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A PEACE PROPOSAL FOR THE SAME-SEX MARRIAGE WARS: RESTORING THE HOUSEHOLD TO ITS PROPER PLACE

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Western legal cultures are enmeshed in fierce social debates about how both marriage and the family should be defined. What was once academic speculation about new forms of marriage has now moved into popular discussion worldwide. Most recently, this debate has been galvanized by judicial decisions in Canada and Western Europe, the Supreme Court's decision in *Lawrence v. Texas* that same-sex sodomy cannot be criminally punished without violating the due process clause,¹ and the Massachusetts Supreme Judicial Court's decision that denial of legal marriage to same-sex partners violates equal protection provisions of the state constitution.²

These cases have brought same-sex marriage to the forefront of popular debate, particularly among political conservatives. On July 30, 2003, President Bush took sides with marriage traditionalists, yet apparently not the states' rights advocates among them, announcing in a press conference, "I believe marriage is between a man and a woman, and I believe we ought to codify that one way or the other and we have lawyers looking at the best way to do that."³ On February 24, 2004, the President unambiguously issued a call for a constitutional amendment to "prevent the meaning of marriage from being changed forever, by defining and protecting marriage as a union of a man and woman as husband and wife," while "leaving . . . state legislatures free to make their own choices in defining legal arrangements other than marriage."⁴

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1. See notes 31-44 *infra* and accompanying text for further discussion.

2. See *Goodridge v. Dep't of Public Health*, 440 Mass. 308, 798 N.E.2d 941 (2003). For a discussion of *Goodridge*, see notes 73-74 and accompanying text.

3. Neil A. Lewis, *From the Rose Garden: Same Sex Marriage; Bush Backs Bid to Block Gays From Marrying*, N.Y. TIMES, July 31, 2003, at A1.

4. *Transcript of Bush Statement*, at <http://cnn.alpolitics.printthis.clickability.com/pt?action&title=CNN.com> (last visited Feb. 24, 2004). Bush argued that this move would "respect every person and protect the institution of marriage. There is no contradiction between these responsibilities. . . ." *Id.* By contrast, immediately after the *Goodridge* decision was handed down, Bush was more ambiguous, suggesting on prime time television that he would support a constitutional amendment to codify man-woman marriage "if neccessary," but in a bow to both conservative and liberal interests, stated, "the position of this administration is that whatever legal arrangements people want to make, they're allowed to make, so long as it's embraced by the state or start at the state level." Carolyn Lochhead, *Bush plays both sides in debate over gay marriage / He says he'll back constitutional ban*, S.F.

America's religious communities have also taken sides in the debate. On July 31, 2003, because of a concern about the growing legalization of same-sex relationships, the Vatican "urged Roman Catholic lawmakers and others to fight back, calling support for such legislation 'gravely immoral.'"⁵ During the same week, the Episcopal Church USA, meeting in Minneapolis, seated its first gay bishop living openly in a committed same-sex relationship, and compromised on same-sex blessings.⁶

The long-advocated cause of legal same-sex marriage has only recently claimed its first stable successes in court and legislative arenas, but these successes are significant. Particularly in the past five years, this movement has scored solid victories for gay and lesbian couples in much of Western Europe, including nations with significant Roman Catholic populations, such as France, Belgium, and Germany.⁷ In the United States, following unstable victories in Hawaii⁸ and Alaska⁹, and a compromise decision in Vermont,¹⁰

CHRON., Dec. 18, 2003, at A1. Bush seemingly tried to recover by declaring that "the issue of same-sex marriage should be left to the states except and unless judicial rulings undermine the sanctity of marriage. In which case, we may need a constitutional amendment." *Id.* Congress has already responded by introducing legislation to constitutionalize marriage. 149 Cong. Rec. H9689-05, H9690 2003 WL 22386811 (Oct. 20, 2003) (remarks of Rep. Blumenauer). Bush has previously attempted to appease both states' rights advocates and anti-gay marriage supporters. See *Bush backs amendment to stop gay marriages*, DESERET NEWS, Dec. 12, 2003, at A12.

