who dispute the legitimacy of gay families typically set up a hierarchical relationship in which biogenetic ties constitute a primary domain upon which “fictive kin” relations are metaphorically predicated. Within this secondary domain, relationships are said to be “like” family, that is, similar to and probably imitative of the relations presumed to actually comprise kinship. Theoretically I have adopted a very different approach by treating gay kinship ideologies as historical *transformations* rather than derivatives of other sorts of kinship relations.

*Id.* at 106.

152. See *id.* at 35, 106-07.

153. See *id.* at 107-16. “Fluid boundaries and varied membership meant no neatly replicable units, no defined cycles of expansion and contraction, no patterns of dispersal... In the language of significant others, significance rested in the eye of the beholder.” *Id.* at 109. “People often presented gay families as a foray into uncharted territory, where the lack of cultural guideposts to mark the journey engendered fear and exhilaration.” *Id.* at 110.


155. See *id.*; see also Raymond M. Berger, Gay and Gray: The Older Homosexual Man 129-31, 193-94 (1982).


158. “[G]ay families differed from [friendship] networks to the extent that they quite consciously incorporated symbolic demonstrations of love, shared history, material or emotional assistance, and other signs of enduring solidarity.” *Id.*; see also Browning, *supra* note 64, at 156-57: By stealing sex away from the restrictive laws of marriage... gay men have shown how lust contributes to the bonds of friendship. By devaluing the taboo of sex among friends, they may have begun to shine more light on the complex and various ways intimacy can be arranged in emerging gay families... [T]heir determination to find a new sort of family may well provide vital models for the remaking of all families, straight and gay.
‘there for you,’” says Weston, “people you can count on emotionally and materially.”

To opponents of same-sex marriage such as Paula Ettelbrick, these “self-defined families” are as legitimately entitled to societal recognition and legal protections as any other family.\(^\text{159}\) Given the choice, however, there is considerable evidence that the vast majority of gay people would opt for the marriage-centered family model.\(^\text{160}\) Seven in ten lesbians and six in ten gay men responding in recent national surveys said they would want to marry same-sex partners if it were legal to do so.\(^\text{161}\) Most were already in extended monogamous relationships, and many had exchanged rings or participated in commitment ceremonies.\(^\text{162}\) In still another national poll, ninety-two percent of gays and lesbians said they approved of “two people of the same sex living together as a married couple.”\(^\text{163}\)

Living together as married, yes. But does marriage have the same meaning—entailing commitment to the same values—for gay people as for their heterosexual counterparts? Not surprisingly, there is no single or simple answer. Witness, for example, the findings of studies regarding relationships among gay men and women.

Alan P. Bell and Martin S. Weinberg, in their classic study of homosexuality for the National Institute of Mental Health,\(^\text{165}\) reported that

\[^{159}\text{Weston, supra note 62, at 113; see also Warren J. Blumenfeld & Diane Raymond, Looking at Gay and Lesbian Life 371-72 (1988) (describing various patterns of gay and lesbian “created” families).}\]

\(^{160}\text{See Browning, supra note 64, at 154-55 (quoting Ettelbrick presentation opposing gay marriage, Chicago, Ill., Oct. 1989).}\]

\(^{161}\text{See Gallagher & Bull, supra note 115, at 203, 212-16 (discussing discontinuity between views of gay activist leadership and gay-lesbian community at large regarding importance of same-sex marriage).}\]

\(^{162}\text{The Advocate, the leading gay and lesbian newsmagazine, polled its national readership on sexuality and relationship issues in two separate surveys in 1994 and 1995. The first survey was limited to gay men; 59% said they would marry if they could; an additional 26% said they might do so. Janet Lever, The 1994 Advocate Survey of Sexuality and Relationships: The Men, Advocate, Aug. 23, 1994, at 17, 24 [hereinafter Advocate Men Survey]. In the second survey, limited to women, 70% said they would want to marry a woman if it were legal. Janet Lever, The 1995 Advocate Survey of Sexuality and Relationships: The Women, Advocate, Aug. 22, 1995, at 23, 27 [hereinafter Advocate Women Survey]. In a more recent Advocate poll (of self-selected telephone and internet respondents to published questions), 81% said they would definitely want to marry their same-sex partners if gay marriage is legalized. The Advocate Polls, Advocate, Jan. 21, 1997, at 20.}\]

\(^{163}\text{Eighty-seven percent of women and 52% of men said they were in monogamous relationships; participation in commitment ceremonies or the exchange of rings was reported by 46% of women and 30% of men. Advocate Women Survey, supra note 162, at 29. The duration of relationships exceeded ten years for 14% of women and 26% of men. Id. at 27; Advocate Men Survey, supra note 162, at 24.}\]

\(^{164}\text{Larry D. Hatfield, New Poll: How U.S. Views Gays, San Francisco Examiner, June 6, 1989, at A19, A21, quoted in Chambers, supra note 22, at 450 n.7 (providing a random national sampling of respondents self-identifying as gay or lesbian).}\]

\(^{165}\text{Alan P. Bell & Martin S. Weinberg, Homosexualities: A Study of Diversity Among Men and Women 14 (1978) (reporting their study of the “development and}
fifty-two percent of gay men and seventy-two percent of lesbians were involved in same-sex "steady relationships," and that ninety-three percent of both genders had been so involved at some time in their lives—about the same as the proportion of heterosexuals who decide to marry. Such relationships are "very meaningful event[s]" in the lives of most gay people, according to Bell and Weinberg, and are "apt to involve an emotional exchange and commitment similar to the kinds that heterosexuals experience." In most respects, homosexual couples were said to "hardly differ[ ] at all" from married men and women; indeed, the former often appeared "as well adjusted as the latter."

One respect in which many gay males, though not lesbians, may differ from heterosexuals is in the exclusivity of their relationships. Eighty-two percent of the gay men in one major study reported having had one or more sexual partners outside the relationship, as compared to only approximately twenty-eight percent of lesbians, thirty-two percent of unmarried cohabiting heterosexuals, and twenty-four percent of husbands and wives. Other significant differences have been reported between the partnering practices of lesbians and...
gay men. More than a third of the males in the Bell and Weinberg study claimed to have had more than five hundred sexual partners in their lives; a majority of females had fewer than ten.\textsuperscript{172} While the sexual partners of lesbians rarely are women they do not know, it was relatively common—at least until recent years—for gay men to have sex with virtual strangers.\textsuperscript{173}

There is evidence that sexual promiscuity has decreased and that monogamy has become more common among gay men since the advent of the AIDS crisis.\textsuperscript{174} In any event, gender may well be a more significant factor in shaping such practices than sexual orientation. According to Bell and Weinberg, many of the differences between the sexual practices of gays and lesbians in their study were attributable to "the greater tendency of males in general to separate sex from affection . . . and to view fidelity as an undesirable restriction upon their freedom and independence."\textsuperscript{175} In a similar vein, Blumstein and Schwartz found coupled male heterosexuals "more like gay men than they are like wives or female cohabitators," and coupled lesbians more like heterosexual women than gay men.\textsuperscript{176} Their study concluded that "women, in general, are the keepers of fidelity," and that "[m]en . . . are less confined to the emotional side of sex, and are more likely to seek sexual variety."\textsuperscript{177}

sexual exclusivity is infrequent among gay couples, but high expectations of emotional fidelity are common.\textsuperscript{178}

172. Bell & Weinberg, supra note 165, at 85, 93, 308 tbl.7.
173. See Blumstein & Schwartz, supra note 170, at 295, 585-86. "We call the capacity to enjoy such experiences the 'trick mentality' . . . [which] is more than a state of mind. It is a social institution within the gay male world. It takes place in designated areas . . . [and] has unwritten rules that every person entering these places understands." Id. at 295; see also Bell & Weinberg, supra note 165, at 85, 93, 101.
174. See Blumenfeld & Raymond, supra note 159, at 376-77; Eskridge, supra note 17, at 73-74; Weston, supra note 62, at 141-42; Raymond M. Berger, Men Together: Understanding the Gay Couple, 19 J. Homosexuality 34-35, 43-45 (1990); cf. Bawer, supra note 115, at 173-75 (discussing the decline of promiscuity in some, though by no means all, elements of the gay male subculture); Bettina Boxall, Young Gays Stray from Safe Sex New Data Shows, L.A. Times, Sept. 3, 1995, at A1 (citing surveys revealing higher levels of unsafe sex among fifteen to twenty-two-year-olds than among older gay males).
175. Bell & Weinberg, supra note 165, at 101. "Frequently, what is ego-syntonic for the female is ego-alien for the male, and nowhere is this better illustrated than in the way they conduct their sexual lives." Id.; see also McWhirter & Mattison, supra note 166, at 128-30.
176. Blumstein & Schwartz, supra note 170, at 303; see also Charles Silverstein, Man to Man: Gay Couples in America 328-29 (1981) (asserting that male homosexuality is predominantly a phenomenon of masculinity, lesbianism is predominantly a phenomenon of femininity, and that straight men and gay men have similar attitudes toward sexual behavior).
177. Blumstein & Schwartz, supra note 170, at 302. Despite their common gender, heterosexual men are more monogamous than gay men, according to Blumstein and Schwartz, because "men who have female partners are attuned to the female preferences for monogamy" and "adjust to this restriction by designing their sex life . . . to accommodate" this expectation. Id.
Regardless of differences in sexual practices, a significant portion of both lesbians and gay men subscribe to the traditional family value of stable companionate cohabitation. For three-fifths of the women and nearly half of the men in the Bell and Weinberg study, a permanent living arrangement with a homosexual partner was either "very important" or "the most important thing in life."\textsuperscript{178} Three-fourths of the women in another study of lesbian relationships had made a "formal commitment" to one another—either by express agreement, exchange of rings, or a symbolic ceremony in lieu of marriage—in order to support a structure of mutual "interdependence."\textsuperscript{179} Even among gay male couples who are not monogamous, there are high expectations of "relationship fidelity"—involving "emotional commitment" and "mutual emotional dependability."\textsuperscript{180}

Kath Weston describes the "combination of emotional with physical unity" in committed gay and lesbian couples as "consistent with twentieth-century ideologies of companionate marriage."\textsuperscript{181} For gay people to call a relationship "committed," she writes, signals "not only a mutual intention for it to endure, but often a claim to kinship as well."\textsuperscript{182} Weston says it is "received anthropological wisdom" that "human procreation . . . [is] kinship's ultimate referent."\textsuperscript{183} This view is challenged, she observes, by lesbians and gay men with "non-procreative sexual identities" who "lay claim to family ties of their own without necessary recourse to marriage, childbearing, or childrearing."\textsuperscript{184}

While Weston is no doubt correct that procreation is irrelevant to most gay couples, it should not be supposed that there is no place in lesbian and gay families for the traditional value of parental nurturing. There always have been children from previous heterosexual unions who are raised by their lesbian mothers, and less often by their gay fathers, either alone or with homosexual partners.\textsuperscript{185} What has

\textsuperscript{178}. Bell & Weinberg, supra note 165, at 322 tbl.7. Fourteen percent of lesbians and twenty percent of gay men said such an arrangement was "not important at all"; the balance said it was either "somewhat important" or "nice, but not important." Id.

\textsuperscript{179}. Susan E. Johnson, Staying Power: Long Term Lesbian Couples 61, 67-68 (1990). Even when partnerships end, many lesbians "continue to pursue the long-term relationship ideal" in a "kind of serial monogamy." Sasha Gregory Lewis, Sunday's Women: A Report on Lesbian Life Today 79 (1979). Although some "radical lesbian[s]" have argued that "monogamy is just one of many relics of heterosexism that has to be abandoned," there have been few changes in the monogamous lifestyles of most lesbians. Id. at 170-71, 187.

\textsuperscript{180}. McWhirter & Mattison, supra note 166, at 252, 285.

\textsuperscript{181}. Weston, supra note 62, at 140.

\textsuperscript{182}. Id.

\textsuperscript{183}. Id. at 33.

\textsuperscript{184}. Id. at 35 (footnote omitted).

\textsuperscript{185}. In one study of lesbian relationships, at least one partner in twenty-eight percent of the couples had children from prior heterosexual relationships. See Johnson, supra note 179, at 266 tbl.6.4. Thirty percent of these couples were "significantly involved" in raising the children. See id. at 266 tbl.6.4, 268. In the balance, the children
changed in the past two decades is the extent to which gay people are pursuing parenting on their own and with one another. Two-thirds of the lesbians and gay men in one survey said they would like to have children if circumstances permitted and they could overcome financial or legal obstacles.  

For those who decide to take the step, a wide range of options—including adoption, foster care, surrogate parenting, artificial insemination, and temporary heterosexual liaisons—helps facilitate the goal. Although hard numbers are elusive, estimates as to the number of children being raised by lesbian and gay parents in the United States range from one and one-half million to as many as ten million. What is clear is that there has been a veritable “lesbian baby boom” in recent years, and that gay male parenting, while still much less common, also is on the rise.

either remained with their fathers or were already raised prior to the beginning of the lesbian relationship. See id. at 266 tbl.6.4, 267-68; see also Frederick W. Bozett & Marvin B. Sussman, Homosexuality and Family Relations 155-57 (1990) (discussing parenting by gay men).

186. Weston, supra note 62, at 165-66; see also Johnson, supra note 179, at 265, 266 tbl.6.4 (40% of the lesbian couples in study had children; 30% of these couples bore or adopted children during their relationship); Lewis, supra note 179, at 124 (34% of lesbians surveyed would like to adopt children).

187. See, e.g., Stephanie Coontz, The Way We Never Were: American Families and the Nostalgia Trap 182-83 (1992) (noting that there are approximately two million gay mothers and fathers and that 10,000 children are borne by lesbians through artificial insemination); Rosalie C. Davies, Representing the Lesbian Mother, Fam. Advoc., Winter 1979, at 21 (1.5 million lesbian mothers live with their children); Elena Marie DiLapi, Lesbian Mothers and the Motherhood Hierarchy, 18 J. Homosexuality 101, 104 (1989) (1.5 million children live with lesbian mothers); Patricia J. Falk, Lesbian Mothers: Psychological Assumptions in Family Law, 44 Am. Psychol. 941 (1989) (between 1.5 and 5 million households with children are headed by lesbians); Catherine Rand et al., Psychological Health and Factors the Court Seeks to Control in Lesbian Mother Custody Trials, 8 J. Homosexuality 27, 27 (1982) (10% of women in the United States are lesbians and 15-20% of that group are mothers); ABA Annual Meeting Provides Forum for Family Law Experts, 13 Fam. L. Rep. (BNA) 1512, 1513 (1987) (there are 4 million homosexual parents with 8 to 10 million children); Leslie Dreyfous, 'Divorced' Lesbians and Gays Challenging Legal Definition of a Parent, L.A. Times, Apr. 28, 1991, at A39 (1.5 to 4 million children are raised by gay or lesbian couples and 10,000 are conceived via donor insemination).


The popularization and eased accessibility of artificial insemination has contributed significantly to the increase in lesbian parenting. By eliminating the need for subterfuge or heterosexual involvement, it is a technique that is said to permit biological mothering without compromising lesbian identity. While many women prefer anonymous insemination, it is not uncommon for the sperm donor to be a gay man or someone else known to the prospective mother. In either case, the donor's role is almost always limited both before and after birth—a "separation of personhood and parenthood from the male's physiological contribution to procreation." Although it is still a minority of lesbians (and fewer still gay men) who actually become parents, more gay people than ever before are embracing the notion "that children complete or legitimate a family."

How then do the real family models and family values of gay people compare with their perceived stereotypes? Occasionally in complete tandem, the evidence would suggest; sometimes at polar odds. More often somewhere between, encompassing forms and values as diverse as the mosaic that comprises all family life in late twentieth century America. What is clear, though, is that gay men and women in substantial numbers do subscribe to the core family values of companionate cohabitation and the nurturing of children, and that the families they form are as requiring of societal support for their autonomous privacy as any other American families. If state-sanctioned marriage is not to be the linchpin around which such families are organized, the

Gay Arrangements: A Paradigm for Reproductive Freedom, 3 Am. U. J. Gender & L. 183, 189-92. "Unlike lesbians, gay men do not adopt traditional gender roles by becoming parents. They do not take on the traditional role of a father; rather they become the primary caretaker of the child, thereby assuming the role of the 'mother' . . . . [and] rejecting the stereotypical lifestyle of gay men." Id. at 192.

Artificial insemination by donor (AID) is the term most commonly used to describe insemination with the sperm of a donor other than the woman's husband. Many lesbians prefer terms such as "alternative insemination . . . to avoid invoking 'natural' as a contrasting category," Weston, supra note 62, at 171. "donor insemination," Hollandsworth, supra note 189, at 187 n.9., or "assisted conception," Phyllis Burke, Family Values: A Lesbian Mother's Fight for Her Son at xi (1993).

192. See id. at 170, 175-78.
193. Id. at 171. Most gay men and lesbians in one study of gay families "did not consider a sperm donor to be intrinsically a parent, much less a partner, in relationship to a child conceived through alternative insemination; . . . his semen tended to be spoken of simply as a catalyst that facilitates conception." Id. at 189.
194. See Johnson, supra note 179, at 265-66 (60% of lesbian couples in the study had no children; most were in agreement about not wanting them); McWhirter & Mattison, supra note 166, at 194, 241-42 (92% of men in gay male study had no children; of 8% who did, only two fathers had their children living with them at the time of the study).
195. Weston, supra note 62, at 175.
questions persist as to the prospects for legally securing their family values.

III. SUPPORT OF COMPANIONATE COHABITATION

Whatever sentimental preference it might harbor for the traditional nuclear family, American society, by-and-large, no longer openly condemns nor imposes sanctions for cohabitation outside the confines of legal wedlock. Buffeted by social change, marriage has been reviled as an instrument of sexual repression and dismissed as a “withering” institution. Seldom is it lionized as it once was by the Supreme Court as a social relation “without which there would be neither civilization nor progress.” Yet it is also an institution with remarkable staying power, one that most Americans will enter into at some time in their lives.

