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FAMILIES REDEFINED: KINSHIP GROUPS THAT DESERVE BENEFITS

*Jane E. Cross, Nan Palmer, and Charlene L. Smith**

ABSTRACT

In *Families Redefined: Kinship Groups that Deserve Benefits*, the authors examine 1) the nature of kinship families, 2) the benefits accorded to married couples, 3) kinship families that lack protection and benefits, 4) the impact of denying kinship families protection and benefits, 5) the use of contract law in kinship relationships, and 6) using legislation to benefit kinship relationships.

This exploration of expanding family law protections to kinship groups addresses a series of interrelated topics. The first two sections of the article explore the characteristics and creation of kinship families in different societies. The third section addresses the legal benefits provided by marriage, while

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the fourth and fifth sections examine, respectively, the types of kinship relationships that should have similar benefits and the effect of denying such benefits. The next two sections present legal solutions that propose using contract law and adopting legislation to provide legal protection and benefits to kinship units.

Accordingly, the article advocates for the expansion of legal concepts of family to include kinship relationships by comparing the treatment of these issues in various states and nations. In this manner, the authors support a new definition of family that goes beyond conjugal arrangements.

I. INTRODUCTION

As noted authorities point out, “[f]amilies are charged with the pivotal tasks of raising children and providing members with ongoing intimacy, affection, and companionship.”¹ Beyond these biological and affectional attributes, the critical need for the family’s economic survival exists from one generation to the next. The United States fails to fulfill those obligations of extending economic and social support to kinship families who provide love, care and socialization to others within their group. Our article offers possible solutions by redefining what constitutes a family unit. We are acutely aware that a divide exists between those who are alarmed by the idea that the state would have to legally recognize a more inclusive definition of what constitutes a kinship family and those who are indifferent. However, to ignore the facts not only punishes both children and adults who would flourish if such groups gained legitimacy, it also puts our greater social system at peril by marginalizing millions of kinship family units through restrictive laws and policies. We highlight how many such kinship families exist, what benefits they do not receive, and how that negatively impacts them from a psychosocial, health and economic perspective. Then, we briefly explore the many proposed solutions and offer some examples of what models can be used to

¹ MARY ANN LAMANNA & AGNES RIEDMANN, *MARRIAGES AND FAMILIES: MAKING CHOICES IN A DIVERSE SOCIETY* 8 (10th ed. 2009).

address the problem.

II. KINSHIP FAMILIES: HOW THE PAST INFORMS THE PRESENT

Kinship families, the focus of this article, have the following characteristics: the group has common goals and share concern for each other, the individuals that comprise the group usually are “like-minded” adults, sometimes with children, and the individuals respond to biological, emotional, spiritual, and economic needs of the group and, to the extent possible, self care. Most frequently the members of the group focus on extending love and care to the other members. Kinship families provide a continuity and coherency of life through day-to-day interactions, which is essential to human well being.² The term “kinship” is historically and currently defined as a “set of practices that establishes the dominance of . . . blood and legal ties over others.”³ This definition reflects a prevailing heteronormative view that gives primacy to the heterosexual relationship.⁴ Kaja Finkler, a scholar in this area, points out that having biological relationships as the “starting point” for defining family relations has been called into question and argues as others have, such as pioneer David Schneider, that “kinship” narrowly defined is a Western construct.⁵ Finkler takes a more generous view of kinship families, calling such units a “‘significant same’ group . . . who perceive themselves as similar and who consider themselves related on grounds of shared material, be it land, blood, food, saliva, semen, or ideological or affective content.”⁶ The continual pressure to maintain a narrow construct of kinship is evidenced by the descriptive words “fictive kin,” which are frequently used by social science researchers and writers to describe arrangements

² See generally Stephen Hicks, *Genealogy's Desire: Practices of Kinship Amongst Lesbian and Gay Foster-Carers and Adopters*, 36 BRIT. J. SOC. WORK 761 (2006).

³ *Id.* at 763.

⁴ *Id.*

⁵ Kaja Finkler, *The Kin in the Gene: The Medicalization of Family and Kinship in American Society*, 42 CURRENT ANTHROPOLOGY 235, 235-36 (2001).

⁶ *Id.* at 236.

that go outside the legal and genetic norms.⁷ Such a position fails to continue essential connections with our past which can reveal avenues that have been used for survival and thriving. Ample support exists for a more generous and altruistic perspective that the authors of this article have taken. The past informs the present as seen in the following illustrative examples.

Exploration of our biological and social past reveals a far more integrative view of family relationships throughout the world than current Western constructs. Survival depends in significant part on the altruistic behavior of others. A society or group cannot manage all the tasks of physical, economic and emotional living without cooperation from each other. In fact, humans are biologically wired for attachment to each other as a matter of survival. Currently, scientists can trace characteristics of caring for others for both daily and generational survival through our ancestry and connection to other primates.⁸ An illustrative primate connection is the bonobo, which are “female-centered [and] egalitarian,” according to Frans de Waal of Yerkes Regional Primate Research Center in Atlanta and professor of psychology at Emory University.⁹ Other examples may be drawn from our human ancestors. In ancient Sparta, females enjoyed many freedoms afforded to males.¹⁰ In Sparta, girls received public education, engaged in sports, and Spartan wives could inherit and transfer wealth as

⁷ Hicks, *supra* note 2, at 762; see also Richard A. Wagner, *Fictive Kinship*, in MARRIAGE AND FAMILY ENCYCLOPEDIA (1995), <http://family.jrank.org/pages/630/Fictive-Kinship.html> [hereinafter *Fictive Kinship*]; MICHAEL DEAN MURPHY, A KINSHIP GLOSSARY: SYMBOLS, TERMS, AND CONCEPTS (2001), <http://www.as.ua.edu/ant/Faculty/murphy/436/kinship.htm>.

⁸ Anthony DeBartolo, *The Bonobo: "Newest" Apes are Teaching Us About Ourselves*, CHI. TRIB., June 11, 1998, at TEMPO1, available at <http://www.hydeparkmedia.com/bonobo.html>. According to DeBartolo, “[t]he bonobo’s apparent ability to empathize, in contrast with the more hostile and aggressive bearing of the related chimpanzee, has some social scientists re-thinking our behavioral heritage . . .” *Id.*

⁹ *Id.*

¹⁰ See Helena P. Schrader, *Sparta Reconsidered: Spartan Women*, <http://elysiumgates.com/~helena/Women.html> (last visited Apr. 23, 2009).

well as control and manage land.¹¹ “The freedom and greater respect for Spartan women began at birth with laws that required female infants and children to be given the same care and food as their brothers”¹²

In North America “traditional tribal lifestyles are more often gynocratic than not, and they are never patriarchal.”¹³ Their lifestyles exhibit a generous array of human expression not confined to the Puritanical notions instituted by Anglo Europeans.¹⁴

In tribal gynocratic systems a multitude of personality and character types can function positively within the social order because the systems are focused on social responsibility rather than on privilege and on the realities of the human constitution rather than on denial-based social fictions to which human beings are compelled to conform by powerful individuals within the society.¹⁵

As to the sexual roles of Native American/First Nations peoples, “two-spirit people” were valued because it was believed that they could understand the perspectives of both males and females.¹⁶ Among the American Plains Indians, such multi-spirit people are often referred to by others as *Berdache*; a man might assume both the dress and role of a woman, and he might marry another man.¹⁷ “Rather than being viewed as an

¹¹ *Id.*

¹² *Id.* An example from another continent is present in Africa. “Among the many myths Europeans have created about Africa, the myth that homosexuality is absent or incidental in African societies is one of the oldest and most enduring.” *Preface to BOY-WIVES AND FEMALE HUSBANDS: STUDIES IN AFRICAN HOMOSEXUALITIES*, at xi (Stephen O. Murray & Will Roscoe eds., 1998). A central theme in this work is the impact of Western morality and ethnocentrism on what might be called “discovered populations.” In other words, forms of social arrangement and gender expression were “closeted” in the writings of early explorers. *See id.* at 12.

¹³ PAULA GUNN ALLEN, *THE SACRED HOOP: RECOVERING THE FEMININE IN AMERICAN INDIAN TRADITIONS 2* (1986).

¹⁴ *Id.*

¹⁵ *Id.* at 3.

¹⁶ *A Native American Perspective on the Theory of Gender Continuum*, http://concernedcounseling.com/communities/Gender/intersexuals/article_native_american.htm (last visited Mar. 16, 2009) [hereinafter *Native American Perspective*].

¹⁷ *Id.* “Some Native Americans object to the very word used to describe the special

aberration, the role was seen as one, which bridged the gap between the temporal and the spirit worlds.”¹⁸ This spiritual aspect “was emphasized far more than the homosexual or gender variant aspect.” For this reason, “berdaches were highly valued by the people of the tribe.”¹⁹ According to the writings of Edwin T. Denig, who lived for decades among First Nations peoples as a trader for the American Fur Company, “among the Crows, men who dressed as women and specialized in women’s work were accepted and sometimes honored.”²⁰ Denig also wrote of women who were warriors leading men into battle and of women who had multiple wives. “Instead of hypermasculine braves and submissive squaws we find personalities of surprising diversity and complexity.”²¹ Another example is Potlatch, a system of gift giving used by Canada’s Kwakiutl Indians as a way of ensuring that they can rely on each other. In this cultural practice, gifts such as blankets and specially made copper pieces are currency. Gray summed it up most eloquently, “Only giving and receiving that is completely unencumbered reflects the true grace of generosity. Everything else is a deal.”²² In this manner, help is assured among all people through a social structure that promotes mutual cooperation.²³

Another illustrative example of the fluidness of family and how it successfully functions is the concept of godparenthood, or *compadrazgo*, as it occurs in Mexico and Latin America.²⁴ This

role of berdache. Some sources say the term [berdache] has its origins in an Arab word for male prostitute or ‘kept’ boy and was coined not by the Indians, but by Europeans.” *Id.* “Berdache” is a term most often used by anthropologists but is now out of favor by many Native Americans. See WILL ROSCOE, CHANGING ONES: THIRD AND FOURTH GENDERS IN NATIVE NORTH AMERICA 7, 17-19 (1998); see also Wesley Thomas & Sue-Ellen Jacobs, “... And We Are Still Here”: *From Berdache to Two-Spirit People*, 23 AM. INDIAN CULTURE & RES. J. 91-92 (1999).

¹⁸ *Native American Perspective*, *supra* note 16.

¹⁹ *Id.*

²⁰ ROSCOE, *supra* note 17, at 3.

²¹ *Id.* at 4.

²² Sharon Gray, *The Power in Giving Presents*, AGE, Oct. 16, 2007, at Metro14.

²³ *Fictive Kinship*, *supra* note 7.

