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Families Redefined: Kinship Groups That Deserve Benefits

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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 protection and benefits, 5) the use of contract law in kinship relationship 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 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.

FAMILIES REDEFINED: KINSHIP GROUPS THAT DESERVE BENEFITS

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I. INTRODUCTION

As noted authorities point out, “[f]amilies are commissioned with the pivotal tasks of providing members with ongoing intimacy, affection, companionship and frequently raising children.”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

¹ MARY ANN LAMANNA & AGNES RIEDMANN, MARRIAGES AND FAMILIES: MAKING CHOICES IN A DIVERSE SOCIETY 6 (8th ed. 2003).

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 address the problem.

II. KINSHIP FAMILIES: HOW THE PAST INFORMS THE PRESENT

Kinship families, as the focus for this article, have the following characteristics: the group has common goals and share concern for each other, the individuals that comprise the family usually are ‘like-minded’ adult(s) 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* historically and currently is defined as a “set of practices that establishes dominance of those blood and legal ties over others.” i.e. that is, a prevailing *heteronormative view* that holds primacy of the heterosexual relationship.³ Kaja Finkler contends that kinship most often is presented in a manner that represents a narrowly defined Western construct. However, Finkler raises the point that this biological relationship as the “starting point” for defining family relations has been called into question and argues as others such as pioneer David Schneider, that *kinship* narrowly defined is a Western construct.⁴ Finkler takes a more generous view of kinship family calling such units as “significant same” group of people who are regarded as family and kin-“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.”⁵ The continual pressure to maintain this narrow construct is evidenced by the descriptive words, *fictive kin*, frequently used by social science researchers and writers to describe arrangements that go outside the legal and genetic norms.⁶ 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 this more generous and altruistic perspective that the authors have likewise 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 behaviors of others. A society or group cannot manage all the tasks of physical, economic, and emotional living without the

² Stephen Hicks, *Genealogy's Desire: Practices of Kinship Amongst Lesbian and Gay Foster-Carers and Adopters*, 36 BRIT. J. SOC. WORK 761–76 (2000).

³ *Id.* at 763.

⁴ Kaja Finkler, *The Kin in the Gene: The Medicalization of Family and Kinship in American Society*, 42 CURRENT ANTHROPOLOGY 235–36 (2001).

⁵ *Id.* at 236.

⁶ Steven Hicks, *supra* note 2, at 762; see also *Marriage and Family Encyclopedia (Fa-Gr)*, <http://family.jrank.org/collection/6/International-Encyclopedia-Marriage-Family.html>; (last visited Sept. 24, 2008)[hereinafter *Fictive Kinship*]; Michael Dean Murphy, *A Kinship Glossary: Symbols, Terms, and Concepts*, U. ALA. DEP'T OF ANTHROPOLOGY, <http://www.as.ua.edu/ant/Faculty/murphy> (last visited Nov. 15, 2008).

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.⁷ An example of an illustrating primate connection is the bonobo that are “female-centered and egalitarian” according to Frans de Waal, Yerkes Regional Primate Research Center in Atlanta and professor of psychology at Emory University.⁸ Other examples may be drawn from our human ancestors. In ancient Sparta, females enjoyed many freedoms afforded to males.⁹ In Sparta, girls received public education, engaged in sports, and through ownership and control of land, possessed economic power and influence.¹⁰ “The freedom and greater respect for Spartan women began at birth with laws that regarded female infants and children to be given the same care and food as their brothers”¹¹

In North America, an example of cultural flexibility may come from the Apache (there are six sub-tribes) who lived in “loosely” related extended family groups in a matriarchal society.¹² Economic and political arrangements were “based on female inherited leadership.”¹³ In addition, it was not uncommon for Apache to take on or adopt customs and practices of tribes and others with whom they came in contact.¹⁴ Two-Spirit people among Native Americans/First Nations peoples were valued because it was believed that they could understand the perspectives of both males and females as individuals and also between them.¹⁵ Among the American Plains Indians, the institution of *berdache* a man might assume both the dress and role of a woman, often marry.¹⁶ “Two-Spirit people were not only considered normal, but a vital and much needed part of the natural world and community.”¹⁷ Two-Spirit is more in keeping with the range of sexuality and gender identity derived from spiritual contemplation of one’s place on this earth.”¹⁸ According to the writings of Edwin T. Denig, who lived for decades among First Nations peoples as a trader for the American Fur Company, he observed “among Crows,

⁷ Anthony DeBartolo, *The Bonobo: "Newest" Apes Are Teaching us About Ourselves*, CHI. TRIB., June 11, 1998, available at <http://www.hydeparkmedia.com/bonobo.html>. According to DeBartolo, “The Bonobo’s apparent ability to empathize, in contrast with the more hostile and aggressive bearing of chimpanzee, has some social scientists re-thinking our behavioral heritage.” *Id.*

⁸ *Id.*

⁹ See Helena P. Schrader, *Sparta Reconsidered: Spartan Women*, <http://elysiumgates.com/~helena/Women.html> (last visited Sept. 17, 2008).

¹⁰ *Id.*

¹¹ *Id.* Another example from another continent includes 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.” *BOY-WIVES AND FEMALE HUSBANDS: STUDIES IN AFRICAN HOMOSEXUALITIES 3* (Stephen Murray & Will Roscoe eds., Palgrave Publishers 1st ed. 1998). A central theme of their discussion is the impact of Western morality and ethnocentrism in the presentation of what might be construed as “discovered populations”. *Id.* In other words, forms of social arrangement and gender expression were “closeted” in the writings of early explorers. *See id.*

¹² *Apache: They Call Themselves Inde, or Nide “the people,”* <http://impurplehawk.com/apache.html> (last modified Apr. 29, 2007) [hereinafter *Apache*].

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Native American Berdache: Two Spirit People*, <http://www.coreymondello.com/berdache.html> (last visited Sept. 1, 2008) [hereinafter *Native American Berdache*].

¹⁶ *Id.* Berdache is a term most often used by anthropologists but now out of favor by many Native Americans. *See WILL ROSCOE, CHANGING ONES: THIRD AND FOURTH GENDERS IN NATIVE AMERICA 3–7* (1998); *see also* Wesley Thomas & Sue-Ellen Jacobs, “. . . And We Are Still Here”: *From Berdache to Two-Spirit People*, 23 *AM. INDIAN CULTURE AND RESEARCH J.* 91–107 (1999).

¹⁷ *Native American Berdache*, *supra* note 15.

¹⁸ *Id.*

men who dressed as women and specialized in women's work were accepted and sometimes honored."¹⁹ He 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."²⁰ Another example is that of Potlatch, a system of gift giving used by Canada's Kwakiutl Indians as a way of ensuring they can rely on each other. In this cultural practice, gifts such as blankets and specially made copper pieces are currency. Gray summed it most eloquently, "only giving and receiving that is completely unencumbered reflects the true grace of generosity. Everything else is a deal." In this manner help is assured among all people through a social structure that promotes mutual cooperation.²¹

Other illustrative examples of the fluidness of family and how it successfully functions includes the concept of godparenthood, or *compadrazgo* as it occurs in Mexico and Latin America is well documented.²² This 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, the rights and obligations for a life time.²³ Accompanying this practice is that of *Confianza* or a presence of trust necessary to reciprocal exchange.²⁴ "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."²⁵

While each of these examples has limitations in 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 be grandmothers caring for their grandchildren, single mothers, daughters or sons who care for their parents, friends who care for friends²⁶ and of course, same-sex couples with or without children.²⁷

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 the so-called 'single'

¹⁹ ROSCOE, *supra* note 16, at 3.