5. Frank Bruni, *Vatican Exhorts Legislators to Reject Same-Sex Unions*, N.Y. TIMES, Aug. 1, 2003, at A1.

6. Monica Davey, *Gay Bishop Wins in Episcopal Vote; Split Threatened*, N.Y. TIMES, Aug. 6, 2003, at A1; Martha Allen Sawyer, *Gay bishop approved; Episcopalian survives allegations, fears of church split*, STAR-TRIBUNE (Minn.-St. Paul), Aug. 6, 2003, at A3, A10; Rachel Zoll, *Episcopal Leaders OK Same-Sex Blessings*, Newsday.com, at www.newsday.com/news/nationworld/wire/snap-episcopalians-gay-bishop (last visited Jan. 12, 2004).

7. See Bruni, *supra* note 5 (noting that France became the first predominantly Roman Catholic nation to allow same-sex marriages, while "Germany, which also has a large Catholic population, grants gay couples protections, benefits, and responsibilities traditionally reserved for married men and women.").

8. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (ruling state statute preventing same sex marriage establishes a sex-based classification subject to strict scrutiny, but also ruled that state constitution does not provide a fundamental right of persons of the same sex to marry).

9. See *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. 1998) (finding that same-sex marriage is a fundamental right; state must have compelling interest that supports its decision to refuse to recognize same sex-marriages). But see *Brause v. Dep't of Health and Human Services*, 21 P.3d 357 (Alaska 2001) (dismissing declaratory judgment action challenging the validity of state statute precluding same-sex marriage as not ripe for adjudication).

10. See *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999) (determining that exclusion of same-sex couples from benefits related to marriage violates common benefits clause of state constitution).

Goodridge v. Department of Massachusetts promises to be the most significant public victory for advocates of gay marriage in the United States, though the Massachusetts court and legislature engaged in a struggle over marriage versus civil unions for gay and lesbian couples.¹¹ Yet, in practical terms, the case that will create the broadest impact in the Western Hemisphere was the decision of the Canadian government to extend marriage to same-sex couples after three provincial court victories.¹²

These are not the only winds blowing change into the law of marriage. Another movement, the covenant marriage movement, which aims to make marriage and divorce a more serious undertaking for the matrimonial couple through heightened restrictions on both, continues to capture the imagination of persons with traditional understandings of marriage and those troubled by the state of modern marriage.¹³ In addition to legislative successes in Arkansas, Arizona, and Louisiana,¹⁴ covenant marriage bills have successfully passed at least one house in Oregon, Georgia, Texas and Oklahoma and have been introduced in at least eighteen other states and Australia as well.¹⁵ Simultaneously, a religious movement

11. *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 343, 798 N.E.2d 941, 969 (2003). For a discussion of these developments, see notes 73-74 *infra* and accompanying text.

12. See Clifford Kraus, *Canadian Leaders Agree to Propose Gay Marriage Law*, N.Y. TIMES, June 17, 2003, at A1 (noting that the Canadian cabinet approved a same-sex marriage policy and ordered draft legislation to implement the policy). However, the debate over extension of marriage to same-sex partners is far from over in Canada. On September 16, 2003, the Canadian House of Commons barely defeated a nonbonding resolution to oppose the government's plan to legalize gay marriage, see Tom Cohen, *Resolution Opposing Same-Sex Unions Fails*, S. FLA SUN-SENTINEL, Sept. 17, 2003, at 21A. The case which spurred the government's decision was *Halpern v. Toronto (city)*, 2003 CarswellOnt 2159, 36 R.F.L.(5th) 127, 172 O.A.C. 276, reversing, in part, *Halpern v. Toronto (Attorney General)*, 2002 CarswellOnt 3209, 28 R.F.L. (5th) 41, 215 D.L.R. (4th) 223 (holding Canadian marriage law that defined marriage in opposite sex-terms only as a violation of section 15(1) of the Canadian Charter of Rights and Freedoms). *Halpern* cites *Hendricks v. Quebec (Procureur General)* 2002 CarswellQue 1890 (2002) R.J.Q. 2506, (2002) R.D.F. 1022 and *EGALE Canada Inc. v. Canada (Attorney General)*, 2002 CarswellBC 3178, 2002 BCCA 710, 178 B.C.A.C. 309 (both holding that the prohibition against same-sex marriages was unconstitutional, but suspending the court declarations for periods of up to two years); Clifford Kraus, *World Briefing: Americas: Canada: Court Allows Same-Sex Marriages*, N.Y. TIMES, June 11, 2003, at A8.