²⁴ Shawn Malia Kana’Iaupuni et al., *Counting on Kin: Social Networks, Social Support, and Child Health Status* 83 SOC. FORCES 1137, 1140-41 (2005).

well-documented practice names persons frequently not related by blood or marriage as protectors of newborns and others who are passing through important life events and carries with it rights and obligations for a life time.²⁵ Accompanying this practice is that of *confianza*, a presence of trust necessary for reciprocal exchange.²⁶ “How the family organizes itself, how it retains its cohesion, how openly it communicates and problem-solves together to cope with threat, largely forecasts its ability to recover, evolve, and adapt over time.”²⁷

While each of these examples has limitations so far as exemplifying totally egalitarian cultures, they do present a range of options and creative solutions to division and discrimination. Given a more generous and inclusive definition, kinship families can include grandparents caring for their grandchildren, single mothers, daughters or sons caring for their parents, friends caring for friends²⁸ and, of course, same-sex couples caring for each other and any children they may have.²⁹

III. WHAT BENEFITS DO OPPOSITE SEX ‘MARRIED’ COUPLES, EVEN WITHOUT CHILDREN, RECEIVE?

According to the United States Government Accountability Office (GAO), over a thousand federal laws treat married people differently from so-called “single” people.³⁰ Numerous benefits

²⁵ *Id.*

²⁶ *Id.*

²⁷ IRENE GOLDENBERG & HERBERT GOLDENBERG, *FAMILY THERAPY: AN OVERVIEW* 8 (5th ed. 2000).

²⁸ See Laura A. Rosenbury, *Friends With Benefits?*, 106 MICH. L. REV. 189, 221-26 (2007). In her very insightful article, Professor Rosenbury advocates extending rights to friends. *Id.* at 236. She notes that such an extension would “signal that marriage need not be the only site for emotional care and support.” *Id.* at 240.

²⁹ See generally Katherine Acey et al., *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families & Relationships*, <http://beyondmarriage.org/BeyondMarriage.pdf>. Beyondmarriage.org advocates expansion of who should receive “marriage benefits” through “legal recognition for a wide range of relationships, households and families” *Id.* at 5. Upon examination, it is noticeable that the list they would extend this legal recognition to mirrors ours. See *infra* note 41.

³⁰ Letter from Dayna K. Shah, Associate General Counsel, United States General Accounting Office, to The Honorable Bill Frist, Former Majority Leader, United States

are automatically granted upon those who are married, which include employee-sponsored health benefits, spousal medical decision-making, family visitation rights for spouses, next-of-kin status for emergency medical decisions or filing wrongful death claims, funeral and bereavement leave, permission to make funeral arrangements for a deceased spouse, joint adoption and foster care, joint parenting rights, such as access to children's school records, access to "family only" services, such as reduced membership to clubs or residency in certain neighborhoods, insurance coverage, joint tax filing and joint filing of bankruptcy.³¹

If one spouse dies, benefits accrue to the surviving spouse. For example, the surviving spouse may receive social security pensions, veteran's pensions, educational assistance, continuation of employer-sponsored health benefits, supplemental security income, income tax deductions, Medicaid disbursements, property tax exemptions, the right to inherit property, and spousal privilege in court.³² Of course, there are also the rights that continue despite the fact that the marriage has ended in divorce. These rights are custodial rights to

Senate (Jan. 23, 2004) (on file with the United States General Accounting Office), available at <http://www.gao.gov/new.items/d04353r.pdf>. The Office of General Accounting listed thirteen categories of federal laws affected by marital status. *Id.* at 2. These categories include the following: "Social Security and Related Programs, Housing, and Food Stamps," "Veterans' Benefits," "Taxation," "Federal Civilian and Military Service Benefits," "Employment Benefits and Related Statutory Provisions," "Immigration, Naturalization, and Aliens," "Indians," "Trade, Commerce, and Intellectual Property," "Financial Disclosure and Conflict of Interest," "Crimes and Family Violence," "Loans, Guarantees, and Payments in Agriculture," "Federal Natural Resources and Related Statutory Provisions," and "Miscellaneous Statutory Provisions." *Id.* at 3-10.

³¹ *Id.* According to the letter there are "1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges." *Id.* at 1. These include: "exclusion of certain individuals and entities from participation in Medicare and state health care programs," "eligibility under first-time home-buyer programs," and "medical care for survivors and dependents of certain veterans." *Id.* at 3-4.

³² It must be noted that "[i]n recent years, couples in which both partners have similar incomes generally pay a marriage tax, while couples in which only one individual works receives a marriage subsidy." James Alm & Leslie A. Whittington, *For Love or Money? The Impact of Income Taxes on Marriage*, 66 *ECONOMICA* 297, 300 (1999). This is commonly known as the marriage penalty.

children, shared property, child support and alimony, to name just a few.³³

IV. HOW MANY KINSHIP FAMILIES GO WITHOUT THE BENEFITS? WHY SHOULD WE BE CONCERNED?

Through the inter-relationship of our biology, our social environment, and our psychological attributes, we can examine how social and economic injustice is detrimental to all humans. Our survival as a species depends on this. Why should we be concerned about the detrimental impact for all human beings? First, regardless of the differences between those who have power and those who do not, we all have in common the biology of humanness. This biology of humans is often distinguished from other species through the attributes of the human brain.

It is the brain that allows us to be connected to each other in the present. . . . [I]t is the brain that connects us to the future as we pass elements of our life experience to the next generations. It is the brain that allowed humankind to create humanity.³⁴

For example, while our human expression is multifaceted, we all have in common our neurobiological need for attachment or, as Virginia Satir called it, "making contact."³⁵ Attachment is

³³ The common law presumption that a mother should have custody of minor children is an unconstitutional discrimination against fathers, depriving them of their right to equal protection under the Fourteenth Amendment. *State ex rel. Watts v. Watts*, 350 N.Y.S.2d 285, 291 (N.Y. Fam. Ct. 1973). Not including separate property acquired before marriage, the court in a divorce case may, without regard to title, exercise broad discretion in distributing all other property accumulated during marriage. *Darling v. Darling*, 444 A.2d 20, 23 (D.C. 1982). Child support is an obligation imposed by one parent on the other for the benefit of the child, not for the benefit of the other adult. *Barnett v. Barnett*, 802 So. 2d 1203, 1204 (Fla. Dist. Ct. App. 2002). It is a dual obligation owed by both biological parents to their child that begins at the child's birth. *Id.* Alimony is provided either for permanent or rehabilitative support, or as assistance in the equitable distribution of marital property. *Martin v. Martin*, 582 So. 2d 784, 786 (Fla. Dist. Ct. App. 1991). When considering alimony, gender is irrelevant. *Heath v. Heath*, 611 So. 2d 1249 (Fla. Dist. Ct. App. 1993).

³⁴ BRUCE D. PERRY, *BRAIN STRUCTURE AND FUNCTION I: BASICS OF ORGANIZATION 2* (2002), http://www.childtrauma.org/CTAMATERIALS/brain1_inter_02.pdf.

³⁵ See generally VIRGINIA SATIR, *MAKING CONTACT* (1976).

biologically driven and influenced by the human brain.³⁶ Attachment affords us safety and protection against the challenges of living and is present in other mammalian life.³⁷ The persistence of social, political, and legal systems to demand and subsequently reflect the restrictive definition of family and kinship family has damaging consequences for families of today. Oppression of all kinds carries with it immense protracted psychological trauma and, for many, physical trauma as well. "Traumatic events are extraordinary, not because they occur rarely, but rather because they overwhelm the ordinary human adaptations to life."³⁸ In recent years, the term "historical trauma" has emerged to recognize the "associated bereavement" and "unresolved grief" and its transfer through generations.³⁹ "This grief may be considered impaired, delayed, fixated, and/or disenfranchised."⁴⁰ The following sections discuss examples of kinship families struggling to not only survive, but to thrive amidst the constant challenges of discrimination, oppression, and disenfranchisement.⁴¹

³⁶ JON G. ALLEN, *COPING WITH TRAUMA: A GUIDE TO SELF-UNDERSTANDING* 37 (1995).

³⁷ *Id.* at 302.

³⁸ JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 33 (1997).

³⁹ Maria Yellow Horse Brave Heart, *The Impact of Historical Trauma: The Example of the Native Community*, in *TRAUMA TRANSFORMED: AN EMPOWERMENT RESPONSE* 176, 178 (Marian Bussey & Judith Bula Wise eds., 2007).

⁴⁰ *Id.*

⁴¹ See Acey et al., *supra* note 29, at 2. Most of the following types of kinship households identified by Acey would include related individuals:

- Senior citizens living together, serving as each other's caregivers, partners, and/or constructed families
- Adult children living with and caring for their parents
- Grandparents and other family members raising their children's and/or a relative's children
- Committed, loving households in which there is more than one conjugal partner
- Blended families
- Single parent households
- Extended families (especially in particular immigrant populations) living under one roof, whose members care for one another
- Queer couples who decide to jointly create and raise a child with another queer person or couple, in two households
- Close friends and siblings who live together in long-term, committed, non-

A. Grandparents Raising Their Grandchildren

Millions of grandparents in the United States currently raise their grandchildren.⁴² According to the 2000 census, 2.4 million grandparents are responsible for their grandchildren who live with them.⁴³ When grandparents were the head of household, the average family income for 1996 was between \$19,750 and \$61,632.⁴⁴ Further, 2.4 million children live in households where the grandparents take primary responsibility for the children's needs.⁴⁵ Specifically, in Kansas, 29,026 grandchildren under the age of eighteen live in a grandparent-headed household.⁴⁶ Of these households, 13.2% live in poverty.⁴⁷ In one Wisconsin county, 14% of the children are being raised by grandparents.⁴⁸

conjugal relationships, serving as each other's primary support and caregivers

- Care-giving and partnership relationships that have been developed to provide support systems to those living with HIV/AIDS.

Id.

⁴² AARP, Census 2000 Data about Grandparent-Headed Households, http://www.aarp.org/families/grandparents/grandparents_resources/a2004-01-16-census2000data.html (last visited Sept. 28, 2008).

⁴³ TAVIA SIMMONS & JANE LAWLER DYE, GRANDPARENTS LIVING WITH GRANDCHILDREN: 2000 (Oct. 2003), <http://www.census.gov/prod/2003pubs/c2kbr-31.pdf>. "The number of households with coresident grandparents is different from the number of people who are coresident grandparents. In 2000, 4.1 million households included coresident grandparents, but these households contained 5.8 million coresident grandparents." *Id.* at 9.

⁴⁴ Age Venture News Service, *National Grandparent Daze Seems Inevitable*, Sept. 25, 1998, <http://www.demko.com/m980921.htm>.

⁴⁵ SIMMONS & DYE, *supra* note 43, at 1; see also Children's Bureau Express, Online Support for Grandparents Raising Grandchildren, <http://cbexpress.acf.hhs.gov/index.cfm?issueId=23> (follow "Online Support for Grandparents Raising Grandchildren" hyperlink under "Resources") (last visited Apr. 10, 2009). "Nationally, there are 5.4 million children living in homes headed by a relative other than a parent. Thirty-nine percent □ 2.1 million of these children □ are being raised solely by grandparents or other relatives *with no parents present* in the household." MARY K. BISSELL & MARYLEE ALLEN, HEALTHY TIES: ENSURING HEALTH COVERAGE FOR CHILDREN RAISED BY GRANDPARENTS AND OTHER RELATIVES 115 (2001), http://cdf.convio.net/site/DocServer/healthyties_fullreport.pdf?docID=638.