²⁰ *Id.* at 4.

²¹ *Fictive Kinship*, *supra* note 6.

²² Shawn Malia Kana'iaupuni, et al., *Counting on Kin: Social Networks, Social Support, and Child Health Status* 83 SOCIAL FORCES 1137, 1140-41 (2005).

²³ *Id.*

²⁴ *Id.*

²⁵ IRENE GOLDENBERG & HERBERT GOLDENBERG, *FAMILY THERAPY: AN OVERVIEW* 8 (5th ed. 1999).

²⁶ See Laura A. Rosebury, *Friends With Benefits*, 106 MICH. L. REV. 189 221-26 (2007). In her very insightful article, Professor Rosebury 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.*

²⁷ See generally Katherine Acey et al., Statement, *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families And Relationships*, BEYOND MARRIAGE.ORG, JULY 2006, available at <http://beyondmarriage.org>. Beyondmarriage.org has been advocating expansion of who should receive "marriage benefits" for some time. *Id.* As the website indicates, they advocate "legal recognition for a wide range of relationships, households and families." *Id.* Upon examination, it is noticeable that the list they would extend this legal recognition to mirrors ours. See *infra* note 39.

people.²⁸ Numerous benefits are automatically granted upon being married which include employee-sponsored health benefits, making spousal medical decisions, family visitation rights for the spouse, 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.²⁹

If one of the 'spouses' dies, other benefits accrue to the remaining 'spouse.' For example, the surviving spouse receives social security pensions, veteran's pensions, educational assistance, continuation of employer-sponsored health benefits, supplemental security income, income tax deductions, Medicaid, property tax exemptions, right to inheritance of property, and spousal privilege in court.³⁰ 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 children, shared property, child support, and alimony to name just a few.³¹

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 psychological attributes of being human, we can examine how social and economic injustice is detrimental to all humans. Our survival as a species depends on this. Why

²⁸ Letter from Dayna K. Shah, Associate General Counsel, United States General Accounting Office, Washington, DC, to Former The Honorable Bill Frist, Majority Leader, United States 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.* These categories were: Social Security and Related Programs, Housing, and Food Stamps; Veterans' Benefits; Taxation; Federal Civilian and Military Service Benefits; Employment Benefits and Related Laws; 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 Laws; and Miscellaneous Laws. *Id.*

²⁹ *Id.* According to the letter there are "1138 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.* These include: exclusion of certain individuals and entities from participation in Medicare and state health care programs; eligibility under first-time home-buyer programs; medical care for survivors and dependents of certain veterans. *Id.*

³⁰ It must be noted that "In 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." John Brozovsky & A J Cataldo, II, *A Historical Analysis of the Marriage Tax Penalty*, 21 ACCT. HISTORIANS J. 163-87 (1994). This is commonly known as the marriage penalty.

³¹ State *ex rel.* Watts v. Watts, 350 N.Y.S.2d 285 (N.Y. Fam. Ct. 1973). 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. *Id.* 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 (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 (Fla. 2d Dist. Ct App. 2002). It is a dual obligation owed by both biological parents to their child that begins at 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 (Fla. 5th Dist. Ct. App. 1991). When considering alimony, gender is irrelevant. Heath v. Heath, 611 So. 2d 1249 (Fla. 4th Dist. Ct. App. 1993).

should we be concerned about the detrimental impact for all human beings? First, regardless of those who have power and those who do not, we all have in common the biology of humanness. This biology of human is often distinguished 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.”³² 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*.³³ Attachment is biologically driven and influenced by the human brain.³⁴ Attachment affords us safety and protection against the challenges of living and is present mammalian life.³⁵ 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 adaptations to life.”³⁶ In recent years, the term *historical trauma* has emerged to recognize the “associated bereavement” and “unresolved grief” and its transfer through generations.³⁷ “This grief may be considered impaired, delayed, fixated, and/or disenfranchised.”³⁸ The following are examples of kinship families struggling to not only survive but to thrive amidst the constant challenges of discrimination, oppression, and disenfranchisement.³⁹

A. *Grandparents Raising Their Grandchildren*

³² Bruce Perry, Md., Ph.D., *Brain Structure and Function I: Basics of Organization, MALTREATED CHILDREN: EXPERIENCE, BRAIN DEVELOPMENT AND THE NEXT GENERATION* (W. W. Norton & Co Ltd 1996) (2002) available at http://www.childtrauma.org/CTAMATERIALS/brain1_inter_02.pdf.

³³ See generally VIRGINIA SATIR, *MAKING CONTACT* (1976).

³⁴ JON ALLEN, *COPING WITH TRAUMA: A GUIDE TO SELF-UNDERSTANDING* 298 (1995).

³⁵ *Id.* at 302–03.

³⁶ JUDITH HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF DOMESTIC ABUSE AND POLITICAL TERROR* 33 (1997).

³⁷ Maria Yellow Horse Brave Heart, *The Impact of Historical Trauma: The Example of the Native Community*, in *TRANSFORMING TRAUMA: EMPOWERMENT RESPONSES* (Marian Bussey & Judy Wise eds. Colum. U. Press 2007).

³⁸ *Id.*

³⁹ See Acey, *supra* note 27, at 2. Most of the following types of kinship households identified in *Beyond Same-Sex Marriage* 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-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.

Millions of grandparents in the United States currently raise their grandchildren.⁴⁰ According to the Census of 2000, 4.5 million grandparents report they are responsible for their grandchildren who live with them.⁴¹ Of these families, 2.3 million were headed by the grandmother only.⁴² When the grandmother was the head of household, the average family income for 1996 was \$19,750.⁴³ Further, 2.4 million children live in households where the grandparents take primary responsibility for the children's needs.⁴⁴ For instance, in Kansas, 29,026 grandchildren under the age of eighteen live in a grandparent headed household.⁴⁵ Of these households, 13.2% live in poverty.⁴⁶ In some counties in Wisconsin, 14% of the children are being raised by grandparents, usually the grandmother.⁴⁷

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 far less likely to be economically independent.⁴⁸ A study by the Urban Institute concluded that 37% of the grandmothers raising grandchildren had incomes below the national poverty level.⁴⁹ 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.⁵⁰ 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.⁵¹ An illustrating example of the impact of discrimination is that of Native

⁴⁰ AARP, Resources and Research, *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).

⁴¹ Tavia Simmons & Jane Lawler Dye, *Census 2000 Data about Grandparent-Headed Households*, (Oct. 2003), <http://www.census.gov/prod/2003pubs/c2kbr-31.pdf>. "The number of households with co-resident grandparents is different from the number of people who are co-resident grandparents." *Id.* In 2000, 4.1 million households included co-resident grandparents, but these households contained 5.8 million co-resident grandparents." *Id.*

⁴² *Id.*
⁴³ *National Grandparent Daze Seems Inevitable*, AGE VENTURE NEWS SERVICE, Sept. 25, 1998, <http://www.demko.com/m980921.htm>.