Even when some aspect of unmarried cohabitation is legitimated, there can be a grudging quality to the reform. In Marvin v. Marvin, the highly influential decision validating agreements on the distribution of property accumulated during nonmarital relationships, the California Supreme Court acknowledged that “[t]he mores of society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many.” “Lest we be misunderstood,” however, the court took judicial notice that “[t]he joining of the man and woman in marriage is at once the most socially


199. Maynard v. Hill, 125 U.S. 190, 211 (1888) (holding that marital obligations cannot be “modified, restricted, or enlarged” by private agreement).

200. See Bureau of the Census, supra note 167, at viii tbl.C (reporting that only four percent of U.S. men and eight percent of women age 65 and over have never married). In spite of these statistics, Census Bureau figures make clear that marriage today is far less dominant than in earlier times. The proportion of unmarried adults increased from 28% of the population in 1970 to 39% in 1993. Id. at vi tbl.A. And for those who do marry, it is no longer the major transition into adulthood; between 1955 and 1993, the median age for marriage rose from 20.2 to 24.5 for women, and from 22.6 to 26.5 for men. Id. at vii tbl.B.

201. 557 P.2d 106 (Cal. 1976).

202. Id. at 122.
productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." Not only productive and fulfilling, the court went on to say, but also to remain legally privileged, the comprehensive protections of the community property laws still to be reserved exclusively for marital spouses.

The bundle of tangible rights and obligations flowing from marriage is, without question, an important issue for those who are denied access to the legal status. For most of its gay and lesbian proponents, however, it is the symbolism of marriage—recognized everywhere as "the single most significant communal ceremony of belonging," that is identified as uppermost. In either case, it is clear that its consequences are not easily replicable by a mere simulacrum of marriage.

A. Seeking Benefits: Tokens and Symbols

1. The Tangible Tokens of Domestic Partnership

David Chambers has comprehensively examined whether the large and durable number of "significant distinctions resting on marital status" in American law would, if applied to same-sex couples, comprise "a just response by the state to the circumstances of persons who live together in enduring, emotionally based attachments." Chambers identifies three categories of legal consequences that attach to marriage: (1) those recognizing "affective or emotional bonds"; (2) 

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203. Id.
204. See id. at 110, 120-21.
205. It was the critical issue for the Supreme Court of Hawaii in the Baehr decision, which held that refusing to allow same-sex couples to marry "deprives them of access to a multiplicity of rights and benefits that are contingent upon that status." Baehr v. Lewin, 852 P.2d 44, 59 (Haw. 1993) (Levinson, J., plurality opinion). The court identified what it saw as some of "the most salient marital rights and benefits," including tax advantages, community property rights, rights of inheritance, support, child custody, exemption of real property from attachment, and the right to bring wrongful death actions. Id.
206. Chambers, supra note 22, at 450. "In a law-drenched country such as ours, permission for same-sex couples to marry under the law would signify the acceptance of lesbians and gay men as equal citizens more profoundly than any other nondiscrimination laws that might be adopted." Id.
207. See, e.g., Eskridge, supra note 17, at 8-13 (claiming that by contributing to "the integration of gay lives and the larger culture," same-sex marriage would both "civilize" gays and "civilize" America); Hunter, supra note 19, at 12-19 (suggesting that legalizing lesbian and gay marriage could "destabilize the gendered definition of marriage for everyone"); Stoddard, supra note 61, at 12-13 (arguing that same-sex marriage is "the political issue that most fully tests the dedication of people who are not gay to full equality for gay people"); Wolfson, supra note 22, at 580-81 (stating that the Hawaii court's decision in Baehr moves gay people from "second-class status" to "full and equal citizenship").
208. Chambers, supra note 22, at 448.
209. Id. at 453-54. Chambers sees legal rules of this kind as "facilitators of the affective aspects of couples' relationships." Id. at 454. These include laws granting decisionmaking powers when a spouse becomes incompetent to act, intestate succession laws, immigration preferences, family medical leave rights, testimonial privileges
those involving marriage as an environment for the raising of children;\textsuperscript{210} and (3) those relating to economic arrangements between partners.\textsuperscript{211} The conclusion of his analysis is that all three groups of legal rules "would, as a whole, fit the needs of long-term gay male and lesbian couples."\textsuperscript{212} Indeed, Chambers says some of the laws affecting marriage "are better suited to the life situations of same-sex couples than they are to those of the opposite-sex couples for whom they were devised."\textsuperscript{213}

Because most of marriage's legal consequences are the product of statutory invention, it ought to be a relatively simple matter to replicate them in an alternative legal status devised for same-sex couples—\textit{if}, that is, the political will existed to do so. The problem for simulacrum advocates, of course, is that there is no such will. The much-heralded advent of local domestic partnership laws, for example, is mostly about modest symbolic gestures accompanied by few if any tangible benefits. Since the first such law was adopted in Berkeley, California in 1984,\textsuperscript{214} many other municipalities, including such cities as Seattle,\textsuperscript{215} Minneapolis,\textsuperscript{216} San Francisco,\textsuperscript{217} New York,\textsuperscript{218} At-

\textsuperscript{210} Id. at 453, 461. In three contexts, Chambers points out, gay and lesbian couples who are or want to be parents are not accorded the same "specially favored" treatment that the law extends to similarly-situated married couples: (1) the acquisition of "stepparent rights" (including adoption, visitation, and custody) by the spouse of a legal parent, \textit{id.} at 463-65; (2) parental rights for both spouses with respect to children conceived by artificial insemination or, in some cases, born to surrogate mothers, \textit{id.} at 465-69; and (3) the opportunity to become nonbiological parents by adoption or foster care placement, \textit{id.} at 469-70.

\textsuperscript{211} Id. at 453, 470. The most common means of differentiating married persons is by legal rules treating "the married couple as an economic unit," Chambers says, including: (1) laws regulating the couple's relationship with the state (taxation of income, gifts, and estates; social security, health care, and welfare benefits), \textit{id.} at 472-76; (2) laws regulating the spouses' relationship with each other (distribution of marital property at divorce, alimony, spousal forced shares, and intestate succession), \textit{id.} at 476-84; and (3) laws regulating the couple's relationship with third persons (employee benefits, wrongful death actions, obligations for "necessaries" and spousal debts), \textit{id.} at 484-85.

\textsuperscript{212} Id. at 447.

\textsuperscript{213} Id. at 448. The most significant examples, according to Chambers, are the default rules for imposed sharing in the event of divorce. Noting the freedom that marital partners have to contract for different outcomes, he opines that same-sex couples who do not otherwise agree "will be hurt less frequently" than their opposite-sex counterparts "when the law's promise of sharing fails to produce economic parity between the partners." \textit{id.} at 481-83.


Atlanta, Los Angeles, and Chicago have followed suit, either by legislative enactment or executive action.

Although differing in some particulars, most of these laws conform to a similar pattern. A domestic partnership is formed by the filing of a declaration that each registrant is the other's sole domestic partner and that they are responsible for each other's welfare. Cohabitation is a common prerequisite, as is a declaration of intention to continue in the relationship indefinitely. The latter requirement is


222. The history of domestic partner laws is described, and many of the ordinances discussed, in Rubenstein, supra note 3, at 765-66 (who estimates that "more than two dozen municipalities" have adopted such laws); Eskridge & Hunter, supra note 3, at 791-94; Vada Berger, Domestic Partnership Initiatives, 40 DePaul L. Rev. 417 (1991); David L. Chambers, Tales of Two Cities: AIDS and the Legal Recognition of Domestic Partnerships in San Francisco and New York, 2 Law & Sexuality 181 (1992); Bowman & Cornish, supra note 214, at 1186-1203; Robert L. Eblin, Note, Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others), 51 Ohio St. L.J. 1067 (1990); Edward J. Juel, Note, Non-Traditional Family Values: Providing Quasi-Marital Rights to Same-Sex Couples, 13 B.C. Third World L.J. 317 (1993).

223. See, e.g., Ithaca, N.Y., Code § 215-21(G) (1994) (requiring a "relationship of mutual support, caring and commitment" and "responsibility" for each other's welfare" before finding that a domestic partnership exists); Minneapolis, Minn., Code of Ordinances § 142.20(a)(5) (1991) (defining domestic partners as two adults who, among other things, are "jointly responsible to each other for the necessities of life"); San Francisco, Cal., Admin. Code ch. 62 § 2(a) (1991) (requiring "jointly responsible for basic living expenses incurred during the Domestic Partnership"); West Hollywood, Cal., Mun. Code § 6900(c) (1996) ("A domestic partnership shall exist if... the persons share the common necessities of life."). It is not clear whether (or to what extent) these obligations are legally enforceable. See infra notes 304-05 and accompanying text.

224. See, e.g., Cambridge, Mass., Code ch. 2.119.020(D)(2)-(7) (1992) (requiring domestic partners to "reside together" and "consider themselves to be a family"); Madison, Wis., Gen. Ordinances § 3.23(2)(aa)(6) (1990) (finding a domestic partnership to exist when the couple "occup[ies the] same dwelling unit" and maintains a relationship of "distinct domestic character"); New York, N.Y., Mayor's Executive Order No. 48 § 2 (Jan. 7, 1993) ("Domestic partners are two people who live together and have been living together on a continuous basis."); San Francisco, Cal., Admin. Code ch. 62, § 2(b) (1991) ("Two people may live together even if one or both have additional living quarters.")

not to be taken too seriously, however, as virtually all ordinances provide for termination of the partnership by the simple declaration of either party.\textsuperscript{226} Thereafter, each is free to file a new partnership, usually after waiting a period of about six months duration.\textsuperscript{227}

And in return for satisfying these requirements, what do the partners receive by way of benefit? For the most part, little more than the satisfaction that a registry is being maintained as symbolic recognition of their union by the governing authority of the locale in which they reside or work.\textsuperscript{228} In some—though by no means all—municipalities, the domestic partners of city employees may be eligible for fringe benefits, although not necessarily on the same terms as married workers.\textsuperscript{229} For other citizens, the tangible benefits are limited to such

\textsuperscript{226} See, e.g., Sacramento, Cal., City Code, § 82.04(a) (1992) (providing that a domestic partnership terminates when partners no longer reside together or when one sends written notice of termination to the other); Seattle, Wash. Ordinance 117244, § 3 (codified in part at Seattle Mun. Code § 4.30.030 (1994)) (providing that a domestic partnership terminates on death of one partner or 90 days after filing notice of termination); Takoma Park, Md., Domestic Partnership Registry, Admin. Procedure No. 93-01, § 07 (Nov. 8, 1993) (authorizing voluntary termination by one or both partners); West Hollywood, Cal., Mun. Code § 6901(c) (1996) (permitting either partner to terminate upon notice to city clerk and other partner).

\textsuperscript{227} See, e.g., Cambridge, Mass., Code ch. 2.119.030(E) (1992) (requiring a six month waiting period unless the previous relationship was ended by the death of the other partner); Laguna Beach, Cal., Mun. Code ch. 1.12.020(e) (prohibiting a new domestic partnership within six months after the termination of the previous one); Madison, Wis., Gen. Ordinances § 3.23(2)(aa)(3) (1990) (requiring six months to have elapsed since the termination of a previous marriage or domestic partnership).

\textsuperscript{228} See, e.g., Cambridge, Mass., Code § 2.119.010 (1992) (declaring that the purpose of the ordinance is to acknowledge a segment of the city's population whose family relationships lack "recognition and validation" and to "attest[ ] to their status" as domestic partners); Minneapolis, Minn., Code of Ordinances §§ 142.10, 142.40 (1990) (recognizing "expanded concept of familial relationships," and limiting registry to partners who reside in the city, or one of whom is a city employee); New York, N.Y., Mayor's Executive Order No. 48, preamble (Jan. 7, 1993) ("provid[ing] a means of recognizing persons with committed and sharing relationships" and limiting registry to residents or employees of city).

Although residency requirements are common, some cities' registries are open to non-residents. See, e.g., Berkeley, Cal., Policy Establishing Domestic Partnership Registration, quoted in Bowman & Cornish, supra note 214, at 1188 n.119; Laguna Beach, Cal., Mun. Code § 1.12.010(a); Laguna Beach "Partnership" Law for the Unmarried OK'd, L.A. Times, Apr. 22, 1992, at A16 (noting that the mayor invites couples from outside the city to register).

\textsuperscript{229} See, e.g., Chicago, Ill., Mun. Code § 2-152-072 (1997) (permitting domestic partners to receive the same benefits, including health coverage, as spousal of city employees); Los Angeles, Cal. Admin. Code § 4.307.3 (1994) (extending health and dental care benefits to domestic partners of non-unionized employees); New York, N.Y., Mayor's Executive Order No. 49 (Jan. 7, 1993) (permitting child care leave when a domestic partner becomes a parent and bereavement leave upon the death of a domestic partner); Takoma Park, Md., City Code § 8B-175 (1993) (extending health insurance benefits on same basis as married employees).
matters as access to the school records of partners' children and partner visitation at city hospitals and places of incarceration.230

In fairness to the local legislators who have pioneered this remarkable movement to afford some measure of societal recognition to gay and lesbian relationships, it should be said that the limited nature of the benefits conferred often results from dictates at higher levels of political authority. Even before the Defense of Marriage Act was adopted in 1996,231 the federal government was notably inhospitable to the support of nonmarital cohabitation. For example, when health insurance is provided for the domestic partners of employees (either governmental or private), the tax consequences are less favorable than in the case of benefits for the families of married employees. Under the Internal Revenue Code, employer contributions for the health and accident insurance coverage of employees and their dependents are excluded from gross income.232 The Internal Revenue Service has consistently taken the position that this exclusion is inapplicable to an employee's domestic partner and his or her dependents, and that the value of the employer's contribution is fully taxable income to the employee.233

Federal preemption poses still another obstacle. In Seattle, for example, the city initially ruled that domestic partner health care benefits must be provided by all public and private employers in the city.234


230. See, e.g., Cambridge, Mass., Code § 2.119.060 (1992) (giving access to school records and children in school as well as visitation rights at health care and correctional facilities); Madison, Wis., Gen. Ordinances § 3.23(5)(a) (1990) (extending the right to purchase “family” memberships at places of public amusement or accommodation); Minneapolis, Minn., Code of Ordinances § 142.70 (1990) (extending the right to visit partners in health care facilities); West Hollywood, Cal., Mun. Code §§ 6906-6907 (Supp. 1996) (permitting visitation at health care facilities and city jails).


234. The Seattle Human Rights Department determined that the denial of employee benefits by public or private employers would violate the city's Fair Employment Practices Ordinance. See Bowman & Cornish, supra note 214, at 1194 n.152; Eblin, supra note 222, at 1073-74.
Following a city attorney’s legal opinion that benefit rules for private employers could only be imposed at the federal level, the domestic partner ordinance was limited to benefits provided for city employees. The Employee Retirement Income Security Act (ERISA) preempts most state and local laws relating to employee benefit plans. Although there is no definitive judicial construction of the scope of ERISA preemption as applied to domestic partner laws, the federal law has served as a damper on more broadly-based employer regulation.

In an effort to avoid the ERISA problem, the San Francisco Board of Supervisors relied on its governmental contracting authority to prohibit agreements between the city and any contractor “that discriminate[s] in the provision of benefits between employees with domestic partners and employees with spouses.” In a similar vein, the Sacramento domestic partner ordinance requires that city contractors must offer family-related leaves of absence to unmarried employees on the same basis that they provide family leave to married workers. Legal challenges to the more controversial San Francisco ordinance allege that it is preempted by ERISA.

235. Seattle, Wash., Ordinance 114648 (Aug. 18, 1989); see Bowman & Cornish, supra note 214, at 1194 n.152; Eblin, supra note 222, at 1074.


237. The ERISA preemption clause applies broadly to “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.” 29 U.S.C. § 1144(a) (1994). Although there is a provision exempting from preemption state laws “which regulate[] insurance,” 29 U.S.C. § 1144(b)(2)(A), the preemption clause has been very broadly construed by the Supreme Court. In Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983), the Court held that a state law prohibiting discrimination in sick-leave plans based on pregnancy was preempted. The breadth of the ERISA preemption was narrowed considerably in New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645 (1995), but it is still applicable to most substantive coverage requirements having more than “indirect” economic effect.


240. Sacramento, Cal., City Code § 82.07(a) (1992). The Sacramento ordinance also purports to require all employers in the city to provide family leave to domestic partners, id. § 82.07(b), and to construe the term “family” in all real estate agreements entered into in the city as including domestic partners, id. § 82.06.

It is at the state rather than the federal level, however, that the domestic partner option is most inhibited. The primary reason the local ordinances are pale marital substitutes is that most of the legal incidents of marriage historically have been considered matters of exclusive state concern. Indeed, domestic partner initiatives in two cities, Atlanta and Minneapolis, have succumbed to determinations that they exceeded state grants of municipal authority. In City of Atlanta v. McKinney, the Georgia Supreme Court upheld Atlanta’s domestic partner registry, but ruled that the city’s attempt to provide employee benefits to domestic partners violated the state’s municipal home rule laws. And in Lilly v. City of Minneapolis, that city’s health insurance program for its employees’ domestic partners was held to invade a domain of exclusively statewide concern.

2. Failed Political Will in the Statehouses

The failure of political will to provide a viable alternative to marriage for same-sex couples is nowhere more apparent than in the state capitols of the nation. It was not until 1997—more than a decade after the domestic partner movement began at the local level—that the first state law was enacted to confer a status and significant marital benefits on unmarried couples. And that, in Hawaii, after a long and rancorous political struggle, even with the extraordinary leverage that the law’s passage might help avert the same-sex marriages that the state’s highest court was on the brink of ordering. When it did prevail, however, the nation’s first such law was impressive for the array of benefits it purported to confer.

The new status, styled a “reciprocal beneficiary relationship,” is open to all Hawai‘i “couples composed of two individuals who are legally prohibited from marrying under state law.” Underscoring that...
the status is not meant to confer special symbolic recognition on gay relationships, the law specifies that it is as open to "a widowed mother and her unmarried son" as to "two individuals who are of the same gender." Although acknowledging that "there are many individuals who have significant personal, emotional, and economic relationships with another individual yet are prohibited... from marrying," the law specifically "finds that the people of Hawaii choose to preserve the tradition of marriage as a unique social institution based upon the committed union of one man and one woman." The breadth of the legislation's coverage led Hawaii Governor Ben Cayetano (who supported the extension of benefits to same-sex couples) to allow it to become law without his signature. See Arthur S. Leonard, Hawaii Becomes First State to Extend Benefits to Domestic Partners Through Legislative Enactment, 1997 Lesbian/Gay Law Notes 100.