⁴⁶ AARP FOUNDATION, GRANDFACTS: A STATE FACT SHEET FOR GRANDPARENTS AND OTHER RELATIVES RAISING CHILDREN 1 (Oct. 2007), <http://www.grandfactsheets.org/doc/Kansas%2007.pdf>.

⁴⁷ *Id.*

⁴⁸ Mary Crave, Wisconsin Children Living in Households Headed by a Grandparent

Studies demonstrate that when grandmothers are the head of household the children suffer the most because no one else shares the burden of raising the children, and grandmothers as a group, because of their age and sex, are relatively unlikely to be economically independent.⁴⁹ A study by the Urban Institute concluded that 37% of the grandparents raising grandchildren had incomes below the national poverty level.⁵⁰ Since many of these grandparents heading households do not have formal custody of the children, it frequently becomes a very difficult problem to receive health care or put them in a local school.⁵¹ Further, grandfathers when specifically studied showed even greater marked distress, in that they tended to be older than grandmothers when they started caring for their grandchildren, were in poorer health, and experienced greater emotional strain.⁵² An example of the impact of discrimination is found in Native American grandparents raising their grandchildren, as “there is a generation of Native Americans who do not feel a sense of competency or efficacy in their parenting abilities because they were not reared by their biological parents and were not taught the traditional ways of their culture and families of origin” and as such, “[t]he historical trauma associated with cultural genocide and boarding schools likely remain in the psyches of many Native American people, impacting their psychological well-being.”⁵³

— 1990 (Nov. 1990), <http://www.uwex.edu/ces/gprg/wisite.pdf>.

⁴⁹ Lynne M. Casper & Kenneth R. Bryson, *Co-resident Grandparents and Their Grandchildren: Grandparent Maintained Families*, (U.S. Census Bureau Population Division, Working Paper No. 26, 1991), available at <http://www.census.gov/population/www/documentation/twps0026/twps0026.html>.

⁵⁰ *Skipping a Generation: Grandparents Raising Grandchildren*, *ECONOMIST*, June 16, 2007, at 39.

⁵¹ *Id.*

⁵² Janet Okagbue-Reaves, *Kinship Care: Analysis of the Health and Well-Being of Grandfathers Raising Grandchildren Using the Grandparent Assessment Tool and the Medical Outcomes Trust SF-36 TM Health Survey*, 9 *J. FAM. SOC. WORK* 47, 64 (2005).

⁵³ Sandra Bailey & Bethany Letiecq, *The Mental Health of Rural Grandparents Rearing Their Grandchildren*, 22 *FOCAL POINT* 24 (2008), available at <http://www.rtc.pdx.edu/PDF/fpS0808.pdf>; see Kathleen Graves et al., *Boarding School Project: Mental Health Outcome*, pp. ii, 1-5 (July 2007), http://elders.uaa.alaska.edu/reports/other_boarding-school-project.pdf; see also Carolyn

B. Same-Sex Kinship Families

The number of same-sex couples has quintupled since 1990 according to census data.⁵⁴ The growth in same-sex couples was proportionally twenty-one times larger than the general population growth from 1990 to 2006.⁵⁵

Comparing various state statistics gives a broad perspective of what impact the lack of resources has upon the groups. For instance, census data shows that 17% of same-sex couples in Florida are raising children.⁵⁶ However, according to the Williams Institute Fellows, “same-sex parents have fewer economic resources to provide for their families than do their married counterparts: they have lower household incomes and lower rates of home ownership.”⁵⁷ Kansas mirrors Florida in many ways, where 17% of Kansas same-sex couples are also raising children under the age of eighteen.⁵⁸ Further, in both

Barcus, *Recommendations for the Treatment of American Indian Populations*, in *PSYCHOLOGICAL TREATMENT OF ETHNIC MINORITY POPULATIONS*, (Council of Nat'l Psychol. Ass'ns for the Advancement of Ethnic Minority Interests), Nov. 2003, at 27, available at http://www.apa.org/pi/oema/programs/empa_ptemp.pdf.

⁵⁴ Gary J. Gates, *Geographic Trends Among Same-Sex Couples in the U.S. Census and the American Community Survey 1* (Nov. 2007), <http://www.law.ucla.edu/williamsinstitute/publications/ACSBriefFinal.pdf>. Of course, some of the “growth” can be attributed to the willingness of those in a partnership to “come out.” *Id.* at 1-2; see also 2000 Census Information on Gay And Lesbian Couples, by State, http://www.gaydemographics.org/USA/2000Census_Gay_state.htm (last visited Oct. 2, 2008).

⁵⁵ Gates, *supra* note 54, at 1. The U.S. Census Bureau admits that the “same-sex spouse” responses were “flagged as invalid” because such a response was contrary to the 1996 Federal Defense of Marriage Act. U.S. Census Bureau, *Technical Note on Same-Sex Unmarried Partner Data from the 1990 and 2000 Censuses*, <http://www.census.gov/population/www/cen2000/samesex.html> (last visited June 19, 2008). Thus, the “real” numbers are still suspect. *Id.*

⁵⁶ Adam P. Romero et al., *The Williams Institute, Census Snapshot: Florida 1* (Dec. 2007), <http://www.law.ucla.edu/williamsinstitute/publications/FloridaCensusSnapshot.pdf> [hereinafter *Florida Snapshot*].

⁵⁷ *Id.* “While 49% of same-sex couples with children own their home, a much larger percentage of married parents (77%) own their home.” *Id.* at 3.

⁵⁸ *Id.*; Adam P. Romero et al., *The Williams Institute, Census Snapshot: Kansas 2* (Jan. 2008), <http://www.law.ucla.edu/williamsinstitute/publications/KansasCensusSnapshot.pdf> [hereinafter *Kansas Snapshot*].

Florida and Kansas, “same-sex parents have far fewer financial resources to support their children than married parents.”⁵⁹ In Kansas, “[t]he median household income of same-sex couples with children is \$50,400, or 11% lower than that of married parents (\$56,530).”⁶⁰ In Florida, “[t]he median household income of same-sex couples with children is \$43,000, or 23% lower than that of married parents (\$55,500).”⁶¹

C. Cohabiting Kinship Families

Two prominent examples of cohabitating kinship are senior citizens living together without marrying and opposite-sex couples who have decided not to marry.

According to the AARP, there are 266,600 seniors (sixty-five years and above) who live together without being married.⁶² These figures might be very low in comparison to actual numbers for a variety of social reasons; most importantly, seniors may be reluctant to admit they cohabit.⁶³ Further, as the AARP points out, this group is expected to have a sudden growth spurt with the onset of the “baby boomers” reaching retirement age.⁶⁴

Regarding non-seniors, according to a survey, younger couples are “more than twice as likely” to live together before marriage as older couples.⁶⁵ The survey showed that 40% of all U.S. adults say they have lived with a romantic partner without going through a marriage ceremony.⁶⁶ That is, 9.7 million Americans reported living with opposite-sex partners in 2000.⁶⁷

⁶⁰Kansas Snapshot, *supra* note 58, at 3; Florida Snapshot, *supra* note 56, at 3.

⁶⁰ Kansas Snapshot, *supra* note 58, at 3.

⁶¹ Florida Snapshot, *supra* note 56, at 3.

⁶² Linda Greider, *Unmarried Together*, AARP BULL. TODAY, Oct. 8, 2004, <http://www.aarp.org/family/articles/shacking.html>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *New Legal Concerns for Cohabiting Couples*, LAWYERS.COM, July 19, 2005, <http://research.lawyers.com/New-Legal-Concerns-for-Cohabiting-Couples.html> (survey commissioned by LexisNexis and Martindale-Hubbell).

⁶⁶ *Id.*

⁶⁷ Alternatives to Marriage Project, <http://www.unmarried.org/statistics.html> (last visited Apr. 20, 2009).

This was a 72% increase between 1990 and 2000.⁶⁸ Further, in 2006, 40% of all babies were born out of wedlock.⁶⁹ In comparison, only 18% of babies were born outside of marriage in 1980.⁷⁰ Some of this increase is attributed to the growing fear of thirty-plus year-old single women that they will not be able to have a child.⁷¹ Women worry more about marrying the “wrong” man than having a child out of wedlock.⁷² Even though older single women are having more babies out of wedlock, it is teenagers who have the most with “[m]ore than 80% of babies delivered by teen mothers . . . born out of wedlock.”⁷³

D. Kinship Families That Are Largely Focused on Caregiving

These particular groups can include a fairly broad spectrum of people, from senior citizens living together, to extended or blended families that frequently typify the immigrant community, to caregivers such as sons and daughters caring for their elderly parents, to single moms, or to a caregiver who is looking after an AIDs stricken friend.

More than 50 million Americans care for a family member or friend with a chronic illness, disability or advanced age during any given year, according to a 2000 survey by the National Family Caregivers Association. And the number of people who take on this role will likely boom: The proportion of the U.S. population who are adults 65 and older will rise from 12 to 17 percent in the next 20 years, according to the U.S. Census Bureau.⁷⁴

Health care costs partially explain why children are taking care of their parents. Seniors find themselves financially strapped and often turn to their children to help them out. The

⁶⁸ *Id.*

⁶⁹ Rochelle Sharpe, *Out-of-Wedlock Births*, USA WEEKEND, Feb. 17, 2008, http://www.usaweekend.com/08_issues/080217/080217by-numbers.html.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Zak Stambor, *Caring for Caregivers*, 37 MONITOR ON PSYCHOL. 46, 46 (Nov. 2006), available at <http://www.apa.org/monitor/nov06/caregivers.html>.

children, otherwise known as the “sandwich” generation, find themselves caring for both their parents and their own children.⁷⁵ “Women represent more than two-thirds of adults providing substantial assistance to elderly parents.”⁷⁶ According to a report, these women “provide an annual average of \$1,521 in financial support to elderly parents and spend 23 hours a week (1,210 hours a year) on average providing care to elderly parents.”⁷⁷

Regarding extended families, even the Census Bureau is cognizant of the fact that “families” in America have become very complex. In 2000, the Bureau added categories such as adopted child, step child, foster child, grandchild, parent-in-law, son/daughter-in-law, brother/sister-in-law, nephew/niece, grandparent, uncle/aunt, cousins and un-married partner to the relationship items on who is considered a part of the household.⁷⁸ There were seventy-nine million “Family Groups” in 2003 where at least one subgroup lived in the household.⁷⁹ For example, if a daughter lives with her parents and she has a child who also lives there, the mother and child are considered a subgroup.⁸⁰ Of U.S. states, Hawaii has the highest percentage of multigenerational family households, with 8.2%, closely followed by California (5.6%) and Mississippi (5.2%).⁸¹ About 2% of the identified multigenerational families’ households consist

⁷⁵ JOINT ECONOMIC COMMITTEE, FACT SHEET: INVESTING IN FAMILIES TAKING CARE OF ELDERLY PARENTS 1 (Feb. 2007), available at <http://jec.senate.gov/archive/Documents/Reports/investinginfamiliestakingcareofelderlyparents.pdf> [hereinafter INVESTING IN FAMILIES].

⁷⁶ *Id.* (citing RICHARD W. JOHNSON & JOSHUA M. WIENER, A PROFILE OF FRAIL OLDER AMERICANS AND THEIR CAREGIVERS 64 tbl. 5.4 (Feb. 2006), http://www.urban.org/UploadedPDF/311284_older_americans.pdf).