⁴⁴ Simmons & Dye, *supra* note 41; *see also* U.S. Dep't of Health & Human Servs., *Online Support for Grandparents Raising Grandchildren*, CHILDREN'S BUREAU EXPRESS, Dec. 2001, http://cbexpress.acf.hhs.gov/articles.cfm?issue_id=2001-11&article_id=370. "Nationally, there are 5.4 million children living in homes headed by a relative other than a parent. Survey by the National Children's Defense Fund, *Healthy Ties: Ensuring Health Coverage for Children Raised by Grandparents and Other Relatives*, (2001), 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. Survey by the National Children's Defense Fund, *Healthy Ties: Ensuring Health Coverage for Children Raised by Grandparents and Other Relatives*, (2001), http://www.childrensdefense.org/site/DocServer/healthyties_fullreport.pdf?docID=638.

⁴⁵ Childrensdefense.org, *Grandfacts: A Fact Sheet for Grandparents and Other Relatives Raising Children*, (Oct. 2007), http://www.childrensdefense.org/site/DocServer/kinship_kansas.pdf?docID=1954.

⁴⁶ *Id.*

⁴⁷ Mary Crave, Ph.D., WISCONSIN CHILDREN LIVING IN HOUSEHOLDS HEADED BY A GRANDPARENT—1990, <http://www.uwex.edu/ces/flp/grgp/wisite.pdf> (last visited Oct. 1, 2008).

⁴⁸ 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>.

⁴⁹ *Skipping A Generation*, 383 THE ECONOMIST 53, June 16, 2007.

⁵⁰ *Id.*

⁵¹ 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. OF FAM. SOC. WORK 47, 63-64 (2005).

American grandparents raising their children. “The historical trauma associated with genocide and boarding schools likely remain in the psyche of many Native American people, impacting their psychological well-being.”⁵²

B. *Same-Sex Kinship Families*

The number of same-sex couples quintupled since 1990 according to the Census data.⁵³ The growth in same-sex couples was 21 times larger than the population growth from 1990-2006.⁵⁴

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 the same-sex couples are raising children.⁵⁵ 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.”⁵⁶ As two examples, Kansas mirrors Florida in many ways. The same percentage, 17%, of Kansas and Florida same-sex couples are raising children under the age of eighteen.⁵⁷ Further, both in Florida and Kansas, same-sex parents have far fewer financial resources to support their children than do married parents.⁵⁸ 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).”⁵⁹ 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).”⁶⁰

C. *Cohabiting Kinship Families*

⁵² SANDRA BAILEY AND BETHANY LETIECO, *THE MENTAL HEALTH OF RURAL GRANDPARENTS REARING THEIR GRANDCHILDREN* 24 (2008); *see also* FOCAL POINT: RESEARCH, POLICY, & PRACTICE IN CHILDREN’S MENTAL HEALTH 22–25; *see* Kathleen Graves, et al., *National Resource Center for American Indian, Alaska Native, and Native Hawaiian Elders, Boarding School Project: Mental Health Outcome* (July 2007) available at http://elders.uaa.alaska.edu/reports/other_boarding-school-project.pdf; *see also* The Society of Indian Psychologists et al., *Psychological Treatment of Ethnic Minority Populations*, THE NEWSLETTER OF THE SOC’Y OF INDIAN PSYCHOLOGISTS, Nov. 2003, (Newsletter), at 27, available at http://www.apa.org/pi/oema/programs/empa_ptemp.pdf

⁵³ GARY J. GATES, *GEOGRAPHIC TRENDS AMONG SAME-SEX COUPLES IN THE U.S. CENSUS AND THE AMERICAN COMMUNITY SURVEY 1* (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).

⁵⁴ *Id.* 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.*

⁵⁵ ADAM P. ROMERO ET AL., THE WILLIAMS INSTITUTE, *CENSUS SNAPSHOT: FLORIDA*, (2007),

<http://www.law.ucla.edu/williamsinstitute/publications/FloridaCensusSnapshot.pdf>. [hereinafter ROMERO I].

⁵⁶ *Id.* “The median household income of same-sex couples with children is \$43,000, or 23% lower than that of married parents”. *Id.* “While 49% of same-sex couples own their home, a much larger percentage of married parents (77%) own their home.” *Id.*

⁵⁷ *Id.*; ADAM P. ROMERO ET AL., THE WILLIAMS INSTITUTE, *CENSUS SNAPSHOT: KANSAS 2* (2008),

<http://www.law.ucla.edu/williamsinstitute/publications/KansasCensusSnapshot.pdf> [hereinafter ROMERO II].

⁵⁸ ROMERO I, *supra* note 55, at 3; ROMERO II, *supra* note 57, at 3.

⁵⁹ ROMERO II, *supra* note 57, at 3.

⁶⁰ ROMERO I, *supra* note 55, at 3.

At least two patterns can emerge on what constitutes a cohabitating kinship family. Some examples are senior citizens living together without marrying and opposite-sex couples who have decided not to marry.

According to AARP, there are 266,600 seniors (65 years and above) who live together without being married.⁶¹ These figures might be very low in comparison to actual numbers for a variety of social reasons; most importantly, seniors maybe reluctant to admit that they cohabit.⁶² Further, as AARP points out, this group is expected to have a sudden growth spurt because of the on-set of the baby boomers reaching retirement age.⁶³

Regarding non-seniors, according to a survey commissioned by LexisNexis Martindale-Hubbell's Lawyers.com, the younger generation is more than twice as likely to live together before marriage than the older generation.⁶⁴ The survey showed that 40% of all U.S. adults say they have lived with a romantic partner without going through the marriage ceremony.⁶⁵ That is, 9.7 million Americans living with opposite sex partners.⁶⁶ This is a 72% increase between 1990 and 2000.⁶⁷ Further, in 2006 40% of all babies were born out of wedlock.⁶⁸ In comparison, in 1980 only 18% of the babies were born outside of marriage.⁶⁹ Some of the growth in numbers is attributed to the growing feeling by 30+ year single women who fear they will not be able to have a child.⁷⁰ Women worry more about marrying the 'wrong' man than having a child out of wedlock.⁷¹ Even though older single women are having babies, it is teenagers who have the most. "More than 80% of babies delivered by teen mothers were born out of wedlock."⁷²

D. *Kinship Families that are Largely Focused on Caregiving*

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

⁶¹ *Unmarried Together*, AARP BULLETIN TODAY, <http://www.aarp.org/family/articles/shacking.html> (last visited June 19, 2008).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ LexisNexis Martindale-Hubbell's lawyers.com, *Increased Frequency in Cohabiting Couples Raises New Legal Concerns*, LAWYERS.COM, <http://research.lawyers.com/New-Legal-Concerns-for-Cohabiting-Couples.html> (last visited Oct. 5, 2008).

⁶⁵ *Id.*

⁶⁶ *Statistics: Living Together (a.k.a. cohabitation, or unmarried partner households)*, ALTERNATIVES TO MARRIAGE PROJECT, <http://www.unmarried.org/statistics.html> (last visited Oct. 5, 2008).