For reciprocal beneficiaries who are not on the public payroll, the most significant new benefits are the right to elective shares in the decedents' estates of their partners, to workers' compensation survivor benefits, and to damages in wrongful death actions. By its terms, the law also requires most private employers to offer the equivalent of "family coverage" health benefits for employees' reciprocal beneficiaries and their children, although the legality of this requirement has been challenged on federal ERISA preemption

eighteen years of age and that neither is married nor party to another reciprocal beneficiary relationship. Id. § 1(4).

249. Id. § 1(2). Although acknowledging that "there are many individuals who have significant personal, emotional, and economic relationships with another individual yet are prohibited... from marrying," the law specifically "finds that the people of Hawaii choose to preserve the tradition of marriage as a unique social institution based upon the committed union of one man and one woman." Id. The breadth of the legislation's coverage led Hawaii Governor Ben Cayetano (who supported the extension of benefits to same-sex couples) to allow it to become law without his signature. See Arthur S. Leonard, Hawaii Becomes First State to Extend Benefits to Domestic Partners Through Legislative Enactment, 1997 Lesbian/Gay Law Notes 100.

250. Act Relating to Unmarried Couples § 1(5)(b).

251. Id. § 3. The right also extends to making the same health care decisions as the spouse of a hospitalized patient. Id. In addition, reciprocal beneficiaries may consent to post-mortems and make anatomical gifts, id. §§ 42-43, 62, and they are entitled to participate in their partners' mental commitment proceedings, id. § 48.

252. Id. §§ 2, 22, 24.

253. Id. §§ 24-33, 44.

254. Id. §§ 11-15.

255. Id. §§ 53-55.

256. Id. § 18.

257. The state's Insurance Code is amended to require that "reciprocal beneficiary family coverage" be made available in all policies of accident and sickness insurance issued in the state "to the extent that family coverage... is currently available to individuals who are not reciprocal beneficiaries." Id. § 4 (to be codified at Haw. Rev. Stat. § 431.10A). Unlike most other states, the option of family coverage is nearly universal for employees in Hawaii, in large part because the state's Prepaid Health Care Act, Haw. Rev. Stat. §§ 393-1 to -51 (1993), mandates access to health coverage in most situations for the employees of private employers, as well as for their dependents, Haw. Rev. Stat. §§ 393-7, -11 to -13, -21; see also Haw. Rev. Stat. § 87-4 (1996) (requiring family coverage for public employees).
grounds. Other benefits range from domestic abuse and victims’ rights protections, to disaster loans, to prison furloughs.

Extensive though this array of entitlements may be, the Hawaii legislation is equally notable for the marital benefits it does not extend to same-sex couples and their children. Following the Hawaii Supreme Court’s Baehr decision, the state legislature established a commission to explore whether some form of domestic partnership law might be enacted to avert a final judicial decision legalizing same-sex marriage. The commission eventually recommended that the legislature itself should approve same-sex marriage, but it also proposed as an alternative the adoption of a “Universal Comprehensive Domestic Partnership” act. Unlike the law ultimately enacted by the legislature, the commission’s proposed bill would have provided in clear and simple terms that domestic partners “shall have the same rights and obligations under the law that are conferred on spouses in a marriage relationship.”

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258. See supra notes 236-38 and accompanying text. In addition to the general exemption from preemption for state laws regulating insurance, 29 U.S.C. § 1144(b)(2)(A), ERISA specifically exempts the Hawaii Prepaid Health Care plan from its preemption clause, 29 U.S.C. § 1144(b)(5)(A). However, the latter exemption—the only waiver Congress has seen fit to provide for any state’s health care plan—is narrowly written, and there are serious doubts as to whether extending the plan’s protections to reciprocal beneficiaries can withstand legal challenge on preemption grounds. See Susan Essoyan, Hawaii’s Domestic-Partner Law a Bust; Ambiguity Blamed, L.A. Times, Dec. 23, 1997, at A5 (discussing legal challenges to the Hawaii legislation); Leonard, supra note 249 (same); Schuler, supra note 238, at 785-803 (discussing Hawaii waiver and general ERISA problems regarding regulation of health care); see generally Jolee Ann Hancock, Diseased Federalism: State Health Care Laws Fall Prey to ERISA Preemption, 25 Cumb. L. Rev. 383 (1994-95) (discussing the “disastrous effect of ERISA preemption on state health care reform efforts”); Wendy E. Parmet, Regulation and Federalism: Legal Impediments to State Health Care Reform, 19 Am. J.L. & Med. 121 (1993) (analyzing the federal barriers to the ability of states to regulate the health care market).


260. Id. §§ 37-38.

261. Id. § 51. Additional benefits include family leave for child birth or adoption, id. § 57; access to auto and life insurance, id. §§ 58-59; homestead rights and the right to create real estate tenancies, id. §§ 10, 36; and the use of university housing and other facilities, id. § 40.


264. State of Hawaii, Report of the Commission on Sexual Orientation and the Law 39-41, 139-44 (1995); see Coleman, supra note 5, 571-77 (supporting the commission’s domestic partner alternative; appending copy of draft legislation prepared for the commission by the author, a longtime advocate for gay family rights); Wardle, supra note 3, at 16-17 (lamenting the “pressure on the political branches” to accommodate same-sex marriage advocates by enacting domestic partner laws).

265. State of Hawaii, supra note 264, at 142 (Appendix D-1, Uniform Comprehensive Domestic Partnership Act § 6). The same recommended provision would have
Missing from the list of benefits and burdens for Hawaii’s reciprocal beneficiaries are some of the most fundamental of those identified in David Chambers’ study of the legal consequences of marriage. In the category of legal rules treating the couple as an economic unit, the taxation of income, gifts, and estates is entirely omitted. Significantly, there is no provision for financial support or distribution of property in the event a relationship ends—rules which Chambers believes would “serve gay and lesbian couples who choose to marry better than they serve opposite-sex married couples today.” And perhaps the law’s most serious failing—in terms of redressing legal problems actually encountered by large numbers of lesbian and gay families—is that it provides none of the favored treatment that the law affords for married couples who are or want to become parents.

If these shortcomings cast a pale on the Hawaii legislation as a national model for the protection of gay and lesbian family rights, elsewhere the state legislative landscape is almost completely barren. In 1994, the California legislature adopted a statewide domestic part-

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266. See Chambers, supra note 22, at 452-85, discussed supra notes 208-13 and accompanying text.

267. See Chambers, supra note 22, at 470-85, discussed supra note 211.

268. Discussing both the pros and cons of treating couples as a single economic unit for tax purposes, Chambers acknowledges that many same-sex couples would be financially disadvantaged by the so-called “marriage penalties” in the current tax laws. Id. at 472-76. In this regard he speculates that a lower proportion of married gays and lesbians than of heterosexual couples would correspond to the premise underlying joint taxation, viz., “that married couples actually share in the control of resources and expenditures.” Id. at 475. But cf. Patricia A. Cain, Same-Sex Couples and the Federal Tax Laws, 1 Law & Sexuality 97 (1991) (arguing that, on balance, the tax consequences of marriage would be advantageous to gay and lesbian couples); Hayes, supra note 139 (contending that the financial benefits of marriage far outweigh the cost of the marriage penalty for most taxpayers). See also Adam Chase, Tax Planning for Same-Sex Couples, 72 Deny. U. L. Rev. 359 (1995) (discussing contracts and tax planning to achieve advantages parallel to the tax code treatment of married couples); Lawrence Zelenak, Marriage and the Income Tax, 67 S. Cal. L. Rev. 339 (1994) (providing analysis and proposals for tax reform).

269. Chambers, supra note 22, at 483; see supra note 213 and accompanying text.

270. See Chambers, supra note 22, at 461-70, discussed supra note 210. Also not included in the law are guardianship and conservator rights, id. at 455, civil and criminal testimonial privileges, id. at 459, and obligations for necessaries and spousal debts, id. 484-85.

271. During the first five months after the law became effective, fewer than 300 couples registered as reciprocal beneficiaries, a tiny fraction of the 20,000 to 30,000 people the state health department had estimated might sign up. Ambiguities in the statute and legal challenges to the law’s private employer mandates, see supra note 258, as well as increased fees for public employee health care, have been cited as reasons for the paucity of registrants. See Essoyan, supra note 258.
ner bill that would have provided little more than a public registry and hospital visitation rights. Even this modest initiative was vetoed by the governor on the ground that it was unnecessary and would be a "foot in the door" for same-sex marriage.

Bills have been introduced in a number of other state legislatures, sometimes with innovative provisions, but typically prescribing no more in benefits (and often less) than the local domestic partner ordinances. In sweeping language reminiscent of the act proposed by the special commission in Hawaii, a bill introduced in the New York legislature every year since 1990 would make it "an unlawful discriminatory practice for any state or local agency" to "use marital status as a factor in any decision, policy or practice unless it uses domestic partnership in the same way." Like almost all of these legislative initiatives, however, this one never has had any serious prospect of being enacted, nor is it likely to at any time soon.


An anti-domestic partner bill was introduced in the Washington state legislature. H.B. 2076, 55th Leg., 1st Reg. Sess. (Wash. 1997) (prohibiting the use of state funds for domestic partner benefits; requiring state contractors not to offer benefits to their employees' domestic partners).

275. See supra note 265 and accompanying text.

276. S.B. 3305, 220th Annual Leg. Sess., 1997-98 Reg. Sess. § 2 (N.Y. 1997). As originally proposed, the prohibition would not have applied "to matters of taxation, inheritance, or adoption or eligibility for public assistance benefits." S.B. 6722, 213th Annual Leg., 1989-90 Reg. Sess. § 2 (N.Y. 1990). Although the scope of the bill was broadened considerably when this limitation was abandoned in later years, other limiting language makes it unclear what would be the full effect of the legislation. See Bowman & Cornish, supra note 214, at 1191 n.134; Franz S. Leichter & William F. Passanante, Letter to the Editor, To Free Nonmarried Couples from Legal Limbo, N.Y. Times, Dec. 27, 1989, at A22.
3. The Scandinavian Prototype

If there is to be a model alternative to marriage drawn from actual legislative precedent, it is going to have to come from abroad, perhaps a Scandinavian country as suggested by Judge Posner in his “simulacrum of marriage” proposal. Sweden became the first nation to establish a special status for same-sex couples in 1987 when it authorized cohabiting homosexuals to register their relationships, thereby consenting to equally shared property rights. In 1989, Denmark adopted a more extensive Registered Partnership Act, which was to become the prototype for comparable laws enacted in the next five years by both Norway and Sweden.

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278. See Åke Saldeen, Sweden: More Rights for Children and Homosexuals, 27 J. Fam. L. 295, 296-97 (1988-89). Equal distribution of property upon dissolution of the relationship (comparable to the community property system in parts of the United States) was the principal consequence of the 1987 Swedish law. See id. at 297. Judge Posner prefers this limited Swedish model to the more extensive registered partnership approach adopted later by Scandinavian countries because, he says, it “assumes, realistically I think, that a homosexual relationship, even when meant to last, is more like heterosexual cohabitation than like heterosexual marriage.” Posner, supra note 23, at 314.


Extending far more rights and obligations than any U.S. domestic partner law, the Danish act provides that, with a few exceptions, “the registration of a partnership shall have the same legal effects as the contracting of a marriage.”281 By this means, virtually all of the economic (and many noneconomic) consequences of marriage—including marital property and inheritance rights, mutual maintenance duties, alimony, joint taxation, and the prohibition of bigamy—are made applicable to registered same-sex couples.282 The exceptions, though small in number, nevertheless make clear that registered partnership is a lesser status. Symbolically, the unions are not recognizable, as is marriage, under the terms of international treaties;283 they also may not be solemnized in the Danish state church.284 And practically, the legal protections are greatly diminished by the denial to same-sex couples of such parental rights as joint adoption, child custody, and access to artificial insemination.285

There can be no doubt that, wherever adopted and by whatever name, domestic partnership laws have brought some measure of civic legitimation to same-sex relationships where before there was none. And in substantial numbers of particular cases, they have supported gay and lesbian family life by the provision of needed tangible benefits. What is equally clear, however, is that even the most beneficent of these enactments is second-class as compared to the laws supporting marriage. Only if companionate cohabitation among gays and lesbians is deemed less worthy of state support can domestic partner laws fairly be seen as reasonable substitutes for marriage.

B. Accepting Burdens: The Implications of Commitment

1. Obligation and Identity

Justice Blackmun, in his celebrated dissenting opinion in Bowers v. Hardwick,286 places gay people squarely within the cultural tradition by which “individuals define themselves in a significant way through

283. Lov om registreret partnerskab [Registered Partnership Act], Act No. 372 § 4(4).
284. See Pedersen, supra note 279, at 290; Wilets, supra note 280, at 96. The state church in Norway also has no duty to perform wedding ceremonies under that country’s partner registration law. Id. The Swedish law does contemplate an official wedding service prior to partnership registration, but it cannot be a church wedding. Id.
285. Lov om registreret partnerskab [Registered Partnership Act], Act No. 372 § 4(1)-(2); see Martin, supra note 279, at 432, 446; Wardle, supra note 3, at 7 n.8. Iceland is the lone exception, authorizing registered partners to share legal custody of each others’ children. See Björgvinsdóttir, supra note 280, at 225; Wockner, supra note 280.
their intimate sexual relationships with others.”

It is the same tradition, he insists, as the one that constitutionally protects the decision to marry “precisely because marriage ‘is an association that promotes a way of life, . . . a harmony in living, . . . a bilateral loyalty.’”

The self-definition and loyalty to which Justice Blackmun refers is most often spoken of in terms of the personal commitment that marriage entails. It is less significant as a promise enforceable by law, says Kenneth Karst, than as a “commitment [in] the sense that one is pledged to care for another and intends to keep the pledge.” Each party's sense of identity is indelibly affected, Karst believes: “the cared-for partner gains in self-respect by seeing himself through his caring partner’s eyes as one who is worth being cared for; the caring partner affirms her autonomy and her responsibility by choosing the commitment.”

In his perceptive volume, *Family Law and the Pursuit of Intimacy*, Milton Regan contends that “marriage has moral significance as an entity” primarily because “status as a spouse . . . gives rise to obligation.” Being a spouse means committing “to honor [the] reliance and to refrain from exploiting [the] vulnerability” that inhere in the structure of marriage, he says. This responsibility is imposed on all spouses “because of the interdependence that typically characterizes marriage,” according to Regan; and “[s]tatus is the embodiment of that responsibility, a proclamation that certain intimate relationships in themselves give rise to obligation because they shape each partner’s sense of self.”

287. Id. at 205. Mary Anne Case argues that, from the context of his discussion, Justice Blackmun must have meant something different by the term “intimate sexual relationships” than the “sexually intimate . . . relationships” that Judge Kenneth Starr wrote of disparagingly with respect to gay liaisons in *Dronenberg v. Zech*, 746 F.2d 1579, 1584 (D.C. Cir. 1984). “I believe Justice Blackmun is seeking to distinguish *intimate* sexual relationships,” she opines, “from those which, although every bit as sexual, are less intimate, i.e., between pair bonding and copulating.” Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 Va. L. Rev. 1643, 1655-56 (1993); cf. Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 Va. L. Rev. 1833, 1851-52 (1993) (criticizing the assimilationism of Blackmun’s approach for its “abstracting” and “sanitizing” of gay sex).


290. Id. at 633.


292. Id.

293. Id. Regan concedes that “a marriage may be more fragile these days, given a greater tendency to perceive it as but one option among many in a personal relations market.” Id. Nevertheless, he insists that the obligation involved in marital status “is a way of acknowledging that individuals do not pass in and out of intimate relationships untransformed, but rather create a shared life that provides an important source of meaning for each.” Id. at 96-97.
To some of its most ardent gay supporters, it is these intangible obligations of marriage, rather than tangible benefits, that are its most salient feature. Marriage is the “highest public recognition of personal integrity,” says Andrew Sullivan. By means of its “hard-to-extract-yourself-from commitment to another human being,” he claims, gay marriage “would foster social cohesion, economic security, and economic prudence.” In the same vein, William Eskridge argues that “the biggest cost of marriage provides the best reason why gays and lesbians should seek legal recognition of their right to marry: marriage is easy to enter but hard to exit.” And it is that reality that yields “the personal security that comes from knowing that one can depend on someone else for better or for worse.”