13. See, e.g., Alan J. Hawkins et al., *Attitudes about Covenant Marriage and Divorce: Policy Implications from a Three-State Comparison*, 51 FAM. REL. 166, 2002 WL 11465233 (2002) (analyzing and comparing data obtained from Louisiana, Arizona, and Minnesota pertaining to viewpoints on heightening guidelines for marriage and divorce).

14. *Id.* at 167.

15. For links to actual statutes and bills, see *Covenant Marriage Links*, at <http://www.divorcereform.org.cov.html> (last visited Jan. 21, 2004).

to encourage and register private covenant marriages has been endorsed and underwritten by many of the most significant conservative marriage and family organizations in the country, including the Moody Bible Institute, the Promise-Keepers, and Focus on the Family.¹⁶ Although both the gay marriage movement and the covenant marriage movement represent positive alternatives in the debate around legal marriage and family, one can argue that both ultimately mimic rather than resolve the problems with using the 'choice'-based nuclear family as the favored legal model for ordering intimate relationships. As a short-term strategy, however, the covenant marriage and gay marriage movements both promise to bring stability to intimate relationships that are increasingly seen by people from various ideological positions as fragile. Moreover, both movements offer the possibility of bringing new social respect to relationships traditionally viewed with disdain over the last few decades: by conservatives- the gay or lesbian committed intimate relationship; and by liberals- the religiously informed traditional marriage.

Unless a solution beyond these two alternatives is found, both movements, in particular the same-sex marriage movement, could ignite a destructive cultural conflagration. Just as significantly, by supporting the modern trend of singling out marriage and the parent-child relationship as the legal *sine qua non* of private relationships, these movements may ultimately defeat their purpose: in fact, they may only exacerbate the modern tendency to, if you will, 'put all the eggs' of private life into the 'basket' of the nuclear family. That is, these movements may ultimately help, albeit modestly, to load the institution of marriage with expectations that it cannot realistically hope to achieve. These movements seem only to shore up the modern wall between public life and the private world of the family rather than freeing men and women to live fulfilling lives.¹⁷

16. See *About Us, What is the Covenant Marriage Movement?*, at <http://www.familyfi.org/CMM-LIST.htm> (last visited Jan. 21, 2004) [hereinafter *What is the Covenant Marriage Movement?*].

17. For a discussion on how the distinction between public and private life affects and creates the manner which an individual functions in society, see generally Elizabeth Mensch & Alan Freeman, *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237, 239, 241-42 (1987). See also MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 156-57 (1995) (noting the blurring of lines between the public and private in areas such as domestic violence); Lynda Nead, *Women and Urban Life*, at http://www.bbc.co.uk/history/lj/victorian_britainlj/women

In addition, one can argue that these movements portend the further stigmatization of the sexually promiscuous and other social outliers who refuse to conform to societal mores regarding sexual behavior and sexual responsibility. These are stigmas that may be deserved in many cases of irresponsible promiscuity, though many in the gay community fear oppressive 'normalization' of sexuality.¹⁸ Yet, if successful, the same-sex marriage and covenant marriage movements promise to further marginalize those who, through no real choice of their own, do not live in relationships resembling the marital ideal.

As emerging forms of family life continue to multiply, another, more inclusive and indeed more traditional form might fruitfully replace marriage and the nuclear family as the key legal category for ordering private intimate relationships; one that does not depend on, but is still large enough to embrace, mutually committed sexual relationships as a typical expression. This form, the household, which consists of all those who live under the same roof whether they are related or not,¹⁹ is a commonly recognized social and legal form used

_urban3.shtml?site=history_victorianlj_urban (last visited Jan. 21, 2004) (noting that women were identified with the private sphere and moral and sexual purity).