⁶⁷ *Id.*

⁶⁸ Rochelle Sharpe, *Out-of-Wedlock Births*, USA WEEKEND.COM, Feb. 17, 2008, http://www.usaweekend.com/08_issues/080217/080217by-numbers.html.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

“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.”⁷³

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 children otherwise known as the ‘sandwich’ generation find themselves caring for both their parents and their own children.⁷⁴ “Women represent more than two-thirds of adults providing substantial assistance to elderly parents.”⁷⁵ According to a report, these women “provide an annual average of \$1,121 in financial support to elderly parents and spend 23 hours a week (1,210 hours a year) on average providing care to elderly parents.”⁷⁶

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.⁷⁷ There are 79 million of “Family Groups” in 2003 where at least one subgroup lives in the household.⁷⁸ 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 sub-group.⁷⁹ Hawaii is the U.S. state with the highest percentage of multigenerational family households: 8.2 %.⁸⁰ California has 5.6% multigenerational households and 5.2% of the population in Mississippi lives in multigenerational households.⁸¹ About 2% of the identified multigenerational family’s households consist of three generations.⁸²

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

Family constellation has dramatically shifted from the American ideal 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,

⁷³ American Psychological Association, *Health Question of the Week*, NAT’L HEALTH MUSEUM.ORG, <http://www.accessexcellence.org/HHQ/qow07/qow070709.html> (last visited Oct. 5, 2008).

⁷⁴ JOINT ECONOMIC COMMITTEE, FACT SHEET: INVESTING IN FAMILIES TAKING CARE OF ELDERLY PARENTS 1 (2007).

⁷⁵ Richard W. Johnson & Joshua M. Wiener, *A Profile of Frail Older Americans and Their Caregivers*, URBAN INSTITUTE, EXECUTIVE SUMMARY (2006).

⁷⁶ Charles R. Pierret, *The ‘Sandwich Generation’: Women Caring for Parents And Children*, MONTHLY LABOR REV., 8, Tbl.7 (2006), available at <http://www.bls.gov/opub/mlr/2006/09/artifull.pdf>.

⁷⁷ Tavia Simmons & Grace O’ Neill, *Households and Families: 2000*, U.S. DEP’T OF COM., Sept. 2001, at 1, available at <http://www.census.gov/prod/2001pubs/c2kbr01-8.pdf>.

⁷⁸ *The Factbook: Eye-Opening Memos on Everything Family, Multiple Generation / Extended Family Households*, <http://www.pobronson.com/factbook/pages/41.html> (last visited October 12, 2008).

⁷⁹ *Id.*

⁸⁰ Simmons & Grace, *supra* note 77, at 7.

⁸¹ *Id.*

⁸² *Id.*

⁸³ MARY ANN LAMANNA & AGNES RIEDMANN, MARRIAGES AND FAMILIES: MAKING CHOICES IN A DIVERSE SOCIETY 5 (2008).

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 the social and legal structures and also neighborhoods or communities.⁸⁴ Policies may deeply constrain or benefit depending on how closely the family fits the ideal.⁸⁵ “These supports or stressors may be thought of as resources [or lack thereof] that come in the form of a whole range of services, such as medical, health care . . . schools, churches, employers . . . government policies.”⁸⁶

The infrastructure of the powerful, that is “white, male, middle-class and moneyed, control who will be able to move upward in society, and who will remain in the relatively powerless groups.”⁸⁷ “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.”⁸⁸ 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. Amnesty International in 1973 found that regardless of situation, a political prisoner or domestic partner, irrespective of culture or age, or other characteristic, that the methods of establishing control over another person are based upon systematic, repetitive infliction of psychological trauma. “They are organized techniques of disempowerment and disconnection that destroys the sense of self and relation to others”.⁸⁹ Legal and social institutions that reflect the current power structure do just that. There are significant implications for both individual and kinship family.

The social and legal environment itself may be experienced as threatful when it includes legal barriers or practices that disenfranchise a person, family, or group. In any threatful situation, the brain will respond protectively through a stress-response system. The brain mediates and controls the neuromuscular, autonomic, endocrine and immune systems. Children in a state of fear retrieve information from the world differently from children who feel calm.⁹⁰ A context which is composed of persistent and pervasive levels of “threatfulness” impacts both 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. The western health care system is a system where the majority of doctors are male, the majority of nurses are female—again gendered on power lines; where the people of colour

⁸⁴ Id. at 391.

⁸⁵ Id.

⁸⁶ HAMILTON, MCCUBBIN & MARILYN MCCUBBIN, *Family Stress Theory and Assessment: The Resiliency Model of Family Stress, Adjustment, and Adaptation, in FAMILIES, HEALTH AND ILLNESS* 2–32 (C. Danielson, B. Hamel-Bissell, & P. Winstead-Fry eds. 1993). Specifically, see FAMILY ASSESSMENT INVENTORIES FOR RESEARCH AND PRACTICE 19 (Hamilton McCubbin & Ann Thompson 1987).

⁸⁷ JULIET ROTHMAN, *CULTURAL COMPETENCE IN PROCESS AND PRACTICE: BUILDING BRIDGES* 27 (2007).

⁸⁸ Id. at 26.

⁸⁹ JUDITH HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF DOMESTIC ABUSE AND POLITICAL TERROR* 77 (1992).

⁹⁰ See Perry, *supra* note 32, at 5.

tend to be found either in the rolls of the patients, or in the kitchens, laundries, and janitorial services of most hospitals.⁹¹

Given these challenges from all sides and the continued oppressive restriction of policies and practices, Irhapeti Ramsden, a Maori nurse and colleagues developed a concept for assessing cultural risk. The purpose of this assessment was to increase cultural safety and sensitive practices. However, she argues, that approach is only possible when cultural groups have the power to determine policies and practices which ensure the safety of their own people within the systems which are clearly not of their own design.⁹²

In order to better identify social environments that maybe threatful to persons, practitioners developed the concept of cultural risk. Studies have shown that youth who experience discrimination are at higher risk for illness and infection. “Such young people may include youth of color, those from low-income families, immigrants, and lesbian, gay, bisexual, and transgender (LGBT) youth. Prejudice and discrimination, at individual and institutional levels, contribute to high morbidity and mortality rates among youth.”⁹³ Further, research suggests that Black and Latino LGBT people are likely to have poor health than other LGBT populations.⁹⁴

Risk is not just to the young. For example, in 2000, The Chicago Task Force on LGBT Aging persons over 55 “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 gender identity”.⁹⁵ Issues of biological and psychological health are but some of the critical aspects to growth and survival of 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.⁹⁶ The researchers referred to this social harm through the denial of marriage as *minority stress* which includes social isolation, stigma and shame which undermine a sense of life meaning, morale, and well being.⁹⁷

VI. THE PROPOSED THEORIES TO AID KINSHIP FAMILIES

⁹¹ Yasmin Jiwani, Changing Institutional Agendas in Health Care: Plenary Presentation at The FREDIA Centre for Research on Violence Against Women and Children: Removing Barriers: Inclusion, Diversity, and Social Justice in Health Care (May 25–27, 2000), available at www.harbour.sfu.ca/freda/articles/barrier/html.

⁹² Elaine Papps & Irhapeti Ramsden, *Cultural Safety in Nursing: The New Zealand Experience* 8 INT’L J. FOR QUALITY IN HEALTH CARE 491, 491–97 (1996).

⁹³ Laura Davis, *Advocates for Youth, Adolescent Sexual Health and Dynamics of Oppression: A Call for Cultural Competency*, ADVOC. FOR YOUTH, www.advocatesforyouth.org (last visited Oct. 12, 2008).

⁹⁴ See *Double Jeopardy: How Racism and Homophobia Impact the Health of Black and Latino Lesbian, Gay, Bisexual, and Transgender (LGBT) Communities*, NAT’L COALITION FOR LGBT HEALTH, <http://www.lgbthealth.net> (last visited Oct. 12, 2008).