⁷⁷ *Id.* (citing Charles R. Pierret, *The ‘Sandwich Generation’: Women Caring for Parents And Children*, MONTHLY LAB. REV., Sept. 2006, at 8 tbl. 7, available at <http://www.bls.gov/opub/mlr/2006/09/art1full.pdf>).

⁷⁸ TAVIA SIMMONS & GRACE O’NEILL, U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2000, 1 (Sept. 2001), <http://www.census.gov/prod/2001pubs/c2kbr01-8.pdf>.

⁷⁹ JASON FIELDS, U.S. CENSUS BUREAU, AMERICA’S FAMILIES AND LIVING ARRANGEMENTS: 2003 6 (Nov. 2004), <http://www.census.gov/prod/2004pubs/p20-553.pdf>.

⁸⁰ *Id.*

⁸¹ SIMMONS & O’NEILL, note 78, at 7.

of three generations.⁸²

V. WHAT IS THE IMPACT ON KINSHIP FAMILIES WHEN BENEFITS ARE DENIED?

The family constellation has dramatically shifted from the American ideals portrayed in the media during the 1950s. However, the legal structure has continued to stigmatize and censure those who deviate from the ideal form of “husband, wife, and children in an independent household—the nuclear family model.”⁸³ The persistence of social, political, and legal systems to demand and subsequently reflect this antiquated ideal has damaging consequences for families of today. From an ecological perspective—that is, taking the view that people and families are influenced both positively and negatively by the context in which they live—“many causes of family stress originate outside the family,” such as social and legal structures and neighborhoods or communities.⁸⁴ Policies may deeply constrain or benefit a family depending on how closely it fits the ideal.⁸⁵

The infrastructure of any society (in the U.S. for example: white, male, and moneyed) controls who is allowed “to move upward” and who is maintained in a position of powerlessness.⁸⁶ “Powerlessness . . . , the *inability* to achieve benefits for oneself. . . [or one’s family] is a very painful condition—there is a sense in which one has no control over one’s life.”⁸⁷ The presence of powerlessness and lack of control is described in essentially every narrative concerning trauma and both overt and covert violence.

The presence of ongoing coercive control has dramatic implications. In 1973, Amnesty International found that, whether a political prisoner or domestic partner, and

⁸² *Id.* at 8.

⁸³ LAMANNA & RIEDMANN, *supra* note 1, at 3.

⁸⁴ *Id.* at 391.

⁸⁵ *Id.*

⁸⁶ JULIET C. ROTHMAN, CULTURAL COMPETENCE IN PROCESS AND PRACTICE: BUILDING BRIDGES 27 (2008).

⁸⁷ *Id.* at 26.

irrespective of culture, age, or any other characteristic, “[t]he methods of establishing control over another person are based upon systematic, repetitive infliction of psychological trauma. They are the organized techniques of disempowerment and disconnection. . . . [that] destroy the victim’s sense of self in relation to others.”⁸⁸ Legal and social institutions that reflect the current power structure do just that. There are significant implications for both individuals and kinship families.

The social and legal environment itself may be threatening when it includes legal barriers or practices that disenfranchise a person, family, or group. In any threatening situation, the brain will respond protectively through a stress-response system.⁸⁹ The brain mediates and controls “the neuromuscular, autonomic, endocrine and immune systems.”⁹⁰ Children in a state of fear retrieve information from the world differently than children who feel calm.⁹¹ A context composed of persistent and pervasive levels of “threatfulness” impacts both the child and the family. Families, even groups, under the constant siege of a malevolent society, feel the affect of this ongoing trauma. The human species above all must physically and mentally survive in order to last into the future. Given challenges from all sides, it will take a fully cooperative and human effort to succeed. The outlook is one of uncertainty. For example, the health care system reflects the larger society and “therefore mirrors the inequalities in society.”⁹²

The western health care system is a system where the majority of doctors are male, and the majority of nurses are female - again gendered on power lines; where the people of colour tend to be found either in the roles [sic] of the patients, or in the kitchens, laundries, and janitorial services of most hospitals.⁹³

⁸⁸ HERMAN, *supra* note 38, at 77.

⁸⁹ See PERRY, *supra* note 34, at 5.

⁹⁰ *Id.* at 7.

⁹¹ *Id.* at 5.

⁹² Yasmin Jiwani, *Changing Institutional Agendas in Health Care: Plenary Presentation at Removing Barriers: Inclusion, Diversity and Social Justice in Health Care* (May 25-27, 2000), <http://www.harbour.sfu.ca/freda/articles/barrier.htm>.

⁹³ *Id.*

Given these challenges from all sides and the continued oppressive restriction of policies and practices, Irihapeti Ramsden, a Maori nurse, and her colleagues developed a concept for assessing cultural risk.⁹⁴ The purpose of this assessment was to increase cultural safety and sensitivity practices.⁹⁵ However, Ramsden argues that the approach is only possible when cultural groups have the power within the systems which are clearly not of their own design to determine policies and practices which ensure the cultural safety of their own people.⁹⁶

In order to better identify potentially threatening social environments, practitioners developed the concept of cultural risk. Studies have shown that youth who experience discrimination are at higher risk for illness and infection.⁹⁷ "Such young people may include youth of color, those from low-income families, immigrants, and gay, lesbian, bisexual, and transgender (GLBT) youth. . . . Prejudice and discrimination, at individual and institutional levels, contribute to high morbidity and mortality rates among youth."⁹⁸ Further, "[r]esearch suggests that Black and Latino LGBT people are more likely to have poor health than other LGBT populations."⁹⁹

Such risk is not limited to the young. For example, in 2000, the Chicago Task Force on LGBT, in a survey of aging persons over fifty-five "identified a number of barriers to receiving appropriate care from both health care and social service providers that were specific to their sexual orientation and/or

⁹⁴ See Elaine Papps & Irihapeti Ramsden, *Cultural Safety in Nursing: The New Zealand Experience*, 8 INT'L J. QUALITY HEALTH CARE 491 (1996), available at <http://intqhc.oxfordjournals.org/cgi/reprint/8/5/491>.

⁹⁵ *Id.*

⁹⁶ *Id.* at 491-97.

⁹⁷ L. LAURA DAVIS, ADVOCATES FOR YOUTH, ADOLESCENT SEXUAL HEALTH AND THE DYNAMICS OF OPPRESSION: A CALL FOR CULTURAL COMPETENCY 1 (2003), <http://www.advocatesforyouth.org/publications/iag/oppression.pdf>.

⁹⁸ *Id.*

⁹⁹ See BOSTON PUB. HEALTH COMM'N, DOUBLE JEOPARDY: HOW RACISM AND HOMOPHOBIA IMPACT THE HEALTH OF BLACK AND LATINO LESBIAN, GAY, BISEXUAL, AND TRANSGENDER (LGBT) COMMUNITIES (2002), <http://www.lgbthealth.net/downloads/research/BPHCLGBTLatinoBlackHealthDispar.doc>

gender identity.”¹⁰⁰ Issues of biological and psychological health are but some of the critical aspects of growth and survival among individuals and kinship families.

Results of a 2006 national study indicated that there is widespread psychological and social harm inflicted on same-sex couples because they are denied the right to marry.¹⁰¹ The researchers referred to this social harm through the denial of marriage as *minority stress*, which includes social isolation, stigma and shame—all of which undermine a sense of life meaning, morale, and well-being.¹⁰²

VI. THE PROPOSED THEORIES TO AID KINSHIP FAMILIES

A. Contracts and Various Formulations

Many authors propose that private contracts should be the vehicle for re-ordering the way in which benefits are distributed.¹⁰³ For instance, Professors Rasmusen and Stake

¹⁰⁰ Dennis Beauchamp et al., *LGBT Persons in Chicago: Growing Older: A Survey of Needs and Perceptions* 3, <http://www.lgbthealth.net/downloads/research/ChicagoAgingReport2003.doc> (last visited Oct. 12, 2008).

¹⁰¹ See generally Gilbert Herdt & Robert Kertzner, *I Do, but I Can't: The Impact of Marriage Denial on the Mental Health and Sexual Citizenship of Lesbians and Gay Men in the United States*, 3 J. NAT'L SEXUALITY RES. CTR. 33, 34 (2006), available at http://nsrc.sfsu.edu/sites/default/files/existing_content/satcher.pdf. Some researchers refer to minority stress as historical trauma. See generally Bailey & Letiecq, *supra* note 53, at 22-25.

¹⁰² Herdt & Kertzner, *supra* note 101, at 38-41.

¹⁰³ Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract* 73 IND. L. J. 453, 500 (1998). Pamela Laufer-Ukeles postulates that marriage should no longer be a legally-protected institution, but rather should be matter of private contract and property; a different form of support structure in which caretaking is central should be developed at the center of family law. Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 HARV. J.L. & GENDER 1, 17 (2008); see MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 70 (1995).

Gender neutrality has substantive implications and signals a change in orientation in which caretaking is devalued and biological and economic connection are deemed of paramount importance.

There are no longer formally different expectations for, or responses to, mothers and fathers in much of family law. However, it is my contention that

observe that “marriage today is considered much more a matter for the two parties concerned, not for society, to structure.”¹⁰⁴ As they note, one size does not fit all.¹⁰⁵ They acknowledge that since many who marry are not sophisticated enough to be familiar with all the ramifications of an agreement, the legislature should provide contract forms that indicate options.¹⁰⁶ Since they recognize the possibility of legislatures setting normative values, the forms, according to Rasmusen and Stake, should allow individuals to “structure their lives as they wish.”¹⁰⁷

Distinct from Rasmusen and Stake, Professor Zelinsky

in practice the egalitarian rhetoric of modern reforms results in unrealistic, punitive responses that are harmful to mothers and children.

Id. (footnote omitted). In addition, Melissa Murray states in her article:

[J]ust as cohabitation agreements and the like have been used to secure some of the benefits of marriage to unmarried couples, private contracts still might be a promising way to provide benefits and some sort of legal recognition to nonparental caregivers.

As a general matter, the recent expansion of the legal concept of parenthood to include functional parents and multiple third parties, in tandem with the use of private agreements in structuring the provision of nonparental care, all are important developments in moving towards greater recognition of the caregiving continuum.

Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 444 (2008). The author suggests that private marriages may “simply resurrect the private character of caregiving and shield nonparental caregiving efforts from public view. Thus, if we are interested in developing a theoretical framework that would encompass the continuum between parents and strangers, the expansion of parenthood through these vehicles may be too limited.” *Id.* at 447; see also David Boaz, *Privatize Marriage: A Simple Solution to the Gay-Marriage Debate*, SLATE, Apr. 25, 1997, <http://www.slate.com/id/2440/>.

¹⁰⁴ Rasmusen & Stake, *supra* note 103, at 500. In the past, religion and society defined the gender roles in a marriage. *Id.* This type of marriage did not allow for simple dissolution or roles that differed from those defined. *Id.* With changing times, the opinion on marriage has changed and “restraints on individual liberty have weakened or disappeared.” *Id.*

¹⁰⁵ *Id.* at 501. To be specific, this article states that no-fault divorce does not necessarily fit all situations because there may be problems with identifying the grounds for divorce. *Id.* Furthermore, in an age when familial and social norms have weakened, “people need legal institutions to pick up the slack, allowing them to make credible commitments to each other.” *Id.* People need to know to what extent their marriages are enforceable by law for the marital bonds to remain traditional between spouses. *Id.*

¹⁰⁶ *Id.* at 502.