18. See, e.g., Michael Warner, *Beyond Gay Marriage*, in *LEFT LEGALISM/LEFT CRITIQUE* 276-278 (Wendy Brown & Janet Halley eds., 2002) (arguing that same-sex marriage will extend efforts to 'normalize' gay life and stigmatize other gay sex).

19. See U.S. Census Bureau, *Current Population Survey (CPS) - Definitions and Explanation*, at <http://www.census.gov/population/www/cps/cpsdef.html> (last visited Jan. 12, 2004) [hereinafter *Current Population Survey*]. The United States Census Bureau's definition of household states that:

A household consists of all the people who occupy a housing unit. A house, an apartment or other group of rooms, or a single room, is regarded as a housing unit when it is occupied or intended for occupancy as separate living quarters; that is, when the occupants do not live and eat with any other persons in the structure and there is direct access from the outside or through a common hall. A household includes the related family members and all the unrelated people, if any, such as lodgers, foster children, wards, or employees who share the housing unit. A person living alone in a housing unit, or a group of unrelated people sharing a housing unit such as partners or roomers, is also counted as a household. The count of households excludes group quarters.,

Id.

See also Roger Thomas, *'Household Definition' 1998, Question Bank Topic Commentary on Health*, at <http://qb.soc.surrey.ac.uk/housedefinition/housedef.htm> (visited Jan. 17, 2004) ("A household comprises either one person living alone or a group of people, who may or may not be related, living (or staying temporarily) at the same address, with common housekeeping, who either share at least one meal a day or share common living accommodation (ie a living room or sitting room)").

today in such governmental programs as the United States Census and the Food Stamp program.²⁰

This is not the first attempt to suggest that the nuclear family concept be replaced by a different legal concept such as contract, trust or kinship as the chief way lawyers think about intimate relationships, a literature survey discloses several such proposals, including some that note the historical significance of the concept of the household.²¹ Indeed, part of my point is that the household form has been with us all along, if we only care to relearn and embrace our tradition on this form. However, I hope that this more extended treatment of the household as a legal model will both remind us of the actual complexity of our social traditions related to the family, and shed some new light on the critical problems of the existing model. While a refocusing on the household as the chief unit of

20. See notes 233-235 *infra* and accompanying text.

21. See Barbara Bennett Woodhouse, *"It All Depends on What you Mean by Home": Toward a Communitarian Theory of the "Nontraditional" Family*, 1996 UTAH L. REV. 569 (1996) (urging that an expanded definition of kinship be used to identify legal rights and responsibilities). For other proposals, see, for example, FINEMAN, *supra* note 17, at 27 (arguing that the law should recognize the mother-child dyad as the legal family and permit sexual partners to order their affairs through private contract); Judith Butler, *Is Kinship Always Already Heterosexual?*, in 13.1 DIFFERENCES: A JOURNAL OF FEMINIST CULTURAL STUDIES 14 (2002) (arguing for refocused social attention on broader forms of kinship than marriage and children, including "self-consciously assembled" kinship until the couple involved have children); Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709 (1996) (arguing that common law marriage should be retained or reinstituted because of the greater level of protection it provides to women); Harry D. Krause & David D. Meyer, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section II-What Family for the 21st Century*, 50 AM. J. COMP. L. 101 (2002) (arguing that married and unmarried couples in the same positions should be treated alike by the law); David D. Meyer, *Self-Definition in the Constitution of Faith and Family*, 86 MINN. L. REV. 791 (2002) (arguing that families should be given greater deference in defining themselves); Summer L. Nastich, *Questioning the Marriage Assumptions: The Justifications for "Opposite Sex Only" Marriage as Support for the Abolition of Marriage*, 21 LAW & INEQU. 114 (2003) (arguing that marital privileges are unjustified and public policy that is ostensibly furthered by marriage should rather be effectuated through contracts, statutes and common law doctrines); Laura Weinrib, *Reconstructing Family: Constructive Trust at Relational Dissolution*, 37 HARV. C.R.C.L. REV. 207 (2002) (arguing that courts should use constructive trust doctrine, "an equitable remedy imposed on a party who has wrongfully obtained the property of another," to protect persons in intimate relationships); Lenore J. Weitzman, *Legal Tradition of Marriage: Tradition and Change, a Proposal for Individual Contracts and Contracts in Lieu of Marriage*, 62 CALIF. L. REV. 1169 (1974) (arguing that as one solution to the difficulties with the marriage contract and an alternative way to regulate the relationship, individuals should have the opportunity to establish private contracts among themselves instead and even independent of marriage); Lisa Milot, Note, *Restitching the American Marital Quilt: Untangling Marriage from the Nuclear Family*, 87 VA. L. REV. 701 (2001) (arguing that individuals should be able to order their lives without state intervention).