⁹⁵ Dennis Beauchamp et al., *LGBT Persons in Chicago: Growing Older: A Survey of Needs And Perceptions*, www.lgbthealth.net (last visited Oct. 12, 2008).

⁹⁶ 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 NAT’L SEXUALITY RESOURCE CENTER 33 (2003), available at <http://365gay.com/Newscon06/02/022806marrHealth.htm>. Some researchers refer to minority stress as historical trauma. See generally Sandra J. Bailey & Bethany L. Letiecq, *The Mental Health of Rural Grandparents Rearing Their Grandchildren*, FOCAL POINT, Summer 2008, at 22–25.

⁹⁷ *Id.*

A. *Contracts and its Various Formulations*

Many authors propose that private contracts should be the vehicle for re-ordering the way in which benefits are distributed.⁹⁸ For instance, Professors Rasmusen and Stake observe “that marriage is considered much more for the two parties concern, not for society to structure.”⁹⁹ As they note, one size does not fit all.¹⁰⁰ They acknowledge that since many who marry are not sophisticated enough to be familiar with all the ramifications of an agreement, that the legislature provide contract forms that indicate options.¹⁰¹ 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.”¹⁰²

Distinct from Rasmusen and Stake, Professor Zelinsky focuses on the free market as a source for contracts. As he notes, adopting a contractual approach “will democratize marriage.”¹⁰³ Secular and religious organizations will offer various prototypical contracts

⁹⁸ Eric Rasmusen & Jeffrey Evans Stake, *INDIANA LAW JOURNAL*, 73 *IND. L. J.* 453, 500 (1998). Fineman 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, 174 (2008); see Martha Fineman, *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 family law. However, it is my contention that in practice the egalitarian rhetoric of modern reforms results in unrealistic, punitive responses that are harmful to mothers and children.

Id. 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*, 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; David Boaz, *Privatize Marriage*, *SLATE*, Apr. 1997, available at <http://www.slate.com/toolbar.aspx?action=print&id=2440>.

⁹⁹ Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract* 73 *IND. L. J.* 453, 500 (1998). 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.*

¹⁰⁰ *Id.* at 501. To be specific, this article states that no-fault marriage does not necessarily fit all situations because there comes a problem with being able to identify 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.*

¹⁰¹ *Id.* at 502.

¹⁰² *Id.*

¹⁰³ 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.

as models.¹⁰⁴ Further, utilizing contracts does not vary that much from what already exists, according to Zelinsky.¹⁰⁵ He analogizes to prenuptial agreements.¹⁰⁶

Certainly the wealthy frequently engage in such pre-planning.¹⁰⁷ According to some sources, the majority of marriages will be preceded by a prenuptial agreement by 2020.¹⁰⁸ “At the New York-based Equality in Marriage Institute . . . a nonprofit that advises couples, the number of inquiries about prenups from both men and women has climbed from 1,500 a month in 2003 to some 5,000 a month . . .” in 2006.¹⁰⁹ Twenty-six states have already adopted a version of the Uniform Agreement Act which governs prenuptial agreements.¹¹⁰

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 included only paying in cash unless the other spouse agreed to do otherwise and to not leave anything on the floor overnight unless one party was packing.¹¹¹ Further, it is not an expensive proposition to draft a prenuptial agreement; they are available on line.¹¹² 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.¹¹³

¹⁰⁴ *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 98. “Wal-Mart could sell books of marriage forms next to the standard rental forms.” *Id.*

¹⁰⁵ Zelinsky, *supra* note 103, at 1184. Similarly to any other contract, a domestic-based contract will need a consent age to determine capability of entering into the marital contract. *Id.*

¹⁰⁶ *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.*

¹⁰⁷ Beth Potier, *For Many, Prenups Seem to Predict Doom*, HARV. U. GAZETTE, Oct. 16, 2003, available at <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.’” *Id.* “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 Love to Know: Divorce, *Prenuptial Agreements: Interview with Helene Taylor*, http://divorce.lovetoknow.com/Prenuptial_Agreements:_Interview_with_Helene_Taylor.

¹⁰⁸ ARLENE G. DUBIN, PRENUPS FOR LOVERS: A ROMANTIC GUIDE TO PRENUPTIAL AGREEMENTS, <http://www.prenupsforlovers.com/definition.php> (last visited Oct. 12, 2008).

¹⁰⁹ Kerry Hannon, *Planning for Love and Money*, U.S. NEWS & WORLD REPORT, June 16, 2006, available at <http://www.usnews.com/usnews/biztech/articles/060716/24prime.htm>.

¹¹⁰ Uniform Law Commissioners: The National Conference of Commissioners on Uniform State Laws, *Fact Sheet: Uniform Premarital, Agreement Act*, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upaa.asp (last visited Oct. 12, 2008).

¹¹¹ Gary Belsky, *Living by the Rules These Ambitious Newlyweds have Signed a 16-Page Contract of Matrimonial Dos and Don'ts Covering Every Aspect of Their Lives. Now They're . . .*, CNN MONEY, May 1, 1996, available at http://money.cnn.com/magazines/moneymag/moneymag_archive/1996/05/01/212090/index.htm. The New Mexico couple further contractually agreed to “never follow the car in front of them by less than one car length for every 10 miles per hour they are traveling” and to “always 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 the areas of 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.*

¹¹² See *Prenuptial Agreement*, http://www.lawdepot.com/contracts/prenup/?pid=google-prenup_us-main_a&kwcid=pre-nuptial%20agreements1485099049&gclid=CN_B-qq525ICFQm6PAodqRlsmA (last visited Oct. 13, 2008).

¹¹³ *Id.*

Deleted: AGREEMENTS

Related to prenuptials, are common law marriages which also have a contractual concept underlying the non-written agreement to cohabit. Some feminist scholars advocated, at least ten years ago, that a common law approach addressed many of the concerns that “typical marriages presented”.¹¹⁴ The theme was that common law marriages protected women who were not formally married.¹¹⁵ The scholars advocated extending or re-introducing common law marriages to all states.¹¹⁶

Historically, the various states tolerated and embraced common-law marriages.¹¹⁷ Unfortunately with the abolition of slavery, many states eliminated common law marriages because of the fear of interracial marriage.¹¹⁸ Later, in the roaring ‘20’s, the ‘lax’ morals contributed to apprehension that the institution of marriage was being threatened, thus states again outlawed more common law marriage provisions.¹¹⁹ Finally, the growth of governmental benefits made some officials worry about how to administer claims if common law marriages were allowed.¹²⁰ Thus, currently only eight states and the District of Columbia formally recognize the institution.¹²¹ Most states that formally recognize those units only if the parties hold themselves out as being married and they are cohabitating.¹²² Unlike the squabble that is currently taking place with regard to same-sex marriages, the various states that do not recognize common law marriage within their own state, frequently declare these unions as valid even though formalized in another state.¹²³ 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.¹²⁴

¹¹⁴ See generally Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709 (1996).

¹¹⁵ *Id.* at 711.

¹¹⁶ 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.* at 711. The “widow” is also “unable to collect damages for a wrongful death action.” *Id.*

¹¹⁷ *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 720. From as early as 1639, Puritans in Massachusetts had established statutes and regulations governing entry into marriage. *Id.*

¹¹⁸ Bowman, *supra* note 114, 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 endorse the doctrine of White Supremacy).