In pragmatic terms, spousal obligation finds expression during the marriage in the doctrine of “necessaries” (which obligates one spouse to pay as needed for the other’s abode and sustenance), and thereafter, either in community property or equitable distribution (when both partners survive the relationship’s demise), or in rights of intestate succession or elective spousal share (when one of them does not survive). Symbolically, as Kenneth Karst sagely observes, marital obligation is a phenomenon that “feeds on itself; if large numbers of people equate marriage and commitment, then each successive

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296. Eskridge, supra note 17, at 71.
297. Id. at 72. Eskridge (who cites and subscribes to many of the views expressed by Milton Regan, id. at 237 n.84) also believes that the commitment in marriage “provides an intense focal point for one to transcend the self and deepen one’s identity through intimate interaction with another being.” Id. at 72.
298. The obligation (imposed by common law and occasionally by statute) is to creditors, and is a limited exception to the general rule that one spouse is not liable for the debts of the other. See 1 Homer H. Clark, Jr., The Law of Domestic Relations in the United States § 7.3, at 444-48 (2d ed. 1987); Bowman & Cornish, supra note 214, at 1167-68; Karol Williams, Note, The Doctrine of Necessaries: Contemporary Application as a Support Remedy, 19 Stetson L. Rev. 661 (1990).
299. In most jurisdictions, spouses may own property separately or jointly as they choose, but each may be entitled to a share of assets without regard to ownership upon dissolution of the relationship (and possibly to receive ongoing financial support) in accord with flexible rules of “equitable distribution.” In community property jurisdictions, spouses jointly own property acquired during the relationship, and each receives one-half upon dissolution. See Roger A. Cunningham et al., The Law of Property §§ 5.14-5.15 (2d ed. 1993); Chambers, supra note 22, at 476-79; Elizabeth A. Cheadle, The Development of Sharing Principles in Common Law Marital Property States, 28 UCLA L. Rev. 1269 (1981).
300. Although the details vary widely, in every state a surviving spouse receives all or part of the other spouse’s assets if he or she dies intestate. Most states also permit the surviving spouse to receive an “elective” (or “forced”) share of assets if the partner left a will that did not make due provision for the spouse. Community property rules achieve much the same result in other jurisdictions. See Ralph C. Brashier, Disinheritance and the Modern Family, 45 Case W. Res. L. Rev. 83, 97-104 (1994); Chambers, supra note 22, at 455-56, 479; Lawrence W. Waggoner, Marital Property Rights in Transition, 59 Mo. L. Rev. 21, 27-29, 36-38 (1994).
marriage is apt to seem to the marrying couple both the symbol of commitment and the undertaking itself.\textsuperscript{301}

By and large, domestic partner laws do not measure up to marriage in the obligations they impose any more than in the benefits they provide. Although almost all the local ordinances purport to insist upon a declaration that the partners are responsible for each other's welfare,\textsuperscript{302} the promise is ephemeral. Each partner is free to unilaterally end the relationship and abrogate the commitment without looking back.\textsuperscript{303} Lest there be any doubt about the degree of obligation imposed, some of the ordinances expressly provide that they are not intended to create contractual relationships between the parties,\textsuperscript{304} or that "the partners incur no further obligations to each other" after the partnerships have ended.\textsuperscript{305}

At first blush, the Hawaii reciprocal beneficiary law appears to impose a significant burden on registering partners by precluding them from disinheriting one another. Surviving reciprocal beneficiaries are entitled to elective shares of their deceased partners' estates to the same extent as partners to a marriage.\textsuperscript{306} However, a crucial difference in the structure of the laws governing the two kinds of relationships severely diminishes the force of an unmarried partner's obligation. As in the case of the local domestic partner ordinances, either reciprocal beneficiary may end the relationship—and all its accompanying obligations—by the mere filing of a declaration of termination.\textsuperscript{307} Of course, a spouse can also escape the elective share

\textsuperscript{301} Karst, \textit{supra} note 10, at 670.

\textsuperscript{302} See \textit{supra} note 223 and accompanying text.

\textsuperscript{303} See \textit{supra} note 226 and accompanying text.

\textsuperscript{304} See, e.g., Seattle, Wash. Ordinance 117244, preamble (Aug. 5, 1994) ("[T]he registration program provided for in this ordinance is not intended to create any new or different legal rights or responsibilities, or to itself create or evidence any contractual relationship or obligations between the individuals who participate in the registration program."); cf. Sacramento, Cal., City Code, § 82.03 (1992) (providing that a domestic partnership creates "no legal rights or duties from one of the parties to the other" other than "[l]egal rights and duties which the partners agree in writing they will owe to each other, provided the agreement is otherwise enforceable").

\textsuperscript{305} San Francisco, Cal., Admin. Code § 62.6(b) (1991), \textit{reprinted in} Rubenstein, \textit{supra} note 3, at 765. The San Francisco law does provide that third parties who have received notice of a domestic partnership and relied upon it may recover damages for actual loss caused by the failure of a partner to provide notice of the relationship's termination. \textit{Id.} § 62.4(b); see also Robin Leonard, \textit{S.F.'s New Domestic Partner Law is a Symbolic Start but State Law is Needed to Confer True Rights}, Recorder (San Francisco), Feb. 14, 1991, at 4 (discussing limited power of municipalities to alter contractual rights).


\textsuperscript{307} \textit{Id.} § 7(a). The relationship also terminates upon the issuance of a marriage license or the entering into a legal marriage by either reciprocal beneficiary. \textit{Id.} § 7(c).
burden by ending the marriage, but that requires a divorce instead of unilateral action, which in turn subjects both spouses' assets to the scrutiny of equitable distribution.\(^308\)

It is the crucial obligation to share material assets—not only in good times during the course of a relationship, but in settling accounts when it ends—that most distinguishes the burdens of marriage from those imposed by domestic partnership laws in the United States. Although many jurisdictions now enforce express agreements (and less often implied ones) privately ordering the property rights of unmarried cohabitants,\(^309\) no state has statutory default rules to govern the overwhelming majority of cases in which couples have not been so prescient as to plan for the ending of their relationships.\(^310\) Only in the Scandinavian registered partnership model is a full statutory counterpart to be found for the marital obligation regime, with a common system of divorce and parallel provisions governing maintenance, property, and inheritance.\(^311\)

2. Limited Partnerships and the Problem of Adverse Selection

When benefits fall short at the end of a campaign for a domestic partner law, it is usually because lawmakers have concluded the new status is less deserving of support than marriage. The absence of extended obligation, on the other hand, may be exactly what the proponents of domestic partnership (or at least some of them\(^312\)) have in mind. Paula Ettelbrick's oft-quoted rallying cry against same-sex mar-


\(^309\) Elsewhere, I have discussed the case law in this area as applied to same-sex couples and the conceptual problems in adapting contract law to the intimate relationships of gay and lesbian families. Christensen, *supra* note 2, at 1327-48.


\(^312\) Of course, not all supporters of domestic partner laws favor diminished commitment. For example, provisions in the model bill drafted by Thomas Coleman for the Hawaii Commission on Sexual Orientation and the Law (which the commission recommended, but which the legislature did not enact) would have subjected domestic partnership to the same divorce proceedings as marriage, as well as to the same substantive rights and obligations upon dissolution. See State of Hawaii, *supra* note 264, at 142 (Appendix D-1, Uniform Comprehensive Domestic Partnership Act § 7); Coleman, *supra* note 5, at 573, 580; see also Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 San Diego L. Rev. 163, 207-18 (1995) (advocating the imposition of increased responsibility on domestic partners).
riage—''I do not want to be known as 'Mrs. Attached-To-Somebody-Else''"—is nothing if not a rejection of marital identity and commitment. Gay author Fenton Johnson rejects the stick of marital obligation in favor of the carrot of public benefits, which he would give only to reward "couples who demonstrate stability" whether or not they are married. In support of this unusual scheme, he cites the experience of an attorney of his acquaintance who specializes in same-sex partnerships. "Marriage as it exists imposes a legal partnership on people that is seldom in sync with how they think about their relationship," he quotes his lawyer friend as saying; "[t]he idea of supporting a spouse for the rest of his or her life is totally contrary to the way most people nowadays think." While there is evidence to suggest that a higher proportion of same-sex than of married opposite-sex couples may share this sentiment, it is equally clear that significant numbers of gays and lesbians—especially those already in established relationships—do not. The dif-

313. Ettelbrick, Since When, supra note 60, at 14; see supra notes 60-61 and accompanying text.
314. Ettelbrick certainly does not disparage all commitment. Her own definition of family encompasses "commitment, caregiving, a shared journey, a guiding hand, companionship, [and] economic security," Ettelbrick, Wedlock Alert, supra note 61, at 109 n.3; but she is also convinced that "personal autonomy within relationships [is] more likely accomplished outside of the social strictures of marriage," id. at 120 (footnote omitted). Frank Browning describes Ettelbrick's self-defined families as "find[ing] their raison d'être in . . . radical individualism" and as being "created solely for the maximum happiness of their individual members." Browning, supra note 64, at 154-55. Nevertheless, he agrees with her that "[b]y rushing to embrace the standard marriage contract, we could stifle one of the richest and most creative laboratories of family experience." Frank Browning, Why Marry?, N.Y. Times, Apr. 17, 1996, at A23.
315. Fenton Johnson, Wedded to an Illusion, Harper's Mag., Nov. 1996, at 43, 49. In Johnson's model, the most significant state-conferred familial benefits "would be reserved for couples who had demonstrated the ability to sustain a household" over an extended period of time; and "[t]he decision to assume the label 'marriage' would be left to the individuals involved, who might or might not seek ratification of their decision by a priest or minister or rabbi." Id.
316. Id. at 48 (quoting Oakland, Cal., attorney Frederick Hertz).
317. The Blumstein and Schwartz comparative study of homosexual and heterosexual couples explored the attitudes of partners about the pooling of income and other assets. Blumstein & Schwartz, supra note 170, at 95. Only 35% of gay men and 31% of lesbians who had been in coupled relationships from zero to two years favored pooling, as compared to 67% of husbands and 63% of wives who had been married for the same period of time. Id. In relationships of two to ten years, 44% of gay men and 40% of lesbians favored pooling, as compared to 74% of husbands and 66% of wives. Id. In relationships of more than ten years duration, however, the gap had narrowed to 68% of gay men and 59% of lesbians in favor, as compared to 77% of husbands and 74% of wives. Id.; see also Chambers, supra note 22, at 471-72, 481 (discussing the Blumstein & Schwartz study and other anecdotal evidence of gay and lesbian attitudes regarding financial obligations to their partners).
318. Blumstein and Schwartz explain the high level of support for the pooling of assets among gays and lesbians in long-term relationships, see supra note 317, as follows:

[G]ay men and lesbians must first get to know their partners and do not pool until they are convinced of the durability of the relationship. . . . Initially
ference between straight and gay couples, of course, is that the former may choose the higher form of commitment that marriage entails, while the latter have no such option. Even if marriage were equally available, however, domestic partnership (or some comparable status) might well be seen as an appropriate second option for couples in both categories who prefer a more modest level of obligation. What is important to emphasize for present purposes is that, by reason of its diminished commitments, the alternative status would not in any real sense be a simulacrum of marriage. And the shortfall would be significant both for its affects on the partners themselves and for its broader implications for the gay community at large.

As to the first: The difference between a little obligation and a lot is more than one of degree. It alters the entire character of the union. In an era when relationships are easily cast off no matter the commitments set aside, the status of marriage provides what Milton Regan calls a "buffer" against the full force of transience. Although "[f]eelings may change, devotion may wane, and other alternatives may come to seem more attractive," he points out, marital status "proclaims that some things can be taken for granted as long as a marriage lasts, and that some obligations may remain even when a partner has decided to leave." Shorn of such extensive obligation, the status

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they have only to decide whether to live together. But there is no institutional understanding that it symbolizes a lifetime commitment. . . . The issue of permanence is something many same-sex couples discuss and negotiate over a period of time.

Blumstein & Schwartz, supra note 170, at 105 (footnote omitted).

319. William Reppy has proposed the creation of a new legal status of "lawful cohabitation" for opposite-sex couples whose relationships would benefit from the stability of defined legal rights and duties, but who wish to incur less extensive obligations than those presently entailed in marriage. William A. Reppy, Jr., Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status, 44 La. L. Rev. 1677 (1984). Reppy's new status would recognize some marital property rights and the possibility of limited financial support following dissolution, but it would make dissolution (and the discharge of most obligations) as simple as the filing of a declaration signed by both parties. Id. at 1719-21. While acknowledging that same-sex couples might benefit from a comparable status, Reppy urges that it be a separate one for fear that their inclusion in his proposal would undermine it in the eyes of judges and government officials. Id. at 1723; see also Arthur H. Gottlieb, Note, Living Together: The Need for a Uniform Nonmarital Cohabitation Act, 2 Adelphia L.J. 79 (1983) (arguing for a nonmarital cohabitation act in light of the increase in the number of couples living together and the resulting tendency of such couples to turn to the courts to resolve their disputes).

320. See, e.g., Eskridge, supra note 17, at 78-80 (suggesting that couples should have "a menu of choices for their unions," including marriage, domestic partnership, and contractual ordering); Wolfson, supra note 22, at 605-08 (arguing that domestic partnership is "second-class" as compared to marriage, but that it should be available to those who want it); cf. Chambers, supra note 22, at 487-88 (contending that, although the disdain that some have for marriage is understandable, most "same-sex couples would probably find that domestic partnership legislation excluded benefits that they would much like to have").

321. Regan, supra note 291, at 96.

322. Id.
loses its capacity to “promote intimacy . . . by protecting those who are willing to make intimate commitments.”

As to the second: The widespread availability of a status conferring societal benefits on unmarried couples without corresponding burdens would underscore what is already a vexing obstacle in the quest by gay people for equal access to familial rights. Sometimes styled as the problem of “adverse selection,” it is the widely-held concern that domestic partnership may function as a ruse to confer status and privilege on partners who bear little responsibility for the civic virtues associated with family life.

David Haddock and Daniel Polsby have recently challenged (on public policy grounds utilizing economic analysis) what they see as the underlying premise of domestic partnership. It is “specious,” they contend, to argue that “how a person chooses to live, and with whom, is essentially a private matter into which the community intrudes as a hostile and officious stranger.” Quite the contrary, they believe the community has every reason to favor stable family relationships, which are much more likely (“in the patois of modern policy wonkspeak”) to “generate positive externalities for society relative to other living arrangements.” Chief among these, they claim, are that a traditional family has much more incentive to “maximize [its] equity in such reputational assets as honesty, virtue, trustworthiness, [and] community-mindedness” than do “[o]ther kinds of households [which] are foreseeably unstable.”

Far too little is known about stability in same-sex relationships to make sound policy decisions regarding “homosexual quasi-marriage,”

323. Id.
324. Linda Laarman, editor-in-chief of the Benefits Law Journal, explains that many employers fear that:

 employees will abuse the option of domestic partner coverage by portraying a sick friend to be a domestic partner, even though the relationship between the employee and the friend is not equivalent to that of spouses. Concerns about such “adverse selection” . . . are considered unfounded by domestic partner benefits advocates, . . . [who argue that] the social stigma attached to homosexuality makes homosexual “marriages of convenience” unlikely.

Laarman, supra note 233, at 569 (footnote omitted).
326. Id. at 18; see, e.g., Browning, supra note 64, at 154 (quoting Paula Ettelbrick during a presentation opposing gay marriage, Chicago, Ill., Oct. 1989: “[S]ociety [should have] no authority to sanction, to reward, or even to approve one set of family relations over another”); see also supra text accompanying notes 71-75.
327. Haddock & Polsby, supra note 325, at 18.
328. Id. at 19.
329. Id. at 34. The perception of instability is important, they point out, because “[w]hat neighbors reasonably believe . . . is, of course, absolutely crucial to public policy. Words are cheap: People can say anything and promise anything. Incentives are what really matter” and “[h]ouseholds organized along kinship lines have a better chance of overcoming . . . atomistic incentives.” Id.
according to Haddock and Polsby. Nevertheless, they believe the incentives for stability would have to be much closer to those in traditional marriage than in existing domestic partnership to justify attaching significant social benefits to that status. Raising the specter of adverse selection run amok, they ask what is to prevent "the development of a market in domestic partnership, in which an employee might retail the value of his fringe benefits to whomever most highly value[ ] them?" The answer, they say, is that "[t]here is no reason not to if one can simply pick up and walk away at will and if there is no anchoring set of legal obligations between the partners." Even short of this worst-case scenario, they contend, homosexual households "cannot for long be regarded as legitimately constituted or entirely respectable in the eyes of the community" unless there is a "legal check against casual household dissolution" that is comparable to the financial arrangements surrounding divorce in heterosexual marriage.

These are not merely academically-conjured horribles, as witness the arguments mounted in litigation and legislative battles against gay family rights. Opposition to the provision of fringe benefits for domestic partners often has been fueled by the image of feigned relationships that would bring expensive health care coverage and other advantages to the casual acquaintances of gay and lesbian employees. Ironically, the antidote sometimes has been to make eligibility for domestic partnership far more restrictive than it is for marriage, and in the process far more intrusive of the relational privacy that is an historical pillar of family autonomy.

The more or less onerous termination provisions that legitimation would . . . have to entail, would change the ex ante calculation each quasi-spouse might make concerning whether to quasi-marry in the first place. At the end of the day, matters might well be left more or less as they are now—many quasi-partners living together in quasi-sin, sometimes obtaining from cowed City Halls a few of the benefits of being married . . . without any of the legal burdens.

Id.

330. Id. at 44-46.
331. Id. at 43.
332. Id.
333. Id. at 44. "[L]egitimating homosexual marriage might cause no change at all," they speculate. Id. at 45.

334. See Laarman, supra note 233, at 569-71 (discussing adverse selection as a deterrent to decisions by employers to provide domestic partner coverage); Alice Rickel, Extending Employee Benefits to Domestic Partners: Avoiding Legal Hurdles While Staying in Tune with the Changing Definition of the Family, 16 Whittier L. Rev. 737, 744-48 (1995) (discussing the potential for abuse in domestic partner benefit programs and employers' fear of the costs of AIDS treatment); Joseph Asher, Unmarried House Partners Gain Benefits in Seattle, Nat'l Underwriter, Property & Casualty/Risk & Benefits Management Edition, June 4, 1990, at 9 (describing the strict eligibility rules imposed in domestic partner law to "prevent benefits being extended to those with frequently changing partners and unstable life styles").

335. See supra text accompanying notes 111-13.
ments,\textsuperscript{336} waiting periods,\textsuperscript{337} and other evidence of relational bona fides\textsuperscript{338} are common features of domestic partnership that are not demanded of spouses as prerequisites to the marital benefits they receive.