private life from which legal rights and responsibilities flow is not without its problems, the gains offered by this shift are more than worth the cost. Some of these gains are symbolic. For example, the legal concept of the household is less exclusive.²² I argue, therefore, that the concept is less subject to the human temptation to elevate one form of private relationship such as marriage or the parent-child bond above others as a morally preferable social unit, and label other groups of individuals who function in similar ways as socially less worthy forms of 'family.'

Arguably, the social conflicts that have been generated at the confluence of debates over feminism, individualism, and religious traditionalism make it possible to bring some rough, tangible equality to a wide variety of family forms. A refocusing on the household as a legal institution will make it less likely that the current fights between liberals and conservatives over marriage will overshadow pressing social problems, such as the welfare of children and economic disparities. If the household becomes the legal form to which the largest number of legal rights and duties are attached, it may also be possible for the debate about marriage, including same-sex marriage, to become more civil. This debate is then less weighted down with the widespread and serious legal consequences for households that attend its outcome. The legal consequences of the definition of marriage are indeed serious: the same-sex marriage debate has identified more than a thousand legal rights and obligations in the United States directly affected by marital status.²³

Still other consequences of refocusing the weight of right and responsibility upon the legal household are practical. For example, already existing socially fragile private communities will increasingly be able to receive the social supports they need and deserve. Some brief examples:

Single heterosexual mothers with children could be empowered to form households with similar other mothers, taking advantage of the availability of multiple adults to care for children, perform household tasks, and seek emotional support and advice from others,

22. See *Current Population Survey*, *supra* note 19 (providing legal definition of household).

23. See, e.g., Demian, *Quick Facts on Legal Marriage for Same-Sex Couples*, at <http://www.buddybuddy.com/marquik.html> (last visited Jan. 17, 2004) (noting 1,040 federal laws triggered by marriage and 160-250 state laws in each jurisdiction). See also, Demian, *U.S. Federal Regulations Triggered by Legal Marriage*, at <http://www.buddybuddy.com/marfedd.html> (last visited Jan. 17, 2004) (listing federal laws for which spousal status also is used to provide benefits or regulate individuals); see also *Baker v. State*, 744 A.2d 864, 883-84 (Vt. 1999) (listing types of Vermont government benefits depending on spousal relationship).

without being penalized by social programs or subjected to the stigmas that gay and lesbian partners currently face.

Gay and lesbian families could coexist with other families without being forced into revealing their living arrangements as sexual or intimate relationships, something that could subject them to harassment, threats to custody arrangements, and other forms of social attack.

Older persons could form households with unrelated peers or younger people to meet their needs for companionship and household help, without social assumptions about their sexuality or vulnerability to exploitation.

Social kinship structures could be strengthened, as inter-generational families, such as grandparents or aunts and uncles who parent or coparent grandchildren, nieces and nephews can receive public benefits that currently exclude them, unless they virtually replace the child's parents for legal purposes.

Group homes composed of adult singles, such as the mentally disabled or chemically dependent, could be treated as legitimate 'families' without social expectation that they are either transitional or aberrant.

The aim of this article is to investigate both the reality of family life and the normative arguments surrounding marriage and the nuclear family in order to make a preliminary case for a move to the household as the key organizing concept in American law. First, it is important to briefly look at the reality of family forms in American society and the burden placed on the nuclear family to represent this diversity of family forms, as well as to understand what the gay and covenant marriage movements are about and where they currently stand.

Second, through the lens of family history and sociology, I want to consider whether the so-called 'nuclear family' is indeed the key model or social building block that family duties have been structured around, which might argue for its continued place as a legal construct.