¹¹⁹ Bowman, *supra* note 114, at 743–44.

¹²⁰ *Id.* at 746–48.

¹²¹ Dorian Solot and Marshall Miller, Unmarried.org, Common law marriage fact sheet, <http://www.unmarried.org/common-law-marriage-fact-sheet.html> (last visited Sept. 12, 2008). States that recognize common law marriage include: Alabama, *Piel v. Brown*, 361 So. 2d 90, 93 (Ala. 1978); Colorado, *Deter v. Deter*, 484 P.2d 805, 806 (Colo. Ct. App. 1971); Georgia—if created before 1/1/97—GA. CODE ANN. § 19-3-1.1 (1997); Idaho—if created before 1/1/96—IDAHO CODE § 32-201 (1996); Iowa, IOWA CODE ANN. §. 595.11 (1995); Kansas, KAN. STAT. ANN. § 23-101 (1996); Montana, MONT. CODE ANN. § 40-1-403 (2007); New Hampshire—for inheritance purposes only—N.H. REV. STAT. ANN § 457:39 (2008); Ohio—if created before 10/10/91—*Lyons v. Lyons* 621 N.E.2d 718 (Ohio Ct. App. 1993); Oklahoma—possibly only if created before 11/1/98—OKLA. STAT. ANN. tit. 43, § 1 (2008); Pennsylvania—if created before 1/1/05—23 PA. CONS. STAT. ANN. § 1103 (2005); Rhode Island, *Sardonis v. Sardonis*, 261 A.2d 22, 23 (R.I. 1970); South Carolina, *Johnson v. Johnson*, 112 S.E.2d 647, 651 (S.C. 1960); Texas, TEX. FAM. CODE ANN. § 2.401 (2005); Utah, UTAH CODE ANN. § 30-1-4.5 (2004); and Washington D.C., *Johnson v. Young*, 372 A.2d 992, 994 (D.C. 1977).

¹²² Bowman, *supra* note 114, at 749.

¹²³ National Conference of State Legislatures, *Common Law Marriages*, <http://www.ncsl.org/programs/cyf/commonlaw.htm> (last visited Oct. 15, 2008). The Mayor’s executive order which required the city departments to recognize same sex marriages of city employees for purposes of employee benefits, did not directly conflict with state’s Defense of Marriage Act which defines marriage as 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

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 and upon its breakdown as to property ownership, debt obligations, and support obligations.”¹²⁵ 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.¹²⁶ While some say that planning on 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.¹²⁷ 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 spouses the same benefits as persons in an officially recognized marriage.¹²⁸ For instance, non-married spouses become ‘widows’ or ‘dependants’ under workers compensation cases.¹²⁹ Obviously courts search for reasons to allow people to

in its “whereas” clauses stating that “marriage equality” should be afforded to all consenting, adult couples regardless of their sexual orientation. *Id.* 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, 818 (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 FF&C, within states, courts have determined that same sex benefits and marriages do demand recognition. *See, infra* note 133.

¹²⁴ U.S. CONST. amend. IV, § 1.

¹²⁵ *See Common Law Partner Agreement*,

<http://www.lawdepot.com/contracts/cohab/index.php?lcn=commonlaw&a=t> (last visited Oct. 13, 2008).

¹²⁶ *Id.*; *see also* USLegal, *Prenuptial Agreement Forms*, <http://www.uslegalforms.com/premarital/> (last visited Oct. 13, 2008); FindLaw, *Sample Premarital/Prenuptial Agreement*, http://family.findlaw.com/marriage/marriage-resources/le19_4_1.html (last visited Oct. 13, 2008).

¹²⁷ 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 1315. As she observes, “the law of marriage contract will over time not differ much from the law of civil marriage.” *Id.* 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.*

¹²⁸ Bowman, *supra* note 114, at 763.

¹²⁹ *Benefits, Insurance, Inheritance and Taxes*, <http://www.peoples-law.org/family/Unmarried%20Cohabs/cohabs%20benefits%20-%20wlc.htm> (last visited Oct. 13, 2008). States that entitle workers’ compensation benefits to unmarried survivors do so based on a dependency standard. MD. CODE ANN.

claim they were ‘married’ using doctrines such as quasi-contract, estoppel, and equitable remedies.¹³⁰ 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’.¹³¹ Not only can a contract be the basis of wrongful death claims, but Hawaii has also been very inclusive of who could claim under the statute. According to court interpretation, both a legal family and a common law family can simultaneously collect damages.¹³² Further, any dependent or partially dependent person can also collect.¹³³ The Hawaiian interpretation of what constitutes family is a model for all states.¹³⁴

Hawaii is not alone. California, which does not officially recognize common law marriages, courts have substituted ‘palimony’ relationships and consider the oral promises as binding contracts. 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.¹³⁵ According to the court, an oral contract involving earnings and property rights between people, even those who have sex with each other, are enforceable.¹³⁶ The court quite willingly used equitable principles and *quantum meruit* to permit recovery.¹³⁷

VII. WHAT CAN LEGISLATION DO?

“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.”¹³⁸

The concept of legislative protection and recognition of kinship families encounters many of the same legal and societal obstacles that confront the recognition of

§ 9-678 (1991). An unmarried cohabitant who can show that he or she was wholly or partly dependent on the deceased employee at the time of the injury resulting in death will receive benefits. *Id.*

¹³⁰ Bowman, *supra* note 114, at 770.

¹³¹ HAW. REV. STAT. § 572 C-6 (1997); HAW. REV. STAT. § 572C-1 (1997) Note that the statute does not provide reciprocal beneficiaries compensation in the event of severe and permanent injury. See Sarah M. Love, *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).

¹³² *Lealaimatafao v. Woodward-Clyde Consultants*, 867 P.2d 220 (Haw. 1994).

¹³³ *Id.* at 224. Contrast with Florida where the wrongful death act only allows “survivors” to collect from an award. FLA. STAT. ANN. § 768.20 (2003). “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. FLA. STAT. ANN § 768.18 (2003).

¹³⁴ “Family” means each legal parent, the natural mother, the natural father, the adjudicated, presumed, or concerned natural father as defined under § 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. HAW. REV. STAT. § 587-2 (2008).

¹³⁵ See generally *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

¹³⁶ *Id.* at 113.

¹³⁷ *Id.* at 110.

¹³⁸ LAW COMMISSION OF CANADA, *BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS* xxiii (2001).

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 comprehensive legal protection to heterosexual adult or conjugal relationships, the state will undermine financial, emotional and societal supports caregivers, who are typically women.¹³⁹ 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 all human relationships.¹⁴⁰

Although private contracts provide some legal protection, a more practical solution is to allow individual 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.¹⁴¹ 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 obligations.¹⁴² Third, legal status facilitates recognition of such arrangements in a variety of contexts.¹⁴³

In addition, extending marriage rights outside of marriage provides legal visibility for important social and economic relationships.¹⁴⁴ 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.” These laws affect hospital visitation rights, making funeral arrangements and permitted medical disclosures. As Nancy Knauer concluded, “I cannot protect my family in the absence of some form of uniform relationship status on both the state and federal level.”¹⁴⁵

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

¹³⁹ 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 that the 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.
¹⁴⁰ 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 dominate.” AVNER GREIF, FAMILY STRUCTURE, INSTITUTIONS, AND GROWTH: THE ORIGIN AND IMPLICATIONS OF WESTERN CORPORATISM 2–3 (2005), available at http://www.aeaweb.org/annual_mtg_papers/2006/0106_0800_1104.pdf.