In \textit{Braschi v. Stahl Associates Co.}\textsuperscript{339}—the New York Court of Appeals decision which is the premier example of functional family jurisprudence\textsuperscript{340}—even the historic finding that a gay couple might be deemed to comprise a "family" for purposes of the state's rent control laws was conditioned on "the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services."\textsuperscript{341} Such probing inquiry into the private terms of a marriage relationship never would be tolerated as the price for qualifying to receive some right reserved by the law for "families."\textsuperscript{342}

\textsuperscript{336} See supra note 224.
\textsuperscript{337} See supra note 227.
\textsuperscript{338} See, e.g., Cambridge, Mass., Code § 2.119.020(E) (1992) (providing that the existence of a "family relationship" must be shown by evidence of: (1) "the manner in which the people live their daily lives"; (2) "how they hold their relationship out to the world"; (3) "their emotional and financial commitment"; (4) "their reliance on each other for daily family services"; and (5) "the longevity and exclusivity of their relationship"); Chicago, Ill., Mun. Code § 2-152-072 (1997) (requiring domestic partners to satisfy at least two of four conditions: (1) residing together for at least twelve months before filing for status; (2) common or joint ownership of a residence; (3) at least two of the following: joint ownership of a motor vehicle, joint credit account, joint checking account, or a lease identifying both partners as tenants; or (4) city employee declares that partner is a primary beneficiary in his or her will).
\textsuperscript{339} 543 N.E.2d 49 (N.Y. 1989) (plurality opinion).
\textsuperscript{340} See Arthur S. Leonard, Sexuality and the Law: An Encyclopedia of Major Legal Cases 364-67 (1993) (discussing the background of the \textit{Braschi} litigation); Christensen, supra note 2, at 1365-72 (discussing \textit{Braschi} and other cases according rights on the basis of functional family characteristics); Note, \textit{Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family}, 104 Harv. L. Rev. 1640 (1991) (same).
\textsuperscript{341} \textit{Braschi}, 543 N.E.2d at 55 (Titone, J., plurality opinion) (citations omitted). Since \textit{Braschi} (and a subsequent decision upholding a rigorous list of factors to be utilized in determining "family" membership for rent stabilization eligibility, \textit{Rent Stabilization Ass'n v. Higgins}, 630 N.E.2d 626, 629 (N.Y. 1993)), lower courts in New York have made clear that these are not merely \textit{pro forma} requirements, and have strictly limited the circumstances in which same-sex couples may be treated as "family." See, e.g., GSL Enters., Inc. v. Lopez, 656 N.Y.S.2d 637, 638 (App. Div. 1997) (finding inadequate evidence of a family relationship where the couple lived together for eleven years, sharing expenses and joint credit cards); 390 West End Assocs. v. Wildfoerster, N.Y. L.J., May 30, 1996, at 27 (N.Y. App. Term. May 1996) (holding that the surviving partner in a gay relationship was not a "family member," despite satisfying most of the criteria, because the deceased partner did not leave a will or name his partner as an insurance policy beneficiary).
\textsuperscript{342} See Case, supra note 287, at 1664-66 (questioning the "unbounded enthusiasm" of gay and lesbian advocates for \textit{Braschi} in light of "the rather conservative things the Court of Appeals required of Braschi and his lover"); Vetter, supra note 233, at 4-5 (discussing invasions of privacy required to establish domestic partnership as compared to non-intrusive marriage eligibility).
Nor does the absence of suspected freeloaders eliminate the problem. In *Phillips v. Wisconsin Personnel Commission,* \(^{343}\) the Wisconsin Court of Appeals found that the denial of health care benefits to the partner of a state employee in a "committed lesbian relationship" was not discriminatory.\(^{344}\) Even being "spouse equivalent[s]" does not make domestic partners "similarly situated" to married couples, the court held, because "[t]he law imposes no mutual duty of general support . . . on unmarried couples of any gender, as it does on married persons."\(^{345}\) Similarly, in *City of Atlanta v. McKinney,* \(^{346}\) the Georgia Supreme Court held that city workers' domestic partners and their children could not receive health benefits because their reliance upon the employees for support and care was not a legal dependency.\(^{347}\)

Of course, there are answers to these arguments and explanations for the differing levels of commitment in marriage and domestic partnership.\(^{348}\) But one of the most common explanations—that diminished commitment is justified by the meager benefits conferred—exacty begs the question whether domestic partnership merits societal support because of its functional similarity to marriage. Opponents of same-sex marriage complain that it would undermine

344. Id. at 123-24.
345. Id. at 126.
346. 454 S.E.2d 517 (Ga. 1995).
347. Id. at 521.
348. For example, in *Tumeo v. University of Alaska,* No. 4FA-94-43 Civ., 1995 WL 238359 (Alaska Super. Ct. Jan. 11, 1995), aff'd, 933 P.2d 1147 (Alaska 1997), an Alaska court dismissed as "tautological" the argument that the denial of employee domestic partner benefits is nondiscriminatory because married and unmarried workers are not "similarly situated" with respect to family support obligations. Id. at *7. "The University's argument is based on . . . logical error" said the court. "The University says it is not discriminating based on marital status but rather on the legal obligation of mutual support. However, by the University's logic the only way to have a legal obligation of mutual support is through marriage. Thus, this is a distinction without meaning . . . ." Id. Under these circumstances, the court held that enough equivalency was made out to maintain a marital discrimination complaint by the fact that the plaintiff and his partner had executed an "Affidavit of Spousal Equivalency" attesting that they were "jointly responsible for each other's common welfare and financial obligations." Id. at *1, *8.

The adverse selection argument has not been borne out by the experience to date in domestic partner benefit programs implemented by public and private employers. The enrollment in such programs has been small (since both partners in most same-sex couples are employed and eligible for their own employer benefit programs), and the claims experience has not revealed a heightened level of risk. See Rickel, *supra* note 334, at 741-50 (tracking private employer experiences); Juel, *supra* note 222, at 330-36 (discussing the impact of domestic partner initiative on municipalities); Louise Kertesz, *Gay Partner Benefits,* Bus. Ins., Apr. 19, 1993, at 6 (finding domestic partner costs to be "insignificant" because same-sex partners tend to be younger with fewer medical problems and because both partners are employed); *Domestic Partner Coverage Not Driving Up Employer Health Costs,* Benefits Today, Apr. 17, 1992, at 121 (report on cost experience to risk and insurance managers).

349. See, e.g., Juel, *supra* note 222, at 342 (stating that "these initiatives provide very limited benefits").
domestic partner laws and scuttle litigation to secure family rights without regard to marital status.\textsuperscript{350} They may well be correct on both counts, but it is also clear that domestic partnership without significant obligation weakens the case for equality of treatment. And for those pursuing a status in lieu of marriage, there can be no doubt that the domestic partner option is correspondingly less supportive of the companionate cohabitation of same-sex couples.

IV. THE NURTURING OF CHILDREN

Among both proponents and detractors, same-sex marriage is seen as relevant primarily to the relationships of the cohabiting partners. It is assumed to have little bearing on issues related to the nurturing of children. Supporters tend to be dismissive of the connections between marriage and parenting.\textsuperscript{351} To gay marriage enthusiast Andrew Sullivan, “a difference that . . . is inherent between homosexual and heterosexual adults” is that “[t]he latter group is committed to the procreation of a new generation. The former simply isn’t.”\textsuperscript{352} William Eskridge, while acknowledging the growing significance of gay and lesbian parenting, asserts that same-sex marriage would not alter parental relationships because “[t]he legal benefits and obligations of marriage . . . do not directly relate to children.”\textsuperscript{353} Marianne Hojgaard Pedersen, head of section at the Denmark Ministry of Justice, defends her country’s decision to exclude parental rights from those afforded to same-sex couples as “based on the assumption that registered partners can have children separately but not together.”\textsuperscript{354}

Reflecting essentially the same points of view, opponents of legalized same-sex unions contend that the institution of marriage is so much about procreation and childrearing that it has little to do with gay people. Judge Richard Posner bases his preference for a marriage simulacrum over the genuine article in part on a belief that marriage—“a status rich in entitlements”—was designed not only “with

\textsuperscript{350} See Ettelbrick, \textit{Since When,} supra note 60, at 17; Ettelbrick, \textit{Wedlock Alert,} supra note 61, at 122, 142-45; Polikoff, \textit{supra} note 19, at 1549.

\textsuperscript{351} Of course, not all proponents do so. See, e.g., Strasser, \textit{supra} note 18, at 75-99 (discussing custody and adoption issues in the context of advocating same-sex marriage); Chambers, \textit{supra} note 22, at 461-70 (analyzing the legal advantages afforded to married couples in the parenting of children).

\textsuperscript{352} Sullivan, \textit{supra} note 294, at 196. Sullivan admits that “there are major qualifications to this—gay men and lesbians are often biological fathers and mothers,” but he insists that “in general, the difference holds. The timeless, necessary, procreative unity of a man and a woman is inherently denied homosexuals; and the way in which . . . parenthood transforms their relationship, is far less common among homosexuals than among heterosexuals.” \textit{Id.}

\textsuperscript{353} Eskridge, \textit{supra} note 17, at 117. Eskridge adds that, “[t]o the extent the law of marriage focuses on children (by and large it does not), it is agnostic as to where the children come from.” \textit{Id.} at 118. “All [parent-child] duties are as applicable to homosexual parents as they are to heterosexual parents.” \textit{Id.} at 117.

\textsuperscript{354} Pedersen, \textit{supra} note 279, at 290; \textit{see supra} note 285 and accompanying text.
heterosexual marriage in mind," but "more specifically heterosexual marriages resulting in children." From an entirely different perspective, Paula Ettelbrick worries that, because the "origins of marriage are deeply imbedded in procreation and the two-parent family," lesbian and gay parents "will need more than marriage to address the many issues of their family structures that will never fit the heterosexual model."

The widespread denial (or at least de-emphasis) of the nexus between same-sex marriage and gay and lesbian parenting is perplexing. Not only does it fail to take adequate account of the profound changes in lesbian and gay family life that have been wrought by the increased incidence of childbearing and childrearing, it also ignores issues that are of paramount importance to a segment of the gay population that may be among the most likely to want to marry (and to need the legal protections that marriage can afford). The linkage between parenting and marriage historically has been one of the essential attributes of the value-laden and legally-favored nuclear family. However diminished that linkage may be today in demographic terms, it should not be surprising that much of the legal tradition remains intact, still favoring the support of married parents over those who do not or cannot marry.

In order to fully evaluate whether a simulacrum is just as good as marriage, or to decide if non-marriage litigation strategies can effectively address the problems facing lesbian and gay families, it is

355. Posner, supra note 23, at 313; see supra notes 23-28 and accompanying text; see also Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) ("[M]arriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race; [therefore,] the refusal of the state to authorize same-sex marriage[s] results from [the] impossibility of reproduction rather than from an invidious discrimination.").

356. Ettelbrick, Wedlock Alert, supra note 61, at 160. Ettelbrick concedes that "marriage could provide some protection for [lesbian and gay family] relationships," but, she says, "even then, overattachment to marriage as the guidepost could equally destroy the expectations of the parties." Id. at 156; see also Weston, supra note 62, at 35 (stating that many lesbians and gay men with "nonprocreative sexual identities" reject the necessary linkage between "family ties" and "marriage, childbearing, or childrearing").

357. See supra notes 185-89 and accompanying text.

358. See supra notes 107-10 and accompanying text.

359. According to the Census Bureau, the single-parent household is by far the fastest growing family type in the United States, accounting for twenty-six percent of children under eighteen in 1991, as compared to only twelve percent in 1970. Bureau of the Census, U.S. Dep't of Commerce, Current Population Reports, Series P-20, No. 461, Marital Status and Living Arrangements: March 1991, at 8 tbl.F (1992). It is estimated that more than half of today's children will live in a single-parent household for some portion of their childhood. Coontz, supra note 187, at 182; see generally Christensen, supra note 2, at 1311-16 (discussing the changing demographics of non-traditional families in the United States).

360. See Chambers, supra note 22, at 461-63.

361. See supra note 51 and accompanying text.

362. See supra notes 65-69 and accompanying text.
absolutely necessary to consider the affects of such alternatives on the nurturing of children. A recurring series of real-life family issues—some involving the creation of rights in same-sex parented families; others concerned with extinguishing rights and the limits of parental autonomy—offer contexts for comparison.

A. Creating Rights: Two-Mom and Two-Dad Families

To say that gay and lesbian relationships are inherently nonprocreative is true only as qualified by the biological reality that a same-sex couple obviously cannot have children unaided by someone external to their relationship. But that is true as well in many opposite-sex relationships, and the law tends to be generous in support of such collaborative parenting when the couple who will raise the child is united by marriage. The legal obstacles faced by same-sex couples in the same situation vary depending upon whether the collaboration occurs in the reproductive process or after the child’s birth by the expedient of adoption.

1. Children of Collaborative Reproduction

Although the procreative collaboration leading to a gay-lesbian family can take the simple form of a cooperative arrangement between a same-sex couple and someone (or another couple) of the opposite gender having children and raising them in a common extended family, such arrangements clearly are not the norm. For lesbians—who have been the most prolific participants in the same-sex-parenting baby boom—it is far more typical to make use of artificial insemination with the aid of a sperm donor external to the planned family circle.

Artificial insemination has become a more accessible reproductive technique than in earlier times through the availability of sperm banks and physician services established primarily to aid married couples in overcoming male sterility as an obstacle to having children. For the lesbian couple without a known donor (or simply preferring anonymity), access to such services can be problematic. In a 1979 survey published in the New England Journal of Medicine, ninety percent of physicians reported that they did not perform artificial insemination services for a single woman. Many lesbians have reported resist-

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364. See supra notes 188-89 and accompanying text.

365. See supra notes 191-93 and accompanying text.

ance from physicians based upon both marital status and sexual orientation.367

Even when insemination is successfully achieved and the child is born, there remains a major obstacle to the formation of a societally-accepted family: only the biological mother is recognized as having a legal relationship to the child. No matter how much the birth of the child was a collaborative effort that would not have taken place without the involvement of both partners, no matter the financial, caregiving, and emotional support provided by the non-biological mother, she is in the eyes of the law (and much of society generally) a "legal stranger" to the child.368 Her authority to make health care decisions, to have access to the child at school, to review educational records, and to carry out countless other parental duties will be severely limited, if it exists at all. Conversely, the child may be deprived of rights that are usually incident to the parental relationship, such as financial support, governmental or employer-provided family benefits, and inheritance.369 In the event of the biological mother's death or incapacity, the child's relationship with the only other parent he or she has ever known may be severed at the discretion of an unsympathetic judge.370


368. See generally Benkov, supra note 363, at 147-57 (discussing issues faced by women who are not biological mothers); Paula L. Ettelbrick, Who Is a Parent?: The Need to Develop a Lesbian Conscious Family Law, 10 N.Y.L. Sch. J. Hum. Rts. 513, 516-21 (1993) (noting that laws fail to account for lesbian families); Polikoff, Two Mothers, supra note 59, at 468-73 (discussing how the theories underlying the legal definitions of parent and non-parent deny the existence of non-traditional families); Sheila M. O'Rourke, Note, Family Law in a Brave New World: Private Ordering of Parental Rights and Responsibilities for Donor Insemination, 1 Berkeley Women's L.J. 140 (1985) (advocating private ordering for donor insemination and the freedom to create diverse family systems).

369. See, e.g., Rovira v. AT&T, 817 F. Supp. 1062, 1072 (S.D.N.Y. 1993) (holding that an employer was not obligated to provide benefits to children raised jointly by an employee and her lesbian partner); Chambers, supra note 22, at 463-65 (discussing support obligations, workers' compensation, and Social Security benefits); Ralph C. Brasher, Children and Inheritance in the Nontraditional Family, 1996 Utah L. Rev. 93, 95-103 (discussing the inheritance rights of children in alternative families).

370. Compare McGuflin v. Overton, 542 N.W.2d 288, 292 (Mich. Ct. App. 1995) (denying custody to a lesbian de facto coparent following the death of the child's biological mother, despite power of attorney and a will purporting to transfer parental powers to petitioner), with In re Guardianship of Astonn H., 635 N.Y.S.2d 418, 424 (N.Y. Fam. Ct. 1995) (awarding guardianship to the deceased mother's life partner in the best interests of the child). See also Polikoff, Two Mothers, supra note 59, at 527-33 (discussing other cases in which "the surviving lesbian mother ultimately prevailed," but only after the child has "face[d] lengthy litigation and the potential disruption of the only home he has known"); Amy L. Brown, Note, Broadening Anachronistic Notions of "Family" in Proxy Decisionmaking for Unmarried Adults, 41 Hastings L.J. 1029, 1036-43 (1990) (noting the uncertain decisionmaking authority in the event of a lesbian partner's incapacity).
By contrast, the biologically unconnected husband whose wife gives birth to a child by means of donor artificial insemination typically has immediate parental rights and obligations. In more than thirty states, he will acquire them automatically by statute. Section 5(a) of the widely-adopted Uniform Parentage Act provides that if, "with the [written] consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived." Under the more recently promulgated Uniform Status of Children of Assisted Conception Act, the husband's parental status is even less subject to doubt; he is conclusively deemed to be the father unless he obtains a judicial determination that he did not consent to his wife's artificial insemination.

The same result is likely to be reached even in the absence of a statute by reliance on the common law presumption of legitimacy—that a husband is deemed to be the father of any child born during a marriage—or by general equitable principles. The lesbian functional coparent enjoys no such protected status, certainly not at common law and not by statute. Her recourse, if any, must come through the tortuous process of adoption.

For a gay male couple seeking parenthood with a biological connection to the child, there is the possibility of a surrogacy arrangement by which a woman agrees to conceive with donated sperm and then give

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374. See, e.g., People v. Sorensen, 437 P.2d 495 (Cal. 1968) (finding the common law presumption of husband's consent to be the legal father is enforceable); Strnad v. Strnad, 78 N.Y.S.2d 390, 391 (Sup. Ct. 1948) (finding a child to be "semi-adopted" by husband's consent to insemination); L.H. v D.H (In re D.L.H.), 419 N.W.2d 283 (Wis. Ct. App. 1987) (concluding that the defense of equitable estoppel may be used as a defense to a mother's paternity suit); see also Andrews, supra note 371, § 14.02[1], at 14-7 to -11 (discussing rights of husbands when their wives are artificially inseminated); Andrea E. Stumpf, Note, Redefining Mother: A Legal Matrix for New Reproductive Technologies, 96 Yale L.J. 187 (1986) (advocating a carefully designed legal framework to safeguard the interests of all parties involved in complex reproductive arrangements).
up the child at birth to be raised by the donor and his partner.\textsuperscript{375} Gestational surrogacy—the procedure whereby an egg from one woman is fertilized and implanted in the womb of another for gestation—offers a means which can be utilized by a lesbian couple so that both are biological, though not genetic, parents of the child.\textsuperscript{376} There are obstacles, however, that severely limit the use of these techniques by both genders. Although, strictly speaking, neither involves the use of "surrogate" mothers, the procedures are sufficiently analogous to the controversial practice of infertile couples contracting with paid surrogates as to taint them with many of the same objections.\textsuperscript{377} To the extent that surrogate contracts are banned altogether, as they are in many jurisdictions,\textsuperscript{379} gay people have no cause to complain about disparate treatment.

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375. See Benkov, supra note 363, at 128-34; Martin, supra note 189, at 106, 166-67; Bernstein, supra note 363, at 14-16; Hollandsworth, supra note 189, at 199-201.