Third, I will argue that both the gay marriage and covenant marriage movements have, in fact, promoted a 'choice' model for the creation of the legal family that is both historically excluding and morally problematical. Finally, I will argue that the household is a viable legal concept for dealing with many of the five vital functions that households and families have traditionally served: sexual expression, reproduction, childhood socialization, economic

interdependence, and social support. I will also address the objections to a wide-scale adoption of the household in place of the nuclear family as a legal model.

THE MARRIAGE DEBATE AND THE VANISHING NUCLEAR FAMILY

In most human societies, some practical construct of the family or household has played a key role in organizing human identity, relationships, historical continuity, and even community economic and social life.²⁴ Most modern societies continue to imagine the family as the most vital location where the realities of human interdependence — desire, conflict, vulnerability, power, security, love, nurture — play themselves out in individual lives.²⁵

Given that in so-called developed countries, marriage and the nuclear family do not serve as the exclusive groundwork upon which society constructs the multiple roles that an individual will occupy over his/her lifetime the nuclear family indeed does seem to be vanishing. Many people are as 'wedded' to their workplace colleagues as to their spouses. Moreover, so-called 'traditional' nuclear families consisting of a married couple and their children have indeed recently shrunk as a proportion of the American population.²⁶ Of the 104.7 million households counted by the U.S. census in 2000, only 55.3 million were married couple households, and only twenty-four percent of the total were 'married-couple households' with their own minor children (down from forty percent in 1970).²⁷

Dire predictions of the demise of marriage as the legal placeholder for the nuclear family are not without evidence: more than three million couples, both straight and gay, were bold enough to identify themselves as cohabiting couples in the last census, in addition to those who "may be reluctant to classify themselves as such in a personal interview situation and may describe themselves

24. See, e.g., Gay and Lesbian Advocates and Defenders, *Why Marriage Matters*, at <http://www.glad.org/publications/CivilRightProject/OP1whymarriagematters.shtml> (last visited Jan. 12, 2004) (providing examples of different marital constructs).

25. See, e.g., Rev. Mark Connolly, *Family Life*, SPIRITUALITY FOR TODAY at <http://www.spirituality.org/issue02/page02.html> (last visited Jan. 15, 2004) (proposing family care as a basis for learning chastity and compassion to others).

26. See Jason Fields & Lynne M. Casper, U. S. Census Bureau, *America's Families and Living Arrangements: March 2000*, CURRENT POPULATION REPORTS, P20-537, 1, 1-3 (2001) at <http://www.census.gov/prod/2001pubs/p20-537.pdf> (last visited Jan. 20, 2004). [hereinafter POPULATION REPORTS 2001].

27. *Id.*

as roommates, housemates, or friends not related to each other."²⁸ Other studies suggest that predictions of doom for marriage and the traditional family generally are vastly overstated.²⁹ Statisticians note that well over ninety-five percent of all women in the United States will be married by the age of sixty-five, though the typical age of marriage has clearly shifted from early twenties to the twenty-five to thirty-five age range for both men and women.³⁰ A more significant worry expressed by nearly everyone who considers himself in the mainstream is the high rate of divorce.³¹ Statistics suggest that between thirty-three to fifty percent of all first marriages will end in divorce, most typically in the first few years after marriage among couples in their early to mid-twenties,³² and that subsequent marriages have even a worse chance of success.³³

To recite the spectrum of proposed causes of the fragility of American and other Western marriages would be tedious, for they are well-rehearsed in public culture. I have suggested one somewhat under-represented argument that marriages, and the nuclear families they found, are in distress not because society focuses on them too little, but because society places too much responsibility on them to resolve social problems. History speaks its ironies: in the Western world, where the concept of the 'family' has been shrunk into a 'nucleus' of husband, wife, and children floating in an apparent plasma of less important relationships, a wide variety of thinkers have held up the family almost devotionally as an object for veneration.³⁴ Though these arguments cannot fully be explored here, at least one Catholic writing on marriage argued that if we "put the family back together again, the rest of the world would take care of itself."³⁵ Secular arguments are similar: GLAD, the society of Gay and Lesbian Advocates and Defenders, notes "[m]arriage is a major building block for strong families and communities. . . . [It] is also

28. *Id.* at 12.