¹⁰⁷ *Id.*

focuses on the free market as a source for contracts. As he notes, adopting a contractual approach will democratize marriage.¹⁰⁸ Secular and religious organizations will offer various prototypical contracts as models.¹⁰⁹ Further analogizing to prenuptial agreements,¹¹⁰ Zelinsky argues that utilizing contracts does not vary that much from what already exists.¹¹¹

Certainly, the wealthy frequently engage in such pre-planning.¹¹² According to some sources, the majority of marriages will be preceded by a prenuptial agreement by 2020.¹¹³ “At the New York-based Equality in Marriage Institute, . . . a nonprofit that advises couples, the number of

¹⁰⁸ Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1182 (2006).

[A] deregulated marital regime would require default rules for those couples who fail to contract and for those couples whose contracts fail to address particular issues. Any contract regime, including one for marital and cohabitation agreements, must decide who can contract and when their deals violate public policy. Determining these default rules and the contours of public policy will be contentious in a heterogeneous and democratic polity like the United States at the beginning of the twenty-first century, but not nearly as contentious as the status quo of civil marriage.

Id. (footnote omitted).

¹⁰⁹ *Id.* at 1182. Marriage contracts could be as individually tailored as other contracts are in our diverse capitalist world. *Id.* For those who wanted a standard one-size-fits-all contract, that would still be easy to obtain. Boaz, *supra* note 103. “Wal-Mart could sell books of marriage forms next to the standard rental forms.” *Id.*

¹¹⁰ *Id.* at 1176. The prenuptial agreement bears similarities to the statutory declaration currently signed by covenant marriage couples. *Id.* The current declaration signifies “commitment to a ‘lifelong relationship.’” *Id.* The prenuptial agreement would limit divorces in the same way covenant marriage statutes do. *Id.*

¹¹¹ *Id.* at 1184. Similar to any other contract, a domestic-based contract will need an age of consent to determine capability of entering into the marital contract. *Id.*

¹¹² Beth Potier, *For Many, Prenups Seem to Predict Doom*, HARV. U. GAZETTE, Oct. 16, 2003, <http://www.hno.harvard.edu/gazette/2003/10.16/01-prenup.html>. “Often considered exclusive to the very wealthy, ‘prenuptial agreements can go beyond preserving assets before the marriage’ . . . They might dictate custody arrangements, for instance, or decree that despite most states’ ‘no-fault’ divorce laws, the couple agrees to divorce only in the presence of the traditional grounds of fault like abuse, addiction, or imprisonment.” *Id.*; see also LovetoKnow.com, Prenuptial Agreements: Interview with Helene Taylor, http://divorce.lovetoknow.com/Prenuptial_Agreements:_Interview_with_Helene_Taylor (last visited Apr. 10, 2009).

¹¹³ ARLENE G. DUBIN, PRENUPS FOR LOVERS: A ROMANTIC GUIDE TO PRENUPTIAL AGREEMENTS, <http://www.prenupsforlovers.com/definition.php> (last visited Oct. 12, 2008).

inquiries about prenups from both men and women has climbed from 1,500 a month in 2003 to some 5,000 a month . . .” in 2006.¹¹⁴ Twenty-six states have already adopted a version of the Uniform Agreement Act which governs prenuptial agreements.¹¹⁵

Prenuptials should not be thought of as just for the wealthy. Sometimes prenuptials contain requirements that control almost every facet of everyday living. For instance, a prenuptial agreement by a New Mexican couple required them to only pay cash unless the other spouse agreed to do otherwise and to not leave anything on the floor overnight unless one party was packing.¹¹⁶ Further, it is not an expensive proposition to draft a prenuptial agreement; they are available online.¹¹⁷ Prenuptial forms ask questions about property, debts, children and support in case of separation. Both parties decide what they think ‘marriage’ should refrain from, contain or be restricted to.¹¹⁸

Related to prenuptials are common law marriages, which also have a contractual concept underlying the non-written

¹¹⁴ Kerry Hannon, *Planning for Love and Money*, U.S. NEWS & WORLD REP., July 16, 2006, at 53, available at <http://www.usnews.com/usnews/biztech/articles/060716/24prime.htm>.

¹¹⁵ UNIF. LAW COMM’RS: THE NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, FACT SHEET: UNIFORM PREMARITAL AGREEMENT ACT, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upaa.asp (last visited Oct. 12, 2008).

¹¹⁶ Gary Belsky, *Living by the Rules*, MONEY MAG., May 1, 1996, at 100, available at http://money.cnn.com/magazines/moneymag/moneymag_archive/1996/05/01/212090/index.htm. The New Mexico couple further contractually agreed to “[n]ever follow the car in front of them by less than one car length for every 10 miles per hour they are traveling” and to “[a]llways have ‘healthy’ sex three to five times a week.” *Id.* This agreement, however, is beyond the normal agreement that spouses sign upon marriage. *Id.* It is detailed in areas from the number of children they will have to the kind of gas they will use. *Id.* The couple believed that agreeing to terms that typically cause fights in a marriage would alleviate arguments because all the areas were already decided upon. *Id.* They maintain their theory because the couple has not fought since they were married. *Id.* If the couple faces times where their plan does not work out as they anticipated, they have stated they are able to expand the agreement because “it’s a living document.” *Id.*

¹¹⁷ See LawDepot.com, Prenuptial Agreement, <http://www.lawdepot.com/contracts/prenup/> (last visited Apr. 10, 2009).

¹¹⁸ *Id.*

agreement to cohabitate. Some feminist scholars advocated, at least ten years ago, that a common law approach addressed many of the concerns that “typical marriages presented.”¹¹⁹ The theme was that common law marriages protected women who were not formally married.¹²⁰ The scholars advocated extending or re-introducing common law marriages to all states.¹²¹

Historically, various states tolerated and embraced common-law marriages.¹²² Unfortunately with the abolition of slavery, many states eliminated common law marriages because of the fear of interracial marriage.¹²³ Later, in the roaring 1920’s, the “lax” morals contributed to apprehension that the institution of marriage was being threatened, thus states again outlawed more common law marriage provisions.¹²⁴ Finally, the growth of governmental benefits made some officials worry about how to administer claims if common law marriages were allowed.¹²⁵ Thus, currently only eight states and the District of Columbia formally recognize the institution without conditions other than the couple cohabitate and hold themselves out as being married.¹²⁶ Unlike the squabble that is currently taking

¹¹⁹ See generally Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709 (1996).

¹²⁰ *Id.* at 711.

¹²¹ See *id.* “[A] common law ‘widow’ . . . [cannot] collect Social Security survivors’ benefits after a relationship of very long standing and thus [must] rely upon public benefits providing much less income . . .” *Id.* The “widow” is also “unable to collect damages for a wrongful death action.” *Id.*

¹²² *Id.* at 719-20. “With the reception of English common law in the American colonies, common law marriage was transferred to this continent, where some states embraced the doctrine and others did not.” *Id.* at 719. From as early as 1639, Puritans in Massachusetts had established statutes and regulations governing entry into marriage. *Id.*

¹²³ *Id.* at 740, 745. See *Loving v. Virginia*, 388 U.S. 1 (1967) (overruling *Naim v. Naim*, 87 S.E.2d 749, 756 (1955), where purposes were “to preserve the racial integrity of its citizens,” prevent “the corruption of blood,” “a mongrel breed of citizens,” and “the obliteration of racial pride,” and finally to endorse the doctrine of White Supremacy).

¹²⁴ Bowman, *supra* note 119, at 743-44.

¹²⁵ *Id.* at 746-48.

¹²⁶ ALTERNATIVES TO MARRIAGE PROJECT, FACT SHEET: COMMON LAW MARRIAGE, <http://www.unmarried.org/commonlaw.pdf> (last visited Apr. 10, 2009); see also Bowman, *supra* note 119, at 749. States that recognize common law marriage include: Georgia—if created before 1/1/97—GA. CODE ANN. § 19-3-1.1 (2004); Idaho—if created before 1/1/96—IDAHO CODE § 32-201 (2006); Iowa, IOWA CODE ANN. §. 595.11 (West 2001); Kansas, KAN.

place with regard to same-sex marriages, the states that do not recognize common law marriage within their own state, frequently declare these unions as valid even though formalized in another state.¹²⁷ The states follow the principles set in the United States Constitution that requires every state to accord “Full Faith and Credit” to the laws of its sister states.¹²⁸

As with prenuptial agreements, there are many samples of an agreement or contract to be used by people considering common law marriages in order “to avoid court imposed support payments or division of property” and “to avoid conflict during the relationship or upon its breakdown” as to “property

STAT. ANN. § 23-101 (2007); Montana, MONT. CODE ANN. § 40-1-403 (2007); New Hampshire—for inheritance purposes only—N.H. REV. STAT. ANN. § 457:39 (2008); Oklahoma—possibly only if created before 11/1/98—OKLA. STAT. ANN. tit. 43, § 1 (West 2001); Pennsylvania—if created before 1/1/05—23 PA. CONS. STAT. ANN. § 1103 (2007); Texas, TEX. FAM. CODE ANN. § 2.401 (1998); Utah, UTAH CODE ANN. § 30-1-4.5 (2007); Alabama, *Piel v. Brown*, 361 So. 2d 90, 93 (Ala. 1978); Colorado, *Deter v. Deter*, 484 P.2d 805, 806 (Colo. Ct. App. 1971); Ohio—if created before 10/10/91—*Lyons v. Lyons* 621 N.E.2d 718, 720 (Ohio Ct. App. 1993); Rhode Island, *Sardonis v. Sardonis*, 261 A.2d 22, 24 (R.I. 1970); South Carolina, *Johnson v. Johnson*, 112 S.E.2d 647, 651 (S.C. 1960); and Washington D.C., *Johnson v. Young*, 372 A.2d 992, 994 (D.C. 1977).

¹²⁷ NAT'L CONFERENCE OF STATE LEGISLATURES, COMMON LAW MARRIAGE, <http://www.ncsl.org/programs/cyf/commonlaw.htm> (last visited Oct. 15, 2008). The Seattle Mayor's executive order which required city departments to recognize same-sex marriages of city employees for purposes of employee benefits, did not directly conflict with the State's Defense of Marriage Act which defines marriage as a civil contract between a male and a female. *Leskovar v. Nickels*, 166 P.3d 1251, 1255 (Wash. Ct. App. 2007). The order merely determined who was eligible for employee benefits without giving legal effect to same-sex marriages, though the order contained language in its “whereas” clauses stating that “marriage equality should be afforded to all consenting, adult couples regardless of their sexual orientation.” *Id.* at 1256. The executive order which required county agencies to recognize same-sex marriages that were validly contracted out-of-state was an implementing device and not a law, and, therefore, it does not violate the constitutional provision which empowered local governments to adopt laws not inconsistent with the state constitution and general law. *Godfrey v. Spano*, 836 N.Y.S.2d 813, 819 (Sup. Ct. 2007). A taxpayer could not show any injury-in-fact resulting from state university's policy of providing health benefits to same-sex domestic partners of its employees based solely upon being a taxpayer. *Brinkman v. Miami Univ.*, No. CA2006-12-313, 2007 WL 2410390, at *3 (Ohio Ct. App. Aug. 27, 2007). Therefore, he did not have common-law taxpayer standing to seek prospective declaratory and injunctive relief to prevent his tax dollars from being used to finance the benefits. *Id.* Even though many states are claiming that DOMA overrides Full Faith and Credit within states, courts have determined that same-sex benefits and marriages do demand recognition. See *infra* note 134.