377. The woman who gives birth to a child to be raised by a gay couple is not a "surrogate" in the usual sense of the term, that is, she is a stand-in for the infertile wife of the child’s father. See Hollandsworth, supra note 189, at 199-200. As a matter of public policy, however, surrogacy is controversial largely because it entails the participation in the birth of a child by a biological parent who does not intend to be the social parent. In this sense, a gay male couple contracting with a woman to give up her child for them to raise clearly is employing the services of a surrogate.

On the other hand, lesbian couples who make use of a procedure analogous to gestational surrogacy would not meet this definition since the gestational mother manifestly does intend to participate fully in the upbringing of her child. Neither is the genetic mother an "ovum donor" in the sense that that role is also controversial, because she too will function as a social parent. See King, supra note 376, at 341. In spite of these policy differences, there has been no rush to embrace this form of lesbian parenting as a logical extension of the widely accepted practice of sperm donor artificial insemination.

378. Academic critics of surrogacy have tended to be more numerous and outspoken than its supporters. See, e.g., Martha A. Field, Surrogate Motherhood (1990) (criticizing surrogacy contracts); Martha A. Field, Surrogacy Contracts—Gestational and Traditional: The Argument for Nonenforcement, 31 Washburn L.J. 1, 6 (1991) (same); Herbert T. Krimmel, Can Surrogate Parenting Be Stopped? An Inspection of the Constitutional and Pragmatic Aspects of Outlawing Surrogate Mother Arrangements, 27 Val. U. L. Rev. 1 (1992) (opposing the legalization of surrogate mother arrangements); Margaret Jane Radin, Market-Inalienability, 100 Harv. L. Rev. 1849, 1909-11 (1987) (arguing that coercion plays a role in selling "children"). But see John Lawrence Hill, What Does It Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights, 66 N.Y.U. L. Rev. 353 (1991) (arguing that the claims of the intended parents outweigh those of the surrogate); Robertson, supra note 376; Marjorie Maguire Shultz, Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality, 1990 Wis. L. Rev. 297 (arguing that technologically assisted reproductive arrangements should be honored).

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In a small but growing number of states, however, surrogacy arrangements are either explicitly authorized by statute or otherwise legally permitted. As in the case of the basic artificial insemination statutes, the legal sanctioning is crafted for the aid of married couples. The Uniform Status of Children of Assisted Conception Act, while avoiding an outright endorsement of surrogacy contracts, proposes an optional mechanism for legally validating the arrangements. For those who qualify, the status reward is that "[u]pon birth of a child to the surrogate, the intended parents are the parents of the child," and the surrogate has no parental role. By definition, however, "intended parents" are limited to "a man and woman, married to each other, who enter into an agreement... that they will be the parents of a child born to a surrogate through assisted conception." Several jurisdictions have adopted statutes patterned by and large on the model act; in only one state, Arkansas, does the right to contract with a surrogate extend to an unmarried man.

The use of gestational surrogacy has become more widespread since the influential decision of the California Supreme Court in Johnson v. Calvert approving such arrangements even without a surrogacy statute. Acknowledging that "both genetic consanguinity and giving birth" are legitimate means of establishing parenthood, the court held that the parties' agreement as to parental rights should be controlling "when the two means do not coincide in one woman." It is unlikely that the precedent will be helpful to validate agreements between

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382. The procedure requires judicial approval of the surrogacy agreement following a "home study" to demonstrate that the intended parents meet the same standard of fitness as required for adoption. The surrogate mother may unilaterally terminate the agreement for any reason within 180 days of insemination. Id. §§ 5-9.
383. Id. § 8(a)(1) (emphasis added).
384. Id. § 1(3).
387. 851 P.2d 776 (Cal. 1993); see Robertson, supra note 376, at 923-24 (discussing the impact of the Calvert decision).
388. Johnson, 851 P.2d at 782.
would-be lesbian coparents, however, as the court expressly declined to find that "the child has two mothers."\textsuperscript{389} Assuming all other obstacles to the use of surrogacy by a gay or lesbian couple can be overcome, the best that can be hoped for in the present state of the law is that one partner will have parental status, and that the outside collaborator's rights will have been effectively relinquished. Again, the "other" same-sex parent's resort, if any, must be to the uncertainties of the adoption process.

2. Forming and Ratifying Families by Coparent Adoption

Unknown to the common law, adoption has nevertheless been firmly established as a statutory means of creating legal parent-child relationships in the absence of biological connection since the mid-nineteenth century.\textsuperscript{390} Originally enacted more to legitimize existing informal transfers of children to substitute parents than to form new relationships,\textsuperscript{391} adoption statutes have long been the principal means whereby childless couples acquire parental roles. Both purposes continue in modern practice, but supplanted in recent times by the formalization of relationships between stepparents and their spouses' children as the most common form of adoption.\textsuperscript{392}

Gay and lesbian couples also turn to the adoption laws to form new parent-child families as well as to ratify existing ones. Sometimes their circumstances are functionally equivalent to those of marital partners; but often—especially in the case of children conceived by new collaborative reproduction techniques—resort to adoption would be unnecessary for similarly-situated married couples.\textsuperscript{393}

Adoption by homosexuals is prohibited by statute in only two states, Florida\textsuperscript{394} and New Hampshire.\textsuperscript{395} In others, responses to gay

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  \item \textsuperscript{389} Id. at 781 n.8. The court was intent upon identifying which one of the two women with biological ties to the child was the legal parent, holding only that, "where a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the natural mother." \textit{Id.} at 782 n.10; see King, supra note 376, at 357-58 (discussing implications of \textit{Johnson v. Calvert}, 851 P.2d 776 (Cal. 1993), for lesbian parents).
  \item \textsuperscript{390} See Joan Heifetz Hollinger, \textit{Introduction to Adoption Law and Practice}, in Adoption Law and Practice, \textit{supra} note 371, \S\,1.02, at 1-18 to -24.
  \item \textsuperscript{391} See \textit{id.} \S\,1.02, at 1-20.
  \item \textsuperscript{392} See \textit{id.} \S\,1.05[2][a], at 1-54.
  \item \textsuperscript{393} See \textit{supra} notes 371-74, 383-84 and accompanying text.
  \item \textsuperscript{394} Fla. Stat. Ann. \S\,63.042(3) (West 1997). The Florida Supreme Court upheld the constitutionality of the statute in a challenge based on due process and privacy grounds, but remanded an equal protection challenge for further consideration. \textit{Cox v. Florida Dep't of Health & Rehabilitative Servs.}, 656 So. 2d 902 (Fla. 1995).
  \item \textsuperscript{395} N.H. Rev. Stat. Ann. \S\S\,170-B:4, 170-F:6 (1994). In an advisory opinion on the then-pending legislative prohibition, the New Hampshire Supreme Court upheld the adoption ban (though not a ban on gay foster parenting) on the grounds that the legislature might rationally conclude that a gay adoptive parent's "role model can influence the child's developing sexual identity." Opinion of the Justices, 525 A.2d 1095, 1099 (N.H. 1987).
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and lesbian adoption range from overt hostility, to cautious neutrality, to supportive acceptance—both from judges and administrators. Even when not formally precluded, approval is highly dependent on the individualized discretion of social services personnel and judges who must decide whether a given adoption meets the universal “best interests of the child” standard. As compared to married couples—who are always given the highest priority for placements—gay people may find that they have access only to the most difficult-to-place children, or that there simply are none available for them to adopt.

Adoption petitions filed jointly by same-sex couples are surprisingly uncommon. Most statutes provide that “any individual” is eligible to adopt, but that married couples must petition jointly; typically they are silent as to other joint adoptions. There are reported cases of successful joint petitions by gay and lesbian parents, and there is

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396. Compare In re Pima County Juvenile Action B-10489, 727 P.2d 830, 835 (Ariz. Ct. App. 1986) (“It would be anomalous for the state on the one hand to declare homosexual conduct unlawful and on the other create a parent after that proscribed model . . . .”), with In re Adoption of Charles B., 552 N.E.2d 884, 888 (Ohio 1990) (homosexual activity “must be shown to have a direct or probable adverse impact on the welfare of the child” if it is to be a basis for denying adoption), and In re Adoption of Evan, 583 N.Y.S.2d 997, 1001 (Sur. Ct. 1992) (“[A] child’s best interest is not predicated or controlled by parental sexual orientation.”).

397. In New York, for example, administrative regulations prohibit the rejection of adoption petitions on the basis of marital status or sexual orientation. N.Y. Comp. Codes R. & Regs. tit. 18, § 421.16[h][2] (1996). By contrast, California Governor Pete Wilson has sought to block gay and lesbian adoptions in that state by administrative mandate to public and private adoption agencies. See Jane Gross, Gays, Singles Also Targets of Adoption Rule, L.A. Times, Sept. 8, 1996, at A3. Legislation that would legalize such adoptions has been opposed by the governor on the grounds that “all children should be brought up in a home where parents have a long-term commitment and the sanctity of marriage.” Max Vanzi, Panel OKs Bill that Would Let Gay Couples Adopt, L.A. Times, Apr. 3, 1997, at A3.

398. See Hollinger, supra note 390, §§ 1.01[2][b], 1.03[2]. The Uniform Adoption Act provides that a “court shall grant a petition for adoption if it determines that the adoption will be in the best interest of the minor,” Unif. Adoption Act § 3-703(a), 9 U.L.A. 59 (West Supp. 1997), and that “[t]he petitioner is a suitable adoptive parent for the minor,” id. § 3-703(a)(6), 9 U.L.A. 60. As to the latter, an evaluation must be undertaken to ascertain suitability, taking account of a number of specific factors (none of which could be construed to include sexual orientation), plus “any other fact or circumstance that may be relevant in determining whether the individual is suited to be an adoptive parent, including the quality of the environment in the individual’s home.” Id. 2-203(d)(10), 9 U.L.A. 21.

399. See Elizabeth Bartholet, Family Bonds: Adoption and the Politics of Parenting 70-72 (1993); Chambers, supra note 22, at 469-70; Hollandsworth, supra note 189, at 197-98.

400. The Uniform Adoption Act, which is typical in this regard, provides that “any individual may adopt or be adopted by another individual for the purpose of creating the relationship of parent and child between them,” Unif. Adoption Act § 1-102, 9 U.L.A. 7 (West Supp. 1997); and that “[t]he spouse of a petitioner must join in the petition unless legally separated from the petitioner or judicially declared incompetent,” id. § 3-301(b), 9 U.L.A. 43.

401. In a widely-reported 1997 decision, the New Jersey Department of Human Services entered into a consent decree in a class action suit, agreeing to permit gay
language in a few appellate court decisions indicating that statutory silence does not preclude joint adoption. Nevertheless, same-sex couples desirous of parenting by adoption are more likely to do so by the expedient of petitioning in the name of only one partner. Given the uncertainties and resistance to parenting still faced by gay people, lawyers often advise their clients not to disclose their sexual orientation unless specifically asked during the adoption process. There are serious risks in this approach if no steps are taken to protect the “other” parent’s interests. In one reported case, for example, a gay male couple received a social service case worker’s recommendation for an adoption, but petitioned for court approval in the name of only one partner. When the child remained with the non-adoptive parent after the couple split up, the original adoption order was revoked.

In three factual contexts, then, gay and lesbian families may need recourse to the adoption laws to legally ratify the status of one of the existing de facto parents: (1) in the case of children born by means of collaborative reproduction; (2) in the case of children legally adopted by only one of two intended parents; and (3) in the case of children of former opposite-sex relationships brought into newly-formed lesbian or gay families. Only in the latter situation are their circumstances genuinely comparable to those of heterosexual stepparents. In the other two, they are forced to submit to the uncertainties of adoption to ratify family relationships that would not have been formed at all without the coparenting participation of both partners. And in all three situations, they face a serious statutory obstacle that may preclude all legal redress.

Because the historic purpose of adoption is to create a new legal family entity, all parental rights and obligations of the child’s biologi-
cal (or other legally recognized) parents are terminated when they are displaced by the new adoptive parents. 405 Needless to say, no parent is willing to give up her own parental rights to ratify her partner's de facto parental status, and application of this principle would negate the use of adoption in any of these situations. For married couples, the law has a ready exception to the cut-off rule in the form of special statutory provisions enabling stepparents to adopt their spouses' children without altering the spouses' parental rights. 406 The cumbersome process of adoption is also streamlined for married stepparents by waiver of home study requirements and lengthy waiting periods. 407

Except in Iceland, 408 there are no domestic partner laws that provide comparable "stepparent" privileges to the partners of unmarried cohabitants. There is a model simulacrum readily at hand, however, and litigation successes have secured coparental adoption rights without the need for marriage in a number of states. The simulacrum is to be found in the modified version of the Uniform Adoption Act promulgated by the National Commissioners on Uniform State Laws in 1994. Although not exactly a model of legislative clarity, section 4-102(b) of the act provides that "[f]or good cause shown, a court may allow an individual who . . . is not a spouse, but has the consent of the custodial parent," to petition for adoption and be "treated as if the petitioner were a stepparent." 409 The drafters' official comment explains that it is intended to cover "the de facto stepparent or 'second parent'" scenario in cases involving same-sex couples. 410

405. See Hollinger, supra note 390, § 1.01[2][c], at 1-12. The Uniform Adoption Act, for example, provides that "each adoptive parent and the adoptee have the legal relationship of parent and child," Unif. Adoption Act § 1-104, 9 U.L.A. 8 (West Supp. 1997), and "the legal relationship of parent and child between each of the adoptee's former parents and the adoptee terminates." Id. § 1-105(1), 9 U.L.A. 8.

406. See Lawrence P. Hampton, The Aftermath of Adoption: The Economic Consequences—Support, Inheritances and Taxes, in Adoption Law and Practice, supra note 371, § 12.03[1][a][iii]. The structure of the Uniform Adoption Act is typical in this regard: "A stepparent has standing . . . to adopt a minor stepchild who is the child of the stepparent's spouse," Unif. Adoption Act § 4-102(a), 9 U.L.A. 67 (West Supp. 1997). If the spouse has either joint or sole legal custody of the child, and the child has "resided primarily with the spouse and the stepparent" for a specified period of time. Id. § 4-102(a)(2), 9 U.L.A. 67. "An adoption by a stepparent does not affect . . . the relationship between the adoptee and the adoptee's parent who is the adoptive stepparent's spouse or deceased spouse." Id. § 4-103(b)(1), 9 U.L.A. 68.

407. See Hollinger, supra note 390, § 1.05[2][a], at 1-54.

408. See supra note 285.


410. See id. § 4.102 cmt. 9 U.L.A. 67. The comment cites with approval court decisions in Vermont and New York approving coparent (or "second parent") adoptions by the same-sex partners of lesbian parents. See also Susan Chira, Law Proposed to End Adoption Horror Stories, N.Y. Times, Aug. 24, 1994, at A12 (quoting Joan Heifetz Hollinger, the act's principal drafter, as saying that the Uniform Adoption Act would make it easier for gay couples to adopt their partner's children).
To date, the new model act has been adopted in only one state, Vermont, which had previously approved same-sex coparent adoptions by decision of the state’s supreme court. Indeed, one of the most remarkable success stories in the quest for a body of gay-friendly family law has been the judicial decisions authorizing such adoptions. Since Vermont became the first state to do so in 1993, either the highest court or an intermediate appellate court in seven jurisdictions has approved second-parent adoptions by the same-sex partners of biological or adoptive parents. Statutory obstacles have been overcome either by ignoring them in the name of public policy, by reconceptualizing petitions as applications for joint adoption by unmarried couples, or by creative statutory construction whereby coparent adoption is deemed functionally equivalent to stepparent adoption. By similar rationales, lower court judges in many other jurisdictions have reached the same conclusions.

413. The jurisdictions are Connecticut, District of Columbia, Illinois, Massachusetts, New Jersey, New York, and Vermont. All of the decisions are discussed in Christensen, supra note 2, at 1406-14.
414. See, e.g., Adoptions of B.L.V.B. & E.L.V.B., 628 A.2d at 1275 (“To deny the children of same-sex partners, as a class, the security of a legally recognized relationship with their second parent serves no legitimate state interest.”); In re Adoption of Evan, 583 N.Y.S.2d 997, 1000 (Sur. Ct. 1992) (relying upon the court’s inherent “equitable power” to waive a statutory cut-off to avoid “an absurd outcome which would nullify the advantage sought by the proposed adoption”); In re Adoption of Minor (T.), 17 Fam. L. Rep. (BNA) 1523 (D.C. Super. Ct. Aug. 31, 1991) (stating that statutory termination is “merely directory” and subject to waiver in order to avoid a “particularly counterproductive and even ludicrous result.”)
415. See, e.g., Adoption of Tammy, 619 N.E.2d 315, 321 (Mass. 1993) (holding that a termination provision is “intended to apply only when the natural parents (or parent) are not parties to the adoption petition”); In re M.M.D. & B.H.M., 662 A.2d 837, 843 (D.C. 1995) (“The result should be the same whether members of an unmarried couple living together in a committed personal relationship seek to adopt sequentially or simultaneously.”); In re K.M. & D.M., 653 N.E.2d 888, 894 (Ill. App. Ct. 1995) (liberally construing the statute to permit “an adoption brought by two unmarried individuals” of the same sex, “including a parent of the child to be adopted” (quoting In re E.S., 1994 WL 157949, at *6 (Ill. Cir.))).
416. See, e.g., In re Jacob, 660 N.E.2d 397, 405 (N.Y. 1995) (observing that the statutory cut-off was “designed as a shield to protect new adoptive families, [and] was never intended as a sword to prohibit otherwise beneficial intrafamily adoptions by second parents”); In re Adoption of Two Children by H.N.R., 666 A.2d 535, 539 (N.J. Super. Ct. App. Div. 1995) (finding no evidence “that the legislature ever meant to terminate the parental rights of a biological parent who intended to continue raising a child with the help of a partner”); In re Adoption of Baby Z, 699 A.2d 1065, 1072 (Conn. Super. Ct. 1996) (finding that coparent adoption is “most analogous to a step-parent adoption and, with liberal construction [of applicable statute], the biological rights of the mother . . . need not be terminated”).
Impressive though these results have been, coparent adoption is still foreclosed to same-sex partners in far more places than it is available. Even when theoretically accessible, petitioners face demanding home studies and a lengthy approval process with no assurance of ultimate success. And there is no counterpart to the expedited adoption process or automatic parental status in cases of artificial insemination that smooths the way for married couples. Although a marriage simulacrum of sorts may be available to some lesbian and gay parents, it is, at best, decidedly non-nurturing and second-class.