¹⁴¹ See LAW COMMISSION OF CANADA, *supra* note 138, 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.*

¹⁴² *Id.*

¹⁴³ *Id.* at xxiii.

¹⁴⁴ See Nancy J. Knauer, *A Marriage Skeptic Responds to the Pro-Marriage Proposals to Abolish Civil Marriage*, 27 CARDOZO L. REV. 1261, 1272–273 (2006).

¹⁴⁵ *Id.* at 1276.

choice of marriage to heterosexual couples.¹⁴⁶ In addition, constitutional provisions in thirty states ban same-sex marriage.¹⁴⁷ 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 GAO enumerated federal benefits, rights, and privileges function to promote and protect the family unit and need recognition and reproduction in kinship relationships.¹⁴⁸ Persons who choose to pool their resources within a household or similar unit need legal protection, support and recognition of those relationships.¹⁴⁹ Apart from marriage and private contracts, government can provide protection to relationships of cohabiting adults through legal recognition and/or the provision of legal benefits to such adults.¹⁵⁰ Two possible ways to accomplish these goals would be to extend domestic partnership registration or domestic partnership benefits to non-conjugal cohabiting adults in kinship relationships.

B. *Registration: Domestic Partnership Law Model*

Domestic partnership law offers a registration model that can be extended to kinship relationships.¹⁵¹ 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 relationship among unrelated

¹⁴⁶ See Sanford N. Katz, *New Directions in Family Law in the United States: From Contract Cohabitation to Registered Partnerships and Beyond*, INDRET, (Feb. 2007), at 12. “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.” 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, *Status of Same-Sex Relationships Nationwide as of Oct. 10, 2008*, <http://www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html> (last visited Nov. 15, 2008) (including California’s constitutional ban of same-sex marriage on November 4, 2008) [hereinafter Lambda Legal].

¹⁴⁷ Lambda Legal, *supra* note 146. Recently, three more states—Arizona, California and Florida—adopted constitutional bans on same sex marriage on November 4, 2008. John Gramlich & Christine Vestal, *Three States, Including California, Ban Gay Marriage*, STATELINE.ORG, Nov. 5, 2008, <http://www.stateline.org/live/details/story?contentId=353318> (noting that “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 have constitutional bans on same-sex marriage. *Id.* Gay rights sources, however, place the number of states with a constitutional ban at twenty eight or twenty nine. See HUMAN RIGHTS CAMPAIGN, *STATEWIDE PROHIBITIONS ON MARRIAGE* (Nov. 6, 2008), http://www.hrc.org/documents/marriage_prohibitions.pdf (list does reflect recent constitutional ban in California); Lambda Legal, *supra* note 146.

¹⁴⁸ Shah, *supra* note 28, at 3.

¹⁴⁹ See Martha Albertson Fineman, *Progress and Progression in Family Law*, 2004 U. CHI. LEGAL F. 1, 4 (2004). 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.*

¹⁵⁰ Acey, *supra* note 27, at 1–5.

¹⁵¹ LAW COMMISSION OF CANADA, *supra* note 138, at 117–19.

adults even though adult relationships among related individuals continue to be an important outgrowth of our “traditional” nuclear families.¹⁵² 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 quasi-marital relationships.¹⁵³

1. Conjugal Aspect

Many of the current domestic partnership law provide protections for individuals in a conjugal relationship, that is, individuals functioning as a “couple.”¹⁵⁴ In so doing, these laws provide legal protections to relationships that mimic marriage. While these arrangements are providing 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.¹⁵⁵ Typically such laws are put in place to provide legal recognition of same-sex couples and/or to provide an option to marriage for heterosexual couples.¹⁵⁶

Most domestic partnership laws, in the U.S. and other nations, provide registration for primarily for same-sex partners.¹⁵⁷ Typically, such schemes require a common residence and prohibit the registration of persons related by blood and only include opposite sex partners involving persons at least sixty two years old.¹⁵⁸

As stated in “Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families and Relationships, “[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.”¹⁵⁹ 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.”¹⁶⁰ 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 “[m]arriage is not the only worthy form of family or relationship, and it should not be legally and economically privileged above all others.”¹⁶¹ In sum, the purpose of extending legal recognition to non-marital relationships is to limit or eliminate marriage privileges that

¹⁵² 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 (2004).

¹⁵³ See THOMPSON WEST, EFFECT OF CIVIL UNIONS / DOMESTIC PARTNERSHIP, STATE STATUTE SURVEY CIVIL UNIONS (2007).

¹⁵⁴ AMERICAN LAW INSTITUTE, PRINCIPLES OF FAMILY DISSOLUTION: AN 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.*

¹⁵⁵ LAW COMMISSION OF CANADA, *supra* note 138, at 119.

¹⁵⁶ See THOMPSON WEST, *supra* note 153.

¹⁵⁷ LAW COMMISSION OF CANADA, *supra* note 138, at 117.

¹⁵⁸ See CAL. FAM. CODE § 297 (b) (2004); N.J. STAT. ANN. § 26:8A-4 (2008).

¹⁵⁹ Acey, *supra* note 27, at 2.

¹⁶⁰ *Id.* at 1.

¹⁶¹ *Id.* at 2.

create legal discrimination or disparate treatment for kinship families that are not bound by marriage or similar arrangements.¹⁶²

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.¹⁶³ 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.¹⁶⁴ As a result, such laws typically would not afford protections for kinship relationship 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.¹⁶⁵ Each of these laws allows unmarried adults share some benefits and protections that were previously afforded to spouses.¹⁶⁶ If individuals meet the criteria specified in the statute, they may establish a reciprocal beneficiaries relationship by signing a declaration.¹⁶⁷ The reciprocal beneficiaries criteria attend to some of the moral concerns for not legally

¹⁶² *Id.* “Autonomy is compromised if the state provides one relationship with more benefits and legal support than others, or conversely if the state imposes more penalties on one type of relationship than it does 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.” LAW COMMISSION OF CANADA, *supra* note 138, at 18.

¹⁶³ LAW COMMISSION OF CANADA, *supra* note 138, at 117.

¹⁶⁴ *Id.* For example, the domestic partnership laws in California and New Jersey require a common residence and exclude related individuals. See CAL. FAMILY CODE § 297 (2008); N.J. STAT. ANN. § 26:8A-4 (2008). 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 (2001).

¹⁶⁵ HAW. REV. STAT. ANN. §§ 572C-1 to -7 (2008); VT. STAT. ANN. TIT. 15, §§ 1301-1305 (2008).

¹⁶⁶ HAW. REV. STAT. ANN. §§ 572C-1 to -7 (2008); VT. STAT. ANN. TIT. 15, §§ 1301-1305 (2008). As one author notes, “[t]he 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 share of a partner’s estate.” Duncan, *supra* note 164, at 963. For a fuller explanation of the rights of reciprocal beneficiaries under the Hawaii law see W. Brian Burnette, *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 benefit 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) Advance directives under chapter 111 of Title. 18;
- (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) (2008).