¹²⁸ U.S. CONST. amend. IV, § 1.

ownership, debt obligations, and support obligations.”¹²⁹ These agreements frequently ask questions regarding property, inheritance, gifts from third parties, insurance policies’ details, law suit awards, debts, support and for how many years, estate matters and income and savings.¹³⁰ While some say that planning for what happens if there is a divorce, separation or death when entering a kinship arrangement puts a pale on the concept of marriage, others advocate that all persons seeking to enter such a union have mandatory planning in case divorce results.¹³¹ Taken from another perspective, pre-nuptial planning and contractual agreements may be a significant process in building the relationship. Such a process would require a thoughtful dialogue about highly important matters such as money, family, location and attributes of home, work, children, blended family issues, pets, celebration of holidays and religious practices, and even sexual relations.

Despite the historical move to non-recognition of common law marriages, as Professor Bowman points out, courts now engage in broadly interpreting statutes to award non-married

¹²⁹ See LawDepot.com, Common Law Partner Agreement, <http://www.lawdepot.com/contracts/common-law-partner-agreement/> (last visited Apr. 10, 2009).

¹³⁰ *Id.*; see also USLegalForms.com, Prenuptial Agreement Forms, <http://www.uslegalforms.com/premarital/> (last visited Oct. 13, 2008); FindLaw.com, Sample Premarital/Prenuptial Agreement, http://family.findlaw.com/marriage/marriage-resources/le19_4_1.html (last visited Oct. 13, 2008).

¹³¹ Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397, 425 (1992). Professor Carol Sanger, even though a contracts expert, is one of the most articulate critics of contracts as a solution. See generally Carol Sanger, *A Case for Civil Marriage*, 27 CARDOZO L. REV. 1311 (2006). Although much of what she argues in her article is directed at using contracts as a basis for same-sex couplings, her critique extends beyond that exclusive category. *Id.* She worries about full disclosure, people being bound by their contracts whether they have read them or not and utilizing “fillers” to complete the indefinite portions. *Id.* at 1313-15. Sanger wonders if “the law of marriage contract will over time not differ much from the law of civil marriage.” *Id.* at 1315. The presumption is that contract arrangements will turn into civil marriages. *Id.* Another concern regarding contracts is always what happens when somebody breaches. *Id.* How is a contract going to be enforced or damages awarded in complex and emotional situations? *Id.* Sanger illustrates what a mess courts would be in if there were contractual breaches. *Id.* As she observes, should a judge enjoin a defendant spouse from “marrying again, just as defecting sports players cannot sign with other teams,” if that were part of the contractual agreement? *Id.*

spouses the same benefits as persons in an officially recognized marriage.¹³² For instance, non-married spouses may recover as “dependants” under workers’ compensation laws.¹³³ Some courts search for reasons to allow people to claim they were “married” using doctrines such as quasi-contract, estoppel and equitable remedies.¹³⁴ Significantly, the recognition of what constitutes a “spouse” or a member of a kinship family is given the broadest interpretation possible to get to the desired results. As another indication of even a state legislature’s willingness to expand the definition of family, Hawaii’s wrongful death statute allows people to enter into a contract designating who is to be a ‘reciprocal beneficiary.’¹³⁵ Not only can a contract be the basis of wrongful death claims, but Hawaii has also been very inclusive of who may make a claim under the statute.¹³⁶ According to court interpretation, both a legal family and a common law family can simultaneously collect damages.¹³⁷ Further, any dependent or partially dependent person can also collect.¹³⁸ The Hawaiian interpretation of what constitutes family is a model for all states.¹³⁹

¹³² Bowman, *supra* note 119, at 763.

¹³³ Peoples-law.org, Benefits, Insurance, Inheritance and Taxes, <http://www.peoples-law.org/family/Unmarried%20Cohabs/cohabs%20benefits%20-%20wlc.htm> (last visited Apr. 20, 2009). Maryland entitles workers’ compensation benefits to unmarried survivors based on a dependency standard. MD. CODE ANN., LAB. & EMPL. § 9-678 (LexisNexis 2008). An unmarried cohabitant who can show that he or she was wholly or partly dependent on the deceased employee at the time of the lethal injury will receive benefits. *Id.*

¹³⁴ Bowman, *supra* note 119, at 770.

¹³⁵ HAW. REV. STAT. § 572 C-1, -6 (2006). Note that the statute does not provide reciprocal beneficiaries compensation in the event of severe and permanent injury. See Sarah M. Love, Comment, *Extending Loss of Consortium to Reciprocal Beneficiaries: Breaking the Illogical Boundary Between Severe Injury and Death in Hawai’i Tort Law*, 28 U. HAW. L. REV. 429, 430 (2006).

¹³⁶ *Lealaimatafao v. Woodward-Clyde Consultants*, 867 P.2d 220 (Haw. 1994).

¹³⁷ *Id.* at 224.

¹³⁸ *Id.* Contrast with Florida where the wrongful death act only allows “survivors” to collect from an award. FLA. STAT. ANN. § 768.20 (West 2005). “Survivors” are defined as the surviving spouse, minor children, parents and any blood relatives and adoptive brothers and sisters who are partly or wholly dependent on the deceased. § 768.18.

¹³⁹ HAW. REV. STAT. § 587-2 (2006).

“Family” means each legal parent, the natural mother, the natural father, the adjudicated, presumed, or concerned natural father as defined under section

Hawaii is not alone. In California, which does not officially recognize common law marriages,¹⁴⁰ courts have substituted “palimony” relationships and consider the oral promises as binding contracts.¹⁴¹ As actor Lee Marvin found out, his oral promise with his non-marital partner, Michelle, was held to be a binding contract, and he was forced to give her one-half of the property accumulated during the period they lived together.¹⁴² According to the court, an oral contract involving earnings and property rights between people, even those who have sex with each other, is enforceable.¹⁴³ The court quite willingly used equitable principles and quantum meruit to permit recovery.¹⁴⁴

VII. WHAT CAN LEGISLATION ACHIEVE?

“The state cannot create healthy relationships; it can only seek to foster the conditions in which close personal relationships that are reasonably equal, mutually committed, respectful and safe can flourish.”¹⁴⁵

The concept of legislative protection and recognition of kinship families encounters many of the same legal and societal obstacles that confront the recognition of same-sex relationships. Indeed, the need for state recognition of these relationships arises not just from human intimacy, but also from human dependency. If states do not provide adequate legal protection for ordinary and loving human relations and continue to limit

578-2, each parent’s spouse, or former spouses, each sibling or person related by consanguinity or marriage, each person residing in the same dwelling unit, and any other person who or legal entity which is a child’s legal or physical custodian or guardian, or who is otherwise responsible for the child’s care, other than an authorized agency which assumes such a legal status or relationship with the child under this chapter.

Id.

¹⁴⁰ *Marvin v. Marvin*, 557 P.2d 106, 122 n.24 (Cal. 1976).

¹⁴¹ *Id.* at 122-23.

¹⁴² *Id.* at 116.

¹⁴³ *Id.* at 113.

¹⁴⁴ *Id.* at 110, 122-23.

¹⁴⁵ LAW COMM’N OF CAN., BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS xxiii (2001), available at http://www.samesexmarriage.ca/docs/beyond_conjugality.pdf [hereinafter BEYOND CONJUGALITY].

comprehensive legal protection to heterosexual adults or conjugal relationships, the state will undermine financial, emotional and societal support of caregivers, who are typically women.¹⁴⁶ Providing legal protections for the social arrangements constructed by adults and their chosen beneficiaries allows individuals to construct their own viable family units to protect and promote their mutual interests and further acknowledges the interdependence of all human relationships.¹⁴⁷

Although private contracts provide some legal protection, a more practical solution is to allow individuals to undertake a series of legal obligations by entering into a public legal arrangement recognized by state, national and international laws. While private contracts can structure the legal aspects of a kinship relationship, such private arrangements are problematic.¹⁴⁸ First, it is difficult to anticipate all of the situations in which the legality of kinship arrangements will be relevant. Second, many parties lack the financial means to create the legal arrangements to confer recognizable duties and

¹⁴⁶ See Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 18 (2000). Professor Fineman asserts:

[T]he caretaking work creates a collective or societal debt. Each and every member of society is obligated by this debt. Furthermore, this debt transcends individual circumstances. In other words, we need not be elderly, ill, or children any longer to be held individually responsible. Nor can we satisfy or discharge our collective responsibility within our individual, private families. Merely being financially generous with our own mothers or duly supporting our own wives will not suffice to satisfy our share of the societal debt generally owed to all caretakers.

Id.

¹⁴⁷ See *id.* Some have argued that “[t]he medieval church instituted marriage laws and practices that undermined large kinship groups. . . . [Thus], by the late medieval period the nuclear family was dominant [sic].” AVNER GREIF, *FAMILY STRUCTURE, INSTITUTIONS, AND GROWTH: THE ORIGIN AND IMPLICATIONS OF WESTERN CORPORATISM* 2-3 (2005) (footnote omitted), available at http://www.aeaweb.org/annual_mtg_papers/2006/0106_0800_1104.pdf.

¹⁴⁸ See BEYOND CONJUGALITY, *supra* note 145, at 115. “The contractual model may respect the value of autonomy but often falls short of fulfilling other values such as equality or efficiency since too few individuals are prepared to negotiate the terms of their close personal relationships.” *Id.*

obligations.¹⁴⁹ Third, legal status facilitates recognition of such arrangements in a variety of contexts.¹⁵⁰

In addition, extending marriage rights outside of marriage provides legal visibility for important social and economic relationships.¹⁵¹ Even with carefully planned legal arrangements, a surviving companion can become a legal stranger under existing laws because such individuals are not considered “next of kin.”¹⁵² These laws affect hospital visitation rights, funeral arrangements and permitted medical disclosures. As Nancy Knauer concluded, “I cannot protect my chosen family in the absence of some form of uniform relationship status on both the state and federal level.”¹⁵³

At the core of extending marriage rights to unmarried persons is the legal protection of units identified as families so that they can share resources, benefits, duties and obligations on a consensual basis. Accordingly, the government regulation of marriage essentially involves a contractual relationship. Marriage has maintained a privileged legal status in the United States. Laws in almost all states limit contractual choice of marriage to heterosexual couples.¹⁵⁴ In addition, constitutional

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at xxiii.

¹⁵¹ See Nancy J. Knauer, *A Marriage Skeptic Responds to the Pro-Marriage Proposals to Abolish Civil Marriage*, 27 CARDOZO L. REV. 1261, 1272-73 (2006).