B. Extinguishing Rights: The Limits of Family Autonomy and Privacy

No attributes of the traditional nuclear family are more firmly entrenched or fiercely defended than the twin pillars of family privacy and the autonomy to resist those who would encroach upon it. From the times of Coke and Blackstone, the common law has reflected that families, "having formed the first society, among themselves," are entitled to autonomously govern their own affairs as a matter of "lex naturae" and "the course of nature." Although long since understood to be neither absolute nor as much a unitary right


418. In about three-quarters of the states, there are no reported cases of same-sex coparental adoptions being approved; and in some states appellate courts have held that such adoptions are not permitted by state law. See In re Angel Lace M., 516 N.W.2d 678, 686 (Wis. 1994) (coparent adoption would result in termination of legal adoptive parent's rights); In re Adoption of T.K.J. & K.A.K., 931 P.2d 488 (Colo. Ct. App. 1996) (adoption statute forecloses coparent adoption).

419. See Chambers, supra note 22, at 469-70; see also Burke, supra note 190, at 116-32, 204-19 (describing a lesbian couple's efforts to demonstrate the "normality" of their family life to a social worker as they become more radicalized in frustration at the obstacles they encounter to co-parent adoption).

420. See supra note 407 and accompanying text.

421. See supra notes 371-74 and accompanying text.

422. See supra notes 111-13 and accompanying text.

423. 1 William Blackstone, Commentaries *47.


425. As early as 1852, for example, the leading treatise on domestic relations recognized that "children are not born for the benefit of the parents alone, but for the country; and . . . the interest of the public in their morals and education should be protected." Joel Prentiss Bishop, Commentaries on the Law of Marriage and Divorce and Evidence in Matrimonial Suits 517-18 (1852). The erosion of family autonomy and the rise of state regulation in nineteenth and twentieth century America is discussed in Teitelbaum, supra note 80, at 1147-63.
as a group of individual rights of separate family members, the legal vitality of the autonomy principle persists. It animates both family law and much of the constitutional law of privacy, both in support of companionate cohabitation and for the nurturing of children.

It is when the parent-child family becomes disjointed from the coupled family—as so often happens in modern family life—that the most serious tensions arise in claims based on parental autonomy. Nowhere is that more true than in the case of two recurring dilemmas in gay and lesbian family life. The first, involving coparent rights when relationships come to an end, entails the application of the autonomy principle with sometimes perverse results. The second, in which sperm donors assert parental rights, often turns on traditional notions of autonomy that simply do not address the real clash of interests at stake.

1. The Functional Parent’s Role at the End of a Relationship

The dissolution of a family with minor children is seldom a propitious time for sorting out parental rights. When only one parent possesses any legally-acknowledged rights in relation to a child, it is a recipe for even more than the usual measure of shattered expectations. Except in the atypical case of successful joint or second-parent adoption, the nonbiological parent in a lesbian or gay family (or non-adaptive parent, as the case may be) is unlikely to have any legal claim for continued access to the child when the couple’s relationship has ended. The legal tradition of parental autonomy dictates that not even visitation, much less a share in custody, should be awarded over the opposition of the legal parent. Even the existence of an express coparenting agreement—that two women will participate in artificially inseminating one of them, and thereafter in supporting and raising the child, each as equal coparents—usually has not been enough to limit the biological mother’s right to change her mind and eliminate all contact between her estranged partner and the child she helped create.

426. Jana Singer contends that it was not until the Supreme Court’s constitutional privacy decisions of the 1970s involving marriage and parenting that family autonomy was seen as extending from internal family governance to individual choices regarding the formation and dissolution of families. Singer, supra note 198, at 1508-13. In earlier times, she notes, family autonomy often was simply an instrument of patriarchal domination. Id. at 1509; see also Teitelbaum, supra note 80, at 1174-80.


Typical is the decision of the California Court of Appeal in *Nancy S. v. Michele G.* The court acknowledged “the intent of the natural mother to create a parental relationship between [her partner] and her children,” and that failing to give effect to that intent “has resulted in a tragic situation.” Nevertheless, the court worried about the autonomy of other parents if it expanded the definition of “parent” to encompass the woman who had functioned as a second mother since the child was born. To do so, the court reasoned, would make parental rights “turn on elusive factual determinations” and “could expose other natural parents to litigation brought by child-care providers of long standing, relatives, successive sets of stepparents or other close friends of the family.”

Similarly, in *Alison D. v. Virginia M.*, the New York Court of Appeals rejected the visitation petition of a lesbian who had functioned in all respects as coparent of the child born to her partner by artificial insemination. Conceding that the petitioner had an “understandable . . . expectation and desire that her contact with the child would continue,” the court nevertheless concluded that granting standing to seek visitation to a “biological stranger” to the child would inappropriately “limit or diminish the right of the concededly fit biological parent to choose with whom her child associates.”

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430. *Id.* at 219. After entering into a private “marriage” ceremony, the couple had two children, both born to the same biological mother by means of artificial insemination. When the couple separated, they entered into a written separation agreement providing that their son would live with his biological mother and that their daughter would live with her *de facto* coparent. The court declined to enforce their agreement when a dispute arose a few years later. *Id.* at 214.
431. The petitioning non-biological mother sought to be deemed a “parent” so as to avoid the autonomy-inspired statutory requirement that “[b]efore the court makes any order awarding custody to a person . . . other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child.” *Id.* at 214-15 (citing Cal. Civ. Code § 4600(c) (repealed 1992)).
432. *Nancy S.*, 279 Cal. Rptr. at 219; see also Sporleder v. Hermes (*In re Z.J.H.*), 471 N.W.2d 202, 208-09 (Wis. 1991) (expressing concern that “a child could have multiple ‘parents,’ and could find himself or herself subject to multiple custody and visitation arrangements” if *de facto* parenthood were to be recognized).
434. *Id.* at 28.
435. *Id.* at 28-29; see also Curiale v. Reagan, 272 Cal. Rptr. 520 (Ct. App. 1990) (holding that a settlement agreement providing for shared custody was not enforceable because only the child’s “natural mother” has standing to assert custody or visitation rights); West v. Superior Court, 69 Cal. Rptr. 2d 160 (Ct. App. 1997) (reaffirming the *Curiale* holding that a lesbian coparent lacks standing to seek custody or visitation rights).
Until relatively recent times, marriage would have made no difference to a functional parent's rights of access to a former spouse's children; the autonomy principle would have precluded any claim to custody or visitation over the legal parent's objection. Since the 1970s, however, more than a third of the states have adopted statutes permitting stepparent visitation, either explicitly or by broad open-ended grants of discretionary authority. The same result has been achieved in still other states by judicial decision even in the absence of clear statutory authorization. Custody, while more problematic for stepparents, is authorized by statute in more than half the states. A statutory preference for biological parents usually limits stepparent awards of either joint or exclusive custody to cases of parental consent.
or demonstrated unfitness.441 However, there are numerous reported cases in which stepparent custody has been held appropriate, even over parental opposition, upon a mere balancing of equities in the “best interests” of the affected children.442

Nancy Polikoff, one of the leading advocates of lesbian and gay parental interests, has proposed that the visitation and custody disputes of same-sex couples be resolved by changing the way legal parenthood is defined. She would expand the definition to include “anyone who maintains a functional parental relationship with a child when a legally recognized parent created that relationship with the intent that the relationship be parental in nature.”443 Polikoff and other advocates have been highly sensitive to the autonomy concerns of biological and adoptive parents, emphasizing that they must actually have intended that their partners’ relationships with their children be not merely close and psychologically bonding, but of a parental nature.444

While there are no jurisdictions that have adopted Polikoff’s formulation, some have come close to doing so. Oregon, for example, permits anyone who has “established emotional ties creating a child-parent relationship with a child” to seek either custody or visitation.445 Borrowing from the famous concept of “psychological parenthood” developed by Joseph Goldstein, Anna Freud, and Albert Solnit,446 the

441. See, e.g., Cal. Fam. Code § 3040(a) (West 1994) (listing the order of preference for custody: (1) to “both parents jointly” or “either parent”; (2) to “the person or persons in whose home the child has been living”; and (3) to “any other person or persons deemed by the court to be suitable”); see also Mahoney, supra note 436, at 137-47 (discussing the evidence necessary to overcome the parental preference in various jurisdictions); Jennifer Klein Mangnall, Note, Stepparent Custody Rights After Divorce, 26 Sw. U. L. Rev. 399 (1997) (arguing that custodial rights should be based on the best interests of the child, not on biological connections, thereby giving step-parents a greater opportunity to demonstrate their fitness as custodians).


443. Polikoff, Two Mothers, supra note 59, at 464.

444. See id. at 573; Paula L. Ettelbrick, supra note 368, at 548; Elizabeth A. Delaney, Note, Statutory Protection of the Other Mother: Legally Recognizing the Relationship Between the Nonbiological Lesbian Parent and Her Child, 43 Hastings L.J. 177, 212 (1991).


446. Goldstein, Freud, and Solnit’s highly-regarded work on child placement contends that “continuity of relationships, surroundings, and environmental influence are
Oregon statute defines a “parent-child relationship” as one involving day-to-day “interaction, companionship, interplay and mutuality, that fulfill[s] the child’s psychological needs for a parent as well as the child’s physical needs.”

A similar Minnesota statute was not enough in *Kulla v. McNulty* to provide visitation for a woman who had developed parental bonds with her partner’s biological daughter during a three-year lesbian relationship. The petitioner contended that the child’s mother had been given “virtual veto power” by the acceptance of her objection that visitation would interfere with her own parent-child relationship. The court agreed that the petitioner’s burden was a “heavy one,” but concluded that the statute was intended to permit non-parent visitation only in extraordinary circumstances.

In the last few years, there have been important victories for lesbian functional coparents, but only in a very few jurisdictions. In *Holtzman v. Knott (In re H.S.H.-K.)*, for example, the Wisconsin Supreme Court held that a lesbian coparent might be awarded visitation if a “biological or adoptive parent consented to, and fostered, the petitioner’s formation and establishment of a parent-like relationship with the child.” And in *J.A.L. v. E.P.H.*, a Pennsylvania court found that a functional coparent had standing to seek partial custody and

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448. The statute permitted visitation by a non-parent with whom a child has resided for two years or more if: “(1) visitation rights would be in the best interests of the child; (2) the petitioner and child had established emotional ties creating a parent and child relationship; and (3) visitation rights would not interfere with the relationship between the custodial parent and the child.” Minn. Stat. § 257.022(2b) (1992).


450. *Id.* at 181.

451. *Id.* at 181-82; see also Music v. Rachford, 654 So. 2d 1234, 1235 (Fla. Dist. Ct. App. 1995) (interpreting a third-party visitation statute for the benefit of grandparents and great-grandparents as conferring “no inherent authority to award visitation” to a lesbian coparent).

452. 533 N.W.2d 419 (Wis. 1995).

453. *Id.* at 421. Three criteria were specified for such relationships: the sharing of a household; the assumption of parental obligations; and the establishment of a “bonded, dependent [parental] relationship.” *Id*.

visitation based on the doctrine of in loco parentis and the child’s best interests.\footnote{Id. at 1319-20; see also Fowler v. Jones, 949 S.W.2d 442, 443 (Tex. Ct. App. 1997) (concluding that same-sex partner had standing to seek visitation of partner’s child based on “care, control, and possession of the child”); A.C. v. C.B., 829 P.2d 660 (N.M. Ct. App. 1992) (holding that a lesbian coparenting contract is enforceable to the extent it is in best interests of the child).} In the vast majority of jurisdictions, however, a lesbian or gay man still has no claim of access to a partner’s child, no matter the parent-child relationship that may have developed between them.

Not surprisingly, defenders of parental autonomy have resisted the expansion of visitation and custody rules as well as other encroachments on parents’ decisionmaking authority.\footnote{See, e.g., Bohl, supra note 424 (surveying grandfather visitation statutes); J. Bohl, “Those Privileges Long Recognized”: Termination of Parental Rights Law, the Family Right to Integrity and the Private Culture of the Family, 1 Cardozo Women’s L.J. 323 (1994) (reviewing determinations of parental unfitness); William J. Goode, State Intervention and the Family: Problems of Policy, 1976 BYU L. Rev. 715 (discussing the general undermining of parental authority); Bruce C. Hafen, Children’s Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their “Rights,” 1976 BYU L. Rev. 605 (examining concepts of custody, children’s rights, and parental consent).} Joan Bohl, one of the most forceful critics of open-ended visitation statutes, has argued that the “family integrity right” properly belongs only to familial groups that are “brought together by private commitments rather than by operation of law” and with “the emotional attachments that derive from the intimacy of daily association.”\footnote{Bohl, supra note 424, at 40 (quoting in part Smith v. Organization of Foster Families for Equal. & Reform, 431 U.S. 816, 844 (1977)). Bohl also says that biological relationships should link at least some members of the family group, id., although, presumably, she would not eliminate couples with adopted children.} These limitations appear eminently reasonable, especially as applied to the widespread phenomenon of grandparent visitation, to which most of Bohl’s concerns are addressed.\footnote{See id. at 29-36, 47-53; J.C. Bohl, Brave New Statutes: Grandparent Visitation Statutes as Unconstitutional Invasions of Family Life and Invalid Exercises of State Power, 3 Geo. Mason U. Civ. Rts. L.J. 271 (1993). Since the first grandparent visitation statute was adopted in New York in 1966, two-thirds of the states have done the same. See Gilbert A. Holmes, The Tie That Binds: The Constitutional Right of Children to Maintain Relationships With Parent-Like Individuals, 53 Md. L. Rev. 358, 387-88 (1994) (providing history and statutory citations).} But it is perverse that a woman who complies fully with these criteria, who was an indispensable participant in the decision to bring a child into a family, and who has functioned as an equal coparent in the child’s support and rearing, would be excluded from continuing access to the child in the name of “family autonomy.” And this while the law in most jurisdictions protects the far more remote interests of grandparents, and often of stepparents with much less extensive parental involvement.
2. Sperm Donors as Intruders from Outside the Family

The rights of sperm donors vis-à-vis artificially-inseminated lesbian mothers and their partners is one of the most divisive family law problems facing the gay and lesbian community. The problem, depending on the critic's point of view, is either: one, that lesbian mothers are inadequately protected against parental claims by donors who change their minds about the limited roles they have agreed to play in their genetic children's lives;459 or, two, that the interests of male participants in the collaborative parenting process are not adequately protected when they become involved in their offspring's lives with the support and encouragement of the children's mothers.460 Historic notions of parental autonomy—even augmented by modern statutes—are seldom adequate to address the real clash of interests at stake.

The concept of a father possessing parental rights independent of a marriage-centered nuclear family was not generally understood to be part of the common law autonomy tradition.461 Thus, when artificial insemination with donated sperm became a widely-used form of collaborative reproduction, there were no easy models at hand to sort out the respective parental interests. There are reported cases in which artificial insemination within a marriage was held to be adulterous,462 in which a child so conceived was deemed illegitimate,463 and in which a donor was held "no more responsible for the use made of


460. See, e.g., William N. Eskridge, Jr., Beyond Lesbian and Gay "Families We Choose," in Sex, Preference, and Family, supra note 47, at 277, 284-85 (arguing for the parental rights of biological fathers); Bernstein, supra note 363, at 4 (exploring the legal status "of a biological progenitor who has a limited involvement in his child's life"); Brad Sears, Recent Development, Winning Arguments/Losing Themselves: The (Dys)functional Approach in Thomas S. v. Robin Y., 29 Harv. C.R.-C.L L Rev. 559 (1994) (exploring "how one family's struggle to define itself triggered a struggle within the lesbian and gay community over how to redefine the family").

461. See Janet L. Dolgin, Just a Gene: Judicial Assumptions About Parenthood, 40 UCLA L. Rev. 637, 645 (1993) ("The father-child relationship, outside the larger context of the family as a social institution, has been accorded little significance during the last few hundred years.").