¹⁶⁷ HAW. REV. STAT. ANN. § 572C-4 (2008). 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.” VT. STAT. ANN. TIT. 15, § 1303 (2008).

recognizing such relationships by providing a minimum age of consent, prohibiting polygamy, and requiring consent to the arrangement. Along these lines, such statutes recognize to some degree the economic dependency that may exist among unmarried adults.¹⁶⁸

Since Hawaii, unlike Vermont, has not legalized same-sex unions, the Hawaiian statute has been criticized for sidestepping the issue of same-sex relationships.¹⁶⁹ Since the Hawaii statute did not extend the rights of marriage to same-sex couples, but only provided more limited rights within the content 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.¹⁷⁰

Extending legal marriage privileges to same-sex and non conjugal relationship will undoubtedly be a slow process. As states struggle with equality issues for same-sex relationships, kinship relationships will face similar challenges. As with same-sex marriages, the concerns will have religious and moral overtones that seek to limit legal recognition of non-tradition family units. The current requirements of domestic partnership and reciprocal beneficiaries 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 beneficiaries laws provide some legal benefits for same sex couples and non-marital couples, they are limited. 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.¹⁷¹ 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.¹⁷² Between these two extremes lies the concept of the

¹⁶⁸ See, e.g., HAW. REV. STAT. ANN. § 572C-2 (2008). 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:

[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.

¹⁶⁹ See Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in The American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1276 (2001).

¹⁷⁰ *Id.*

¹⁷¹ 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. LAW COMMISSION OF CANADA, *supra* note 138, at 116.

¹⁷² SA LAW REFORM COMMISSION, 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.*

granting of benefits and entitlements that are important to share in emotionally and economically interdependent relationships.¹⁷³

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.”¹⁷⁴ In *Beyond Conjuality*, the Law Commission of Canada proposed a four-step methodology to review existing laws based on relationships status.¹⁷⁵

The first question is whether a law is pursuing legitimate objection 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 a relationship is not relevant to a legislative objective, then the law should not take them into account. If relationships do matter, a preferred option is to allow individual 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.¹⁷⁶

The ultimate goal of this methodology is to inform the construct two legal mechanisms—registration and ascription—that would provide legal protections and benefits in kinship relationship. Along these lines, a registration model could allow parties “identify the relationships most important to them.”¹⁷⁷

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.¹⁷⁸ Likewise, civil union and domestic partnership laws in other countries serve similar functions.¹⁷⁹

In addition, ascription is another statutory mechanism for recognizing kinship relationship could also arise due to ascription. 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.”¹⁸⁰ The problem, however, with granting rights by ascription is that it is that it would treat all similarly situated parties the same without distinction based on the actual arrangements of the parties involved.¹⁸¹

¹⁷³ LAW COMMISSION OF CANADA, *supra* note 138, at 29–37

¹⁷⁴ *Id.* at 29.

¹⁷⁵ *Id.* at 29–37.

¹⁷⁶ *Id.* at 36.

¹⁷⁷ *Id.*

¹⁷⁸ Duncan, *supra* note 164, at 987–88. Related to this is the private recognition of these relationships, amongst companies that provide domestic partnership benefits. *Id.* at 965–78.

¹⁷⁹ INTERNATIONAL GAY HUMAN RIGHTS COMMISSION, WHERE YOU CAN MARRY: GLOBAL SUMMARY OF REGISTERED PARTNERSHIP, DOMESTIC PARTNERSHIP, AND MARRIAGE LAW (Nov. 2003), <http://www.iglhrc.org/site/iglhrc/content.php?type=1&id=91> (last visited Nov. 15, 2008).

Just over twenty nations sanction civil unions or domestic partnerships in all or part of their jurisdictions. *Id.*

¹⁸⁰ LAW COMMISSION OF CANADA, *supra* note 138, at 116.

¹⁸¹ *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 individual circumscribes the ability of individuals to create and maintain viable social and economic relationships outside of marriage. As 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 relationship. 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.¹⁸²

Therein lies the *paradox of oppression*. Oppression, discrimination and disenfranchisement in its endless forms must concern all of us. In his seminal work, *Pedagogy of the Oppressed*, Freire (1970) observed, “[a]s 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”¹⁸³ Dehumanization is a distortion of what it means to be fully human.¹⁸⁴ 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”¹⁸⁵

Instead of focusing on the results of a break-down of the kinship family, attention should focus on recognizing these family units by society as a whole. The data confirms that kinship families would be more productive and enhance our collective

¹⁸² Senator Stan Rosenberg, *Our Best Angels*, Presented to Unitarian Universalist Society of Amherst (January 12, 1997).

¹⁸³ Paulo Freire, *PEDAGOGIA DEL OPRIMIDO* 39 (Myra Bergman Ramos trans., Herder & Herder 1970); see also DOMAN LUM, *CULTURALLY COMPETENT PRACTICE: A FRAMEWORK FOR UNDERSTANDING DIVERSE GROUPS AND JUSTICE ISSUES* 55–56, 2003.

¹⁸⁴ *Id.* at 56.

¹⁸⁵ Nancie Palmer, *Fostering Resiliency in Children: Lessons Learned in Transcending Adversity*, 19 J. SOC. THOUGHT 69, 85 (1999).

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 the state validated kinship families. Most importantly, the state could save money. Now, instead of totally relying on the welfare system to supply basic needs, kinship groups would pay taxes like other families and received the same tax benefits which in many instances would off-set welfare payments.

As the New York Comptroller, William Thompson, astutely observed in his report about the benefits of same-sex marriage, to recognize brings economic rewards.¹⁸⁶ According to the study, same-sex kinship families would bring \$142 million to New York City's economy.¹⁸⁷ The same recognition would add \$184 million to the State's economy.¹⁸⁸ These revenues would be generated by sales taxes, "marriage license fees . . . income tax, estate taxes and public spending on means-tested government transfer programs."¹⁸⁹ Additionally, "the Comptroller's Office estimates that the state will collect about \$8 million more in taxes and save more than \$100 million in out lays on health care."¹⁹⁰

¹⁸⁶ See generally OFFICE OF THE NEW YORK CITY COMPTROLLER & OFFICE OF FISCAL & BUDGET STUDIES, LOVE COUNTS, THE ECONOMIC BENEFITS OF MARRIAGE EQUALITY FOR NEW YORK (June 2007), available at <http://www.comptroller.nyc.gov/bureaus/bud/07reports/Jun07LoveCountBudgetnotes.pdf>.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* The article states that legalizing same-sex marriage might be costly to some businesses, specifically, insurance companies because they would be required to insure same-sex spouses. *Id.* However, because several firms already offer coverage for domestic partnerships, the costs would be partially offset. *Id.* There would also be financial gain because "weddings generate sales taxes and marriage license fees, and marriage may affect the income tax, estate taxes, and public spending on means-tested government transfer programs." *Id.* at 2. By legalizing same-sex marriage, the above mentioned finances would be added to the already generated fiscal income. *Id.* at 3. Based on the number of same-sex couples that lived together in 2005 throughout the United States, the "economic impact of marriage equality" would be financially beneficial to the government. *Id.* at 2.

These estimates do not capture all of the potential impacts of legalizing marriage for same-sex couples. For example, firms may face lower recruiting costs or an expanded pool of qualified candidates if same-sex couples are more likely to move to New York as a result of a change in the marriage laws. In addition, greater economic security resulting from marriage may lead more couples to purchase homes, which would generate more tax revenue.

Id.
¹⁹⁰

Id.