¹⁵² *Id.*

¹⁵³ *Id.* at 1276.

¹⁵⁴ See, NEW DIRECTIONS FOR FAMILY LAW IN THE UNITED STATES: FROM CONTRACT COHABITATION TO REGISTERED PARTNERSHIPS AND BEYOND 12 (2007) http://www.indret.com/pdf/430_en.pdf. “Normally, contract law assumes freedom of contract, party autonomy, and equal bargaining power. The marriage contract is not totally free of governmental regulation and therefore parties have limited freedom of choice.” *Id.*; see also SANFORD N. KATZ, FAMILY LAW IN AMERICA 36-37 (2003). As of November 4, 2008, only two states, Connecticut and Massachusetts, permit same-sex marriages. Lambda Legal.org, Status of Same-Sex Relationships Nationwide, <http://www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html> (last visited Apr. 10, 2009) (including California’s constitutional ban of same-sex marriage on November 4, 2008) [hereinafter Lambda Legal]. Following this report, Iowa and Vermont also recognized same-sex marriage. The Iowa Supreme Court decided denial of same-sex marriage violated equal protection of the law. *Varnum v. Brien*, No. 07-1499, 2009 WL 874044 (Iowa Apr. 3, 2009). The Vermont Legislature overrode the Governor’s veto and now recognizes same-sex marriage also. Abby Goodnough & Katie Zezima, *Rejecting Veto, Vermont Backs Gay Marriage*, N.Y. TIMES,

provisions in twenty-nine states ban same-sex marriage.¹⁵⁵ As a result, obstacles to legal recognition of same-sex couples have acted to impede the provision of similar recognition and benefits for other adult relationships.

A. What Legal Rights Should Be Conferred?

The federal benefits, rights and privileges that were enumerated by the GAO have functioned to promote and protect the family unit and need recognition and reproduction in kinship relationships.¹⁵⁶ Persons who choose to pool their resources within a household or similar unit need legal protection, support and recognition of those relationships.¹⁵⁷ Apart from marriage and private contracts, government can provide protection to relationships of cohabitating adults through legal recognition and/or the provision of legal benefits to such adults.¹⁵⁸ Two possible ways to accomplish these goals

Apr. 8, 2009, at A1.

¹⁵⁵ Lambda Legal, *supra* note 154. Recently, on November 4, 2008, three more states—Arizona, California and Florida—adopted constitutional bans on same-sex marriage. John Gramlich & Christine Vestal, *3 States, Including Calif., Ban Gay Marriage*, STATELINE.ORG, Nov. 7, 2008, <http://www.stateline.org/live/details/story?contentId=353318> (“California’s vote calls into question 18,000 marriage licenses granted to same-sex couples since they won the right to wed under a court ruling six months ago.”). With these bans, thirty states (if Hawaii is included) have constitutional bans on same-sex marriage. *Id.* Gay rights sources, however, place the number of states with a constitutional ban at twenty-nine and include Hawaii as one of fifteen states that have law prohibiting same-sex marriage. See Human Rights Campaign, *Statewide Marriage Prohibitions*, Nov. 17, 2008, http://www.hrc.org/documents/marriage_prohibitions.pdf (reflecting the recent constitutional ban in California); Lambda Legal, *supra* note 154. Hawaii is often omitted from the lists of states with constitutional bans on marriage because Hawaii’s constitutional amendment did not ban same-sex marriage per se. The amendment, however, allows the Hawaiian legislature to restrict marriage to opposite-sex couples. Haw. Const. Art. I, § 23.

¹⁵⁶ Shah, *supra* note 30, at 3.

¹⁵⁷ See Martha Albertson Fineman, *Progress and Progression in Family Law*, 2004 U. CHI. LEGAL F. 1, 4. Professor Fineman notes that “Of particular importance for policymakers should be family units that are caring for children, the elderly, or the ill. In our family ideology it is the marital family that is assigned responsibility for the caretaking of dependant individuals. This family is the way we ‘privatize’ dependency.” *Id.*

¹⁵⁸ Acey, *supra* note 29, at 1-5.

would be to extend domestic partnership registration or domestic partnership benefits to non-conjugal cohabitating adults in kinship relationships.

B. Registration: Domestic Partnership Law Model

Domestic partnership law offers a registration model that can be extended to kinship relationships.¹⁵⁹ As such, domestic partnership law has begun the task of recognizing the importance of kinship units outside of the conjugal heterosexual model. With domestic partnership law comes the recognition that adults may choose to share their lives for a variety of reasons and that the recognition of such family relations can benefit society. Still, these models foster, in part, legal relationships among unrelated adults even though adult relationships among related individuals continue to be an important outgrowth of our “traditional” nuclear families.¹⁶⁰ Nevertheless, domestic partnership laws have opened the door to addressing the need for laws applicable to kinship family units that provide mutual support and care for adults and their loved ones. Currently, however, domestic partnership laws usually provide legal recognition of only quasi-marital relationships.¹⁶¹

1. Conjugal Aspect

Many of the current domestic partnership laws provide protections for individuals in a conjugal relationship, that is, individuals functioning as a “couple.”¹⁶² In so doing, these laws provide legal protections to relationships that mimic marriage.

¹⁵⁹ BEYOND CONJUGALITY, *supra* note 145, at 117-19.

¹⁶⁰ See Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. CHI. LEGAL F. 353, 355.

¹⁶¹ See Thomson Reuters/West, *Effects of Civil Unions / Domestic Partnerships on Benefits at the State Level*, 50 State Statutory Surveys, Dec. 2008, at 1.

¹⁶² THE AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03 (2002). For example, The American Law Institute states that “domestic partners are two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple.” *Id.*

While these provisions offer much needed protection to a host of intimate relationships, they exclude relationships that are not consecrated on sexual intimacy or that do not replicate married couples' relationships.¹⁶³ Typically such laws are put in place to provide legal recognition of same-sex couples and/or to provide an option similar to marriage for heterosexual couples.¹⁶⁴

Most domestic partnership laws, in the United States and other nations, provide registration primarily for same-sex partners.¹⁶⁵ Typically, such schemes require a common residence, prohibit the registration of persons related by blood and only include opposite-sex partners involving persons at least sixty-two years old.¹⁶⁶

As stated in *Beyond Same-Sex Marriage*, “[a]ll families, relationships, and households struggling for stability and economic security will be helped by separating basic forms of legal and economic recognition from the requirement of marital and conjugal relationship.”¹⁶⁷ This document later explains that “[t]o have our government define as ‘legitimate families’ only those households with couples in conjugal relationships does a tremendous disservice to the many other ways in which people actually construct their families, kinship networks, households, and relationships.”¹⁶⁸ Thus, allowing persons to share in rights afforded to married partners provides security and stability for non-traditional family arrangements. Accordingly, *Beyond Same-Sex Marriage* asserts that “[m]arriage is not the only worthy form of family or relationship, and it should not be legally and economically privileged above all others.”¹⁶⁹ In sum, the purpose of extending legal recognition to non-marital relationships is to limit or eliminate marriage privileges that create legal discrimination or disparate treatment for kinship families that are not bound by marriage or similar

¹⁶³ BEYOND CONJUGALITY, *supra* note 145, at 119.

¹⁶⁴ See Thomson Reuters/West, *supra* note 161.

¹⁶⁵ BEYOND CONJUGALITY, *supra* note 145, at 117.

¹⁶⁶ See CAL. FAM. CODE § 297 (b) (West 2004); N.J. STAT. ANN. § 26:8A-4 (West 2007).

¹⁶⁷ Acey, *supra* note 29, at 1.

¹⁶⁸ *Id.* at 2.

¹⁶⁹ *Id.*

arrangements.¹⁷⁰

2. Non-Blood Relationships

Domestic partnership law arose out of a need to provide legal recognition of and protection for the consensual arrangements of unmarried couples.¹⁷¹ Due to this focus, the domestic partnership laws attempt to provide limited legal protections for heterosexual or same-sex couples who do not or, in the case of same-sex couples, cannot legally marry.¹⁷² As a result, such laws typically would not afford protections for kinship relationships amongst related adults. Thus, these laws would exclude important kinship relationships.

3. Reciprocal Benefit Arrangements

Both Hawaii and Vermont have laws that provide for reciprocal beneficiaries.¹⁷³ Each of these laws allows unmarried adults to share some benefits and protections that were previously afforded only to spouses.¹⁷⁴ If individuals meet the

¹⁷⁰ *Id.*

Autonomy is compromised if the state provides one relationship status with more benefits and legal support than others, or conversely, if the state imposes more penalties on one type of relationship than it does on others. It follows then that an important corollary of the value of relational autonomy is a principle of state neutrality regarding the form or status that relationships take. The state ought to support any and all relationships that have the capacity to further relevant social goals, and to remain neutral with respect to individuals' choice of a particular form or status.

BEYOND CONJUGALITY, *supra* note 145, at 18.

¹⁷¹ BEYOND CONJUGALITY, *supra* note 145, at 117.

¹⁷² *Id.* For example, the domestic partnership laws in California and New Jersey require a common residence and exclude related individuals. See CAL. FAM. CODE § 297 (West 2004) (operative Jan. 1, 2005); N.J. STAT. ANN. § 26:8A-4 (West 2007). For an overview of municipal and county domestic partnership law in the United States, see William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, 2001 BYU L. REV. 961, 965-78.

¹⁷³ HAW. REV. STAT. § 572C (2006); VT. STAT. ANN. tit. 15, §§ 1301-05 (2002).

¹⁷⁴ HAW. REV. STAT. §§ 572C-1 to -7; VT. STAT. ANN. tit. 15, §§ 1301-05. As one author notes:

The Hawaii law provides a number of benefits to state employees and citizens, although its effect on private employers is limited. Its provisions include funeral leave for state employees, hospital visitation rights, health insurance coverage for partners of state employees, and the ability to claim an elective

criteria specified in the statute, they may establish a reciprocal beneficiaries relationship by signing a declaration.¹⁷⁵ The reciprocal beneficiaries criteria address some of the moral concerns for not legally recognizing such relationships by providing a minimum age of consent,¹⁷⁶ prohibiting polygamy¹⁷⁷ and requiring consent to the arrangement.¹⁷⁸ Along these lines, such statutes recognize to some degree the economic dependency that may exist among unmarried adults.¹⁷⁹

share of a partner's estate.

Duncan, *supra* note 172, at 963. For a fuller explanation of the rights of reciprocal beneficiaries under Hawaiian law, see W. Brian Burnette, Note, *Hawaii's Reciprocal Beneficiaries Act: An Effective Step in Resolving the Controversy Surrounding Same-Sex Marriage*, 37 BRANDEIS L.J. 81, 87-89 (1998). Section 1301 of the Vermont statute limits benefits to the following specific areas:

- (1) Hospital visitation and medical decision-making under 18 V.S.A. § 1853;
- (2) Decision-making relating to anatomical gifts under 18 V.S.A. § 5240;
- (3) Decision-making relating to disposition of remains under 18 V.S.A. § 5220;
- (4) Durable power of attorney for health care under 14 V.S.A. § 3456 and terminal care documents under 18 V.S.A. § 5254;
- (5) Patient's bill of rights under 18 V.S.A. chapter 42;
- (6) Nursing home patient's bill of rights under 33 V.S.A. chapter 73;
- (7) Abuse prevention under 15 V.S.A. chapter 21.