463. Gursky v. Gursky, 242 N.Y.S.2d 406 (Sup. Ct. 1963) (holding that a child conceived by donor sperm was illegitimate, but that mother's consenting husband was financially responsible).
his sperm than is the donor of blood or a kidney."464 In still another case, however, a donor of sperm to an unmarried woman was held to be the legal father of the child thereby conceived, and thus eligible for visitation.465

Because such uncertainty about the participants’ parental status threatened to undermine the viability of artificial insemination, most states adopted statutes foreclosing parental claims by sperm donors.466 The assumption, however, was that donor insemination was intended only as a technique to be utilized by the wives of sterile men, and the vast majority of statutes extended protection only to married women.467

Further compounding the vulnerability of lesbians and other unmarried women was the Supreme Court’s newfound solicitude for the parental autonomy of unmarried fathers, beginning with its 1972 decision in Stanley v. Illinois.468 If the Court’s holding in Stanley—that “[t]he private interest . . . of a man in the children he has sired and raised . . . warrants deference and, absent a powerful countervailing interest, protection”469—did not fully spell out the extent of the paternal due process right, a subsequent series of decisions did much to clarify its scope.470 It was to become apparent that the pattern of dis-

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464. People v. Sorensen, 437 P.2d 495, 498 (Cal. 1968) (holding that a husband who agreed to the artificial insemination of his wife was the legal father of the child).
465. C.M. v. C.C., 377 A.2d 821, 824-25 (N.J. Super. 1977) (holding that where a woman was inseminated with her boyfriend’s semen to avoid sexual intercourse before marriage, the donor’s parental rights were preserved because “he fully intended to assume the responsibilities of parenthood”).
466. See Sexual Orientation & Law, supra note 401, at § 1.04[1][c] (comprehensive review of state legislation based on Uniform Parentage Act and other models).
467. Section 5(b) of the Uniform Parentage Act provides that “[t]he donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.” Unif. Parentage Act § 5(b), 9B U.L.A. 301 (1987). By contrast, section 4 of the Uniform Status of Children of Assisted Conception Act (“USCACA”) provides without qualification that “[a] donor is not a parent of a child conceived through assisted conception.” Unif. Status of Children of Assisted Conception Act § 4, 9B U.L.A. 200 (West Supp. 1997). Thirty states have adopted statutes patterned on the Uniform Parentage Act (half of them, however, dispensing with the requirement of physician assistance); only one has adopted the USCACA provision. See Unif. Status of Children of Assisted Conception Act § 4 cmt., 9B U.L.A. 2001-01 (West Supp. 1997). Nine other states have extended protection against donor claims to unmarried women. See Sexual Orientation & Law, supra note 401, § 1.04[1][d] at 1-79 n.140; O’Rourke, supra note 368, at 145-47 (discussing variations in state statutory patterns).
468. 405 U.S. 645 (1972).
469. Id. at 651. Stanley had lived intermittently with his three children and their mother for eighteen years before her death. Because they had never married, however, he was presumed by state law to be an unfit parent. Id. at 646-47.
470. Lehr v. Robertson, 463 U.S. 248, 267 (1983) (finding no due process right for a father who had not “established a substantial relationship with his daughter”); Caban v. Mohammed, 441 U.S. 380, 389 (1979) (holding that an unmarried father who maintained a household with the mother and child for several years has a protected “relationship with his children fully comparable to that of the mother”); Quilloin v.
interested anonymous sperm donation utilized by most married women was not vulnerable to donor claims. As Justice Stevens carefully elaborated in *Lehr v. Robertson*, \(^{471}\) "[p]arental rights do not spring full-blown from the biological connection between parent and child.\(^{472}\) "The significance of the biological connection," he explained, "is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring"; but his interest is protected only if "he grasps that opportunity and accepts some measure of responsibility for the child's future."\(^{473}\)

The great fear of lesbian parents inseminated with sperm from known donors (which is a common choice\(^{474}\)) is of genetic fathers who do decide to "grasp the opportunity" to assert paternal rights, despite agreements that they will not do so. Mindful of the unwed father cases, courts in a number of states have strictly construed artificial insemination statutes to facilitate donor paternity claims against unmarried sperm recipients. In *C.O. v. W.S.*, \(^{475}\) for example, an Ohio court held that it would be a "complete circumvention" of a statute intended to "provide anonymity and protection to both the donor and the mother" to permit its use "where an unmarried woman solicits the participation of the donor, who was known to her."\(^{476}\) The mother conceded that she and her lesbian partner had agreed to the gay donor serving as a "male role model" for the child, and the court concluded that in the absence of "the critical element of anonymity," it would be "contrary to due process safeguards" to hold that the statute "extinguishes a father's efforts to assert the rights and responsibilities of being a father."\(^{477}\)

Even statutes purporting to protect unmarried women have given way to donor claims of paternal right. The California Court of Appeal ruled in *Jhordan C. v. Mary K.*\(^{478}\) that a donor who had been "permitted to develop a social relationship... as the child's father" was not precluded from asserting a visitation claim, the lesbian mother having failed to involve a physician in the insemination process as technically

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Walcott, 434 U.S. 246, 256 (1978) (holding that an unwed father who visited the child only occasionally and provided irregular support was not entitled to veto the subsequent adoption by the stepfather, because such protection extends only to fathers who "shoulder[ ]... significant responsibility" for the child).  
\(^{471}\) Id. 463 U.S. 248 (1983).  
\(^{472}\) Id. at 260 (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)).  
\(^{473}\) Id. at 262.  
\(^{474}\) See *supra* note 193 and accompanying text.  
\(^{475}\) 639 N.E.2d 523 (Ohio Ct. C.P. 1994).  
\(^{476}\) Id. at 524-25.  
\(^{477}\) Id. at 525.  
\(^{478}\) 224 Cal. Rptr. 530 (Ct. App. 1986). California had enacted § 5(b) of the Uniform Parentage Act, *see supra* note 467, but omitted the limitation that only a "married woman" is protected from a donor's paternity claims. Cal. Civ. Code § 7005(b) (repealed 1994).
required by the statute that would have cut off his parental rights.\textsuperscript{479} And in \textit{McIntyre v. Crouch},\textsuperscript{480} the Oregon Court of Appeal held that it would violate due process to extinguish a donor’s parental rights after he “gave his semen . . . in reliance on an agreement . . . that he ‘would remain active’ in the child’s life.”\textsuperscript{481}

Serious tensions between donors and lesbian parents are most likely to arise when unanticipated parental attachments develop in the course of contact with a child that had been planned as only limited. The paradigmatic case is \textit{Thomas S. v. Robin Y.},\textsuperscript{482} a controversial set of decisions involving just such a dispute. Robin and her lesbian partner, Sandra, had each given birth to a child conceived with the aid of a different gay male sperm donor. The couple’s advance oral agreement with Thomas was that they would raise the child as coparents and that he would have no parental rights or obligations, but that he would make himself known to the child if she inquired about her biological origins.\textsuperscript{483} When the couple’s two daughters were old enough to begin asking about the “men who helped make them,” Robin and Sandra decided to establish contact between the children and their biological fathers.\textsuperscript{484} Over the course of the next six years, Thomas visited several times a year with his daughter, Ry, and her family, developing a “warm and amicable relationship” in which Ry “express[ed] her love for him” and called him “Dad.”\textsuperscript{485} When Thomas sought more extensive involvement with his daughter, separate from the rest of her family, Robin and Sandra resisted and eventually cut off all contact between Ry and her biological father.\textsuperscript{486}

Thomas’ petition for an order of filiation and visitation was rebuffed in a remarkable decision by New York Family Court Judge Edward Kaufmann which stands as the high watermark of judicial deference to lesbian coparental autonomy. Finding common law principles inadequate to “decide paternity proceedings for families whose reality is more complex than a one mother, one father biological model,” Judge Kaufmann turned instead to what he saw as the dispute’s most compelling equitable considerations.\textsuperscript{487} Although Ry “understands the

\begin{itemize}
\item \textsuperscript{479} Jhordan C., 224 Cal. Rptr. at 534-36.
\item \textsuperscript{480} 780 P.2d 239 (Or. Ct. App. 1989).
\item \textsuperscript{481} Id. at 241. One of the few victories for a lesbian mother in cases such as these also came in Oregon. In \textit{Leckie v. Voorhies}, 875 P.2d 521 (Or. Ct. App. 1994), a donor was unsuccessful in establishing paternity and visitation privileges because he had entered into a written agreement with the sperm recipient and her lesbian partner fully relinquishing all of his parental rights.
\item \textsuperscript{483} Thomas S. v. Robin Y., 599 N.Y.S.2d 377, 378 (Fam. Ct. 1993) [hereinafter \textit{Thomas S.-I}].
\item \textsuperscript{484} Id. at 378-79.
\item \textsuperscript{485} Thomas S. v. Robin Y., 618 N.Y.S.2d 356, 358-59 (App. Div. 1994) [hereinafter \textit{Thomas S.-II}].
\item \textsuperscript{486} Id. at 358.
\item \textsuperscript{487} \textit{Thomas S.-I}, 599 N.Y.S.2d at 382.
\end{itemize}
underlying biological relationships" in her family, the judge observed, "[t]he reality of her life is having two mothers . . . working together to raise her and her sister."488 "To Ry," he said, Thomas "is an outsider attacking her family."489 Invoking the doctrine of equitable estoppel, Judge Kaufmann faulted Thomas for having waited too long before attempting to exercise his parental rights, and he ruled that it would not be in Ry's best interest to grant paternity and visitation to someone who is no more than "an important man in her family's life."490

Reflecting the great divide in the gay community regarding the clash of interests in the case, Judge Kaufmann's decision was both praised and reviled.491 To activist Paula Ettelbrick, it was an "affirming victory for lesbian and gay families" because of its adherence to "the original agreements made among the parties to the creation of their family."492 To lesbian lawyer Tanya Neiman, on the other hand, the decision represented a "failure to realize that a donor, once made a part of a family, cannot simply 'turn off' the love and deep devotion that comes with truly loving your child."493

To the Appellate Division court that overturned Judge Kaufmann's ruling, the issue was far more prosaic. "Having found that petitioner is the father of Ry," the court reasoned, "Family Court was commanded by statutory direction to enter an order of filiation";494 "there is no room for judicial interpretation."495 Although "the respective rights of a gay life partner vis-à-vis a biological parent presents a timely issue," the court observed, "[t]he notion that a lesbian mother should enjoy a parental relationship with her daughter but a gay father should not is so innately discriminatory as to be unworthy of comment."496 In any event, the court concluded (with due citation to the unwed father due process precedent), "[t]he asserted sanctity of the [lesbian couple's] family unit is an uncompelling ground for the drastic step of depriving petitioner" of his paternal rights.497

Paula Ettelbricke contends that it would not have altered the outcome of the case if Robin and Sandra had been legally married,498 and

488. Id. at 380.
489. Id. at 382.
490. Id. at 380-82.
492. Paula Ettelbrick, Letters to the Lesbian/Gay Law Notes, Lesbian/Gay L. Notes, June 1993, at 1; see also Polikoff, supra note 459, at 203-05.
493. Tanya Neiman, Letters to the Lesbian/Gay Law Notes, Lesbian/Gay L. Notes, June 1993, at 1; see also Sears, supra note 460, at 565-66.
495. Id.
496. Id. at 361.
497. Id. at 359 (citing Lehr v. Robertson, 463 U.S. 248 (1983)).
498. Ettelbricke, Wedlock Alert, supra note 61, at 161-62. "The absence of a marital relationship was irrelevant to the events in Thomas," Ettelbricke claims; and she also asks rhetorically, "If Robin and Sandra married, how would Thomas' relationship
she is probably correct in her surmise. But the existence of a family united by marriage ought to make a difference when an outsider, even a child's father, seeks to intrude—that is, if the most recent Supreme Court decision on the subject is to be believed. The one interest that trumps an unwed father's paternal claim, according to the holding in Michael H. v. Gerald D., is that of an intact marriage-centered nuclear family. There the Court upheld a state court decision denying visitation rights to the biological father of a child conceived while the mother was married to another man. Even a developed relationship between father and child was not enough to withstand what the lower court described as "the state's interest in preserving the integrity of the matrimonial family."  

Justice Scalia, writing for a Supreme Court plurality of four, said that the Court's earlier unwed father cases did not stand for the proposition that "biological fatherhood plus an established parental relationship" without more were enough to invoke due process protection. The real rationale of those cases, he insisted, rested "upon the historic respect—indeed sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family." Since state law, "like nature itself, makes no provision for dual fatherhood," he reasoned, it was appropriate not to "award substantive rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child." But would the same rules apply to children born into dual-mother marital unions? No one could seriously suppose that Justice Scalia—whose crabbed insistence on measuring which traditions are worthy of due process protection by reference to "the most specific level [of generality] at which a relevant tradition . . . can be identified"—would

with Ry be defined? . . . Would Robin, Sandra and Thomas have to marry one another in order to clarify the legal roles of the three adults to the child?" Id. at 162-63. 499. 491 U.S. 110 (1989) (plurality opinion). 500. Michael H. v. Gerald D., 236 Cal. Rptr. 810, 818 (Ct. App. 1987), aff'd, 491 U.S. 110 (1989). 501. Michael H., 491 U.S. at 123 (Scalia, J., plurality opinion). Justice Scalia was joined in whole by Chief Justice Rehnquist and in part by Justices O'Connor and Kennedy; Justice Stevens concurred in the judgment. 502. Id. Janet Dolgin argues that implicit in the reasoning of all the Supreme Court's unwed father cases, not only Michael H., is the requirement that due process protection is contingent upon the biological father having formed either a marital or a "marriage-like relationship" with the child's mother. Dolgin, supra note 461, at 649-50; see also David V. Hadek, Comment, Why the Policy Behind the Irrebuttable Presumption of Paternity Will Never Die, 26 Sw. U. L. Rev. 359 (1997). 503. Michael H., 491 U.S. at 118. 504. Id. at 127. 505. Id. at 127-28 n.6. Justice Scalia's narrow formulation—by which he characterized the interests of Michael H. as being those of "an adulterous natural father," rather than simply as those of a "natural father," id.—led Justices O'Connor and Kennedy to dissociate themselves from that portion of his opinion. Id. at 132 (O'Connor,
find any "relevant tradition" favoring the parental autonomy of a married lesbian couple raising a child together over the asserted interests of the child's biological father. Yet, by the logic of his analysis, the couple's position ought to be as favored as that of any "unitary family" formed by the saying of marriage vows.

The problem with all of this, and of trying to resolve parental disputes such as Thomas S. by reference to traditional notions of parental autonomy, is that the historic models are out of sync with the realities faced by gay sperm donors and lesbian mothers. The rules of the unwed father cases, from Stanley to Michael H., serve to mediate between the "good father" (who earns parental rights by developing a relationship with his child in a unitary family) and the "bad father" (who doesn't grasp parental opportunity, or who procreates with another man's wife, and who now seeks to disrupt another unitary family).

These are not the verities that produce the tensions in the Thomas S.-type situation. The real unitary family in such a case is comprised of the lesbian couple and their child, only partly united by biology. But the donor (the absent biological parent) is not a "bad father" simply because he is not part of the unitary family. And he is not an intruder, but rather an indispensable party who has played a crucial role in the formation of the family. When unanticipated emotional attachments are formed between father and child with the full knowledge and participation of both mothers, it is no answer to his desire for continuing involvement to say that he is estopped to assert any rights because he kept his agreement and never became a real member of the unitary family. But neither should he be allowed to interfere on equal parental footing merely because he possesses genetic links and has behaved himself.

Paula Ettelbrick argues that if Robin and Sandra had felt secure that Thomas would not seek to become a "full-fledged parent," they might have been more willing to acquiesce in his developing relationship with Ry. Perhaps she is wrong to assume that marriage would not have helped in that regard. If marital union had given them the


Further defining the term, Justice Scalia wrote:

The family unit accorded traditional respect in our society, which we have referred to as the "unitary family," is typified, of course, by the marital family, but also includes the household of unmarried parents and their children. Perhaps the concept can be expanded even beyond this, but it will bear no resemblance to traditionally respected relationships—and will thus cease to have any constitutional significance—if it is stretched [too] far . . . .

Michael H., 491 U.S. at 123 n.3.

Ettelbrick, Wedlock Alert, supra note 61, at 163-64.
autonomy that *Michael H.* and the other unwed father cases seem to contemplate for marriage-centered unitary families, Robin and Sandra might well have felt the security of which Ettelbrick speaks. It seems more likely, however, that this is one context in which the rules governing marital relationships would fall short of resolving the clash of interests at stake. It is a setting that cries out for a nuanced solution more thoughtfully attuned to the subtleties of the various parental roles.

V. Conclusion: The Domestication of Sexual Outlaws

Again the questions put at the outset as the matters to be examined by this essay: Are gay and lesbian familial concerns likely to be better served by uncoupling family life from marriage—as activist critics claim—than by the pursuit of same-sex wedded union? And would pragmatic compromise of the quest for marriage parity be of modest consequence to gay people—as scholarly skeptics assume—because a simulacrum of marriage would do just as well?

The answers, it would seem, depend on the definition chosen. One dictionary tells us that a simulacrum is “an image; likeness”; or else it is “a vague representation; semblance”; or perhaps it is “a mere pretense; sham.” By no fair reckoning could it be said that any alternative status or combination of legal strategies now available or contemplated in the foreseeable future would bring to gay families the “image” or “likeness” of the bundle of rights and obligations that flow from legal marriage. Short of that, there are some aspects of domestic partnership that offer “vague representations” of marital status, and there are rights won in hard-fought litigation that are at least a “semblance” of those flowing automatically from marriage. In other respects, however, the family options open to gay people, by and large, are a “sham” or “pretense” compared to the marriage-centered family’s rights.

For the same-sex coupled family seeking support for companionate cohabitation, a few domestic partnership laws provide important rights. At best (as in the Scandinavian countries), or even well short of best (as in Hawaii’s first-in-the-nation statewide domestic partner law), significant tangible benefits are available for the first time to qualifying same-sex couples. Elsewhere, local ordinances offer little more than token symbolism to most gay people, if such laws exist at all. More importantly, there is no alternative status anywhere in this country that affords gay and lesbian partners the opportunity to register commitment and obligation to one another in the way that marriage does. If that is a difference that is perfectly acceptable to some, it is nevertheless a factor that deprives the domestic partner option of

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legitimacy in the eyes of many same-sex couples and of the broader civic community at large.

For the lesbian or gay parent-child family seeking the state's aid (or at least not its opposition) in the nurturing of children, not even the pretense is held out of the favored treatment that the law affords for married couples. Whether by adoption or collaborative reproduction, children brought into same-sex-parent families will not as easily have legal ties to both parents as will the similarly-situated children of married couples. For most functional non-legal parents, neither stepparent adoption nor automatic spousal rights will ease the way or assure continuing access to a same-sex partner's child. Litigation victories for lesbian and gay parents, while notable, are still far more the exception than the rule.

In the final analysis, however, and whatever the impact on day-to-day gay family life, it is likely that the most far-reaching consequence of legalized same-sex marriage would be symbolic. Ever since Justice White decreed in Bowers v. Hardwick that there is "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other," gay people have been denied all manner of claims for equal treatment in the name of the Supreme Court's depiction of their lives as beyond the pale of respectability. Gay rights opponents have remained fixated on the sexual aspects of sexual orientation. To many, including Justice White's successor in interest, Justice Scalia, criminal sodomy is "the conduct that defines the class" of gay people, and "homosexual 'orientation' is an acceptable stand-in for homosexual conduct" or for "those with a self-avowed tendency or desire to engage in the conduct."

Conversely, gay rights supporters have stayed distant in recent years from defending the intimate aspects of lesbian and gay life. Victimization, status discrimination, and the same equality arguments that have been the mainstay of other civil rights struggles have replaced most talk about the fundamental right to freely order one's intimate affairs. Avoidance of the sexual outlaw image has been an important political and litigation strategy.

It is hard to imagine any action more likely to lift the sexual outlaw onus than the legalization of same-sex marriage. In one step, society would confer, perform, the symbolic legitimation of intimacy that is always implicit in the celebration of a marriage. It would be a civic recognition of shared humanity like no other that gay people have

510. Id. at 191.
512. Id. at 625.
513. Id.
ever experienced. But it could only come with marriage. There is no simulacrum that would do the same.