15 VT. STAT. ANN. tit. § 1301(a).

¹⁷⁵ HAW. REV. STAT. ANN. § 572C-4. The requirements of the Hawaii statute are as follows:

- (1) Each of the parties be at least eighteen years old;
- (2) Neither of the parties be married nor a party to another reciprocal beneficiary relationship;
- (3) The parties be legally prohibited from marrying one another under chapter 572;
- (4) Consent of either party to the reciprocal beneficiary relationship has not been obtained by force, duress, or fraud; and
- (5) Each of the parties sign a declaration of reciprocal beneficiary relationship as provided in section 572C-5.

Id. The Vermont statute has similar requirements, but adds an additional requirement that the parties "[b]e related by blood or by adoption . . ." § 1303(3).

¹⁷⁶ § 572C-4(1); § 1303(1).

¹⁷⁷ § 572C-4(2); § 1303(2).

¹⁷⁸ § 572C-4(4); § 1303(4).

¹⁷⁹ See, e.g., § 572C-2. Hawaii used a public policy rationale as a basis creating the necessary legislation. Section 572C-2 of the Hawaii Statutes states the findings that led to the adoption of the "Reciprocal Beneficiary" law. *Id.* This section explains that:

Since Hawaii, unlike Vermont, has not legalized same-sex unions, the Hawaiian statute has been criticized for sidestepping the issue of same-sex relationships.¹⁸⁰ Because the Hawaii statute did not extend the rights of marriage to same-sex couples, but only provided more limited rights within the context of domestic partnerships, it has been viewed as granting less than full equality to same-sex couples even though it affords more rights to non-conjugal relationships.¹⁸¹

Extending legal marriage privileges to same-sex and non-conjugal relationships will undoubtedly be a slow process. Just as states currently struggle with equality issues for same-sex relationships, kinship relationships will face similar challenges. Like same-sex marriages, the concerns will have religious and moral overtones that seek to limit legal recognition of non-traditional family units. The current requirements of domestic partnership¹⁸² and reciprocal beneficiaries¹⁸³ strive to address such concerns.

C. Benefit Sharing: Domestic Partnership Designation

1. What Statutes Should Provide

As discussed above, domestic partnership law and reciprocal beneficiaries law provide models for the extension of laws supporting kinship relationships. While reciprocal

[T]he legislature concurrently acknowledges that there are many individuals who have significant personal, emotional, and economic relationships with another individual yet are prohibited by such legal restrictions from marrying. For example, two individuals who are related to one another, such as a widowed mother and her unmarried son, or two individuals who are of the same gender. Therefore, the legislature believes that certain rights and benefits presently available only to married couples should be made available to couples comprised of two individuals who are legally prohibited from marrying one another.

Id.

¹⁸⁰ See Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1277 (2001).

¹⁸¹ *Id.* at 1277-78.

¹⁸² See *supra* note 172 and accompanying text.

¹⁸³ See *supra* note 175 and accompanying text.

beneficiaries laws provide some legal benefits for same-sex couples and non-marital couples, they are limited.¹⁸⁴ At the same time, however, individuals in kinship groups may not want the full range of rights and duties accorded in domestic partnership or marriage laws.¹⁸⁵ Thus, kinship arrangements can range from “offering the most extensive rights and obligations” that can be offered in adult relationships to “no rights or obligations at all” between adults.¹⁸⁶ Between these two extremes lies the concept of the granting of benefits and entitlements that are important to share in emotionally and economically interdependent relationships.¹⁸⁷

2. Developing a Methodology: The Law Commission of Canada Approach

The process of proposing legislation for kinship relationship should begin with reviewing the existing laws that use “relational terms to accomplish [their] objectives.”¹⁸⁸ In *Beyond Conjugality*, the Law Commission of Canada proposed a four-step methodology to review existing laws based on relationships status.¹⁸⁹

The first question is whether a law is pursuing legitimate objectives that respond to social realities in a manner consistent with fundamental values. If not, the law should be repealed or revised. The second question is whether relationships even matter in a particular policy context. If the existence of relationships is not relevant to a legislative objective, then the law should not take them into account. If

¹⁸⁴ See Blumberg, *supra* note 180 and accompanying text.

¹⁸⁵ For that reason, the Law Commission of Canada expressed a preference for the registration model over the ascription model for recognizing the relationships of unmarried adult cohabitants. *BEYOND CONJUGALITY*, *supra* note 145, at 116.

¹⁸⁶ S. AFR. LAW REFORM COMM'N, DISCUSSION PAPER 104: DOMESTIC PARTNERSHIPS 262 (2003), available at <http://www.doj.gov.za/salrc/dpapers.htm> (last visited Nov. 15, 2008). On this basis, the South African Law Reform Commission divided registered partnerships schemes into the two categories of “marriage-minus” and “blank-slate-plus.” *Id.*

¹⁸⁷ *BEYOND CONJUGALITY*, *supra* note 145, at 29-37.

¹⁸⁸ *Id.* at 29.

¹⁸⁹ *Id.* at 29-37.

relationships do matter, a preferred option is to allow individuals to identify the relationships most important to them. If that option is not workable, then consideration needs to be given to revising legal definitions to more accurately capture relationships that have characteristics relevant to the state objectives at issue.¹⁹⁰

The ultimate goal of this methodology is to identify which legal mechanism—registration or ascription—would provide adequate legal protections and benefits for kinship relationships. Along these lines, a registration model could allow parties “to identify the relationships most important to them.”¹⁹¹

Currently in the United States, laws establishing civil unions, domestic partnership registration and domestic partnership benefits allow conjugal couples to opt into arrangements that provide different levels of legal recognition of their relationships.¹⁹² Likewise, civil union and domestic partnership laws in other countries serve similar functions.¹⁹³

In addition, ascription is another statutory mechanism for recognizing kinship relationships. As with conjugal relationships, this process would provide legal recognition to persons in kinship relationships “without their having taken any positive action to be legally recognized.”¹⁹⁴ The problem, however, with granting rights by ascription is that it would treat all similarly situated parties the same without distinction based on the actual arrangements of the parties involved.¹⁹⁵

¹⁹⁰ *Id.* at 36-37.

¹⁹¹ *Id.*

¹⁹² Duncan, *supra* note 172, at 987-88. Related to this is the private recognition of these relationships amongst companies that provide domestic partnership benefits. *Id.* at 965-78.

¹⁹³ INT'L GAY & LESBIAN HUMAN RIGHTS COMM'N, INTERNATIONAL: GLOBAL SUMMARY OF REGISTERED PARTNERSHIP, DOMESTIC PARTNERSHIP, AND MARRIAGE LAW (Nov. 2003), <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/815.html> (last visited Nov. 15, 2008). Just over twenty nations sanction civil unions or domestic partnerships in all or part of their jurisdictions. *Id.*

¹⁹⁴ BEYOND CONJUGALITY, *supra* note 145, at 116.

¹⁹⁵ *Id.*

3. Kinship Arrangements: The Next Frontier

The legal recognition and status of marriage relationships has provided many social and economic benefits that are viewed to be the cornerstone of society. To limit those rights, in a changing society, to married heterosexual individuals circumscribes the ability of individuals to create and maintain viable social and economic relationships outside of marriage. As a starting point, domestic partnership law and reciprocal beneficiaries law provide a basic set of rights and obligations primarily for conjugal couples. Similarly partnership benefit arrangements allow the sharing of limited legal protections. The Canada Law Commission approach creates the methodology that should be employed to examine, revise and repeal existing laws and to adopt new laws and policies to support kinship relationships. Accordingly, approaches to kinship legislation should employ current models while examining how laws can better support economic and emotional relationships that serve societal goals.

VI. CONCLUSION

Think about how it feels to be a target—a target of stares, a target of scorn, a target of spite. Think about how bias and hate continue to live underground, where they have grown deep and varied roots. Think about the pain when hate breaks the surface. Think about bias attacking your family. Think about another's ignorance holding back someone you love, keeping them from living up to their potential, from contributing their talents, from building our communities.

....

We, as a society, stand today at a moment when progress and decline, opportunity and hopelessness, are in desperate conflict.¹⁹⁶

Therein lies the *paradox of oppression*. Oppression,

¹⁹⁶ Senator Stan Rosenberg, *Our Best Angels*, Presented to Unitarian Universalist Society of Amherst (Jan. 12, 1997).

discrimination and disenfranchisement in its endless forms must concern all of us. In his seminal work, *Pedagogy of the Oppressed*, Paulo Freire observed, “[a]s the oppressors dehumanize others and violate their rights, they themselves also become dehumanized. As the oppressed, fighting to be human, take away the oppressors’ power to dominate and suppress, they restore to the oppressors the humanity they had lost in the exercise of oppression.”¹⁹⁷ Dehumanization is a distortion of what it means to be fully human.¹⁹⁸ Indeed, we are at a crossroad of challenge and of opportunity to preserve our humanness, our kinship families in all of their forms, our children and generations beyond. There is a rich tapestry of stories woven in the souls of survivors and those who did not. However, we must not settle for mere *survival*. The *only* standard is to fully give ALL children and ALL families what they need to grow and thrive.¹⁹⁹

Instead of focusing on the results of a break-down of the kinship family, attention should focus on society as a whole recognizing these family units. Data confirms that kinship families would be more productive and enhance our collective lives. If those within a kinship unit would give thoughtful consideration of what the family needed prior to entering an agreement, many break downs would be avoided. Many of the psychological/social problems would be solved if states validated kinship families. As the Law Commission of Canada concluded:

The state has a role in providing a legal framework to help people fulfill the responsibilities and rights that arise in close personal relationships. However, any involvement by the state should honour the choices that people make. Instead of focusing mainly on married couples and couples deemed to be “marriage-like,” governments should establish registration schemes to facilitate the private ordering of both conjugal and

¹⁹⁷ PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 42 (Myra Bergman Ramos trans., 1970); see also DOMAN LUM, *CULTURALLY COMPETENT PRACTICE: A FRAMEWORK FOR UNDERSTANDING DIVERSE GROUPS AND JUSTICE ISSUES* 55, 60-63 (2007).

¹⁹⁸ Lum, *supra* note 197, at 56.

¹⁹⁹ See generally Nancie Palmer, *Fostering Resiliency in Children: Lessons Learned in Transcending Adversity*, 19 J. SOC. THOUGHT 69, 85 (1999).

non-conjugal relationships.²⁰⁰

²⁰⁰ BEYOND CONJUGALITY, *supra* note 145, at 131. Regrettably, the Law Commission of Canada was closed at the end of 2006 after the conservative Harper government cut all of its funding. John Ibbitson, *Fatal Cuts to Law Panel Deeply Ideological*, GLOBE & MAIL (CAN.), Sept. 28, 2006, at A4. Shortly thereafter, the Ontario government formed its own Law Commission. Kirk Makin, *Ontario Unveils Law-Reform Commission*, GLOBE & MAIL (CAN.), Dec. 1, 2006, at A6.