29. *Id.* at 9-10.

30. *Id.*

31. See Arthur J. Norton & Louisa F. Miller, U. S. Census Bureau, *Marriage, Divorce, and Remarriage in the 1990's*, CURRENT POPULATION REPORTS, P23-180 1, 1-6 (1992) at <http://www.census.gov/population/socdemo/marr-div/p23-180/p23-180.pdf> (last visited Jan. 20, 2004) [hereinafter POPULATION REPORTS 1992].

32. *Id.* at 4-5.

33. *Id.* at 6.

34. See, e.g., JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 3-12 (1997); Connolly, *supra* note 25.

35. Connolly, *supra* note 25 (quoting a story where a little boy puts a puzzle of the world together by putting the family on the other side of the puzzle back together.)

a social institution of the highest importance; the ultimate expression of love and commitment."³⁶

Virtually any modern discussion of marriage will invest it with a wide array of benefits and responsibilities. Many of these benefits and responsibilities, for example the responsibilities of committed sexual expression and reproduction, have traditionally been thought to accompany marriage almost exclusively.³⁷ Yet many other responsibilities, once they are more widely distributed among larger kinship groupings, are new burdens or even benefits thrust upon the nuclear family within the last few decades. For instance, although spouses, particularly husbands, have been held responsible for supporting their spouses throughout time, other vehicles for support of persons, such as extended family support and even legal kinship responsibilities such as adult children's duty to support aging parents, have been significantly eroded in mainstream American society.³⁸

The benign impetus for many of the legal changes, to ensure vulnerable individuals whose families have defaulted on them can receive support coupled with a modicum of autonomy and dignity, and to lessen the strain on adult children for their extended families, has its downside. Effectively, some of these programs have virtually eliminated the legal responsibility of some extended family members for others. Unreflective government program rules have been perverse in their contribution to this breakdown. Only recently have foster parents from a child's family received the same level of payments as stranger foster parents,³⁹ and studies have shown that they are offered substantially fewer services than nonkin foster parents though they often face greater obstacles.⁴⁰ Federal and state

36. See Gay and Lesbian Advocates & Defenders, *supra* note 24.

37. See, e.g., FINNEMAN, *supra* note 17, at 146-47 (discussing how traditional laws supported marriage and heterosexual expression as the only sexual relationship).

38. See, e.g., Holly Shaver Bryant, Note, *Funding Kinship Care: A Policy-Based Argument for Keeping the Elderly in the Family*, 8 WM. & MARY J. WOMEN & L. 459, 469-70 (2002) (recognizing a lack of a legal duty to care for parents).

39. *Id.* (noting that relatives were originally ineligible for foster payments, and now are eligible only if they are licensed). See also Rob Green, The Urban Institute, Foster Children Placed With Relatives Often Receive Less Government Help, NEW FEDERALISM, ISSUES AND OPTIONS FOR STATES, Series A, No. A-59, App. 2, at http://www.urban.org/UploadedPDF/310774_A-59.pdf (last visited Mar. 8, 2004) (noting that most states do not provide foster care payments if kin are licensed through a special process or have licensing standards waived).

40. See Green, *supra* note 39, at 2-3, App. 1 (noting that kin foster parents more often have economic, child care, counseling, and educational support needs than nonkin foster parents, but are offered and request fewer services).

data practices and privacy policies in programs aiding teenage mothers may exclude adult grandparents from important information about the teenage mother/grandchild family unit that is necessary to help them make responsible choices.⁴¹

This pattern of putting increasing weight on the marital or single parent unit, whereas extended family/friend support is not expected and sometimes discouraged, is not repeated in all American subcultures. Studies of newly arrived Hispanic families note the tradition of helping others in the extended family that persists into the new setting.⁴² Studies of African American and American Indian communities have documented the persistence of extended family care for dependent children.⁴³ Even studies of lesbian parents have noted how frequently they receive 'family' support of all kinds from others in their lesbian community.⁴⁴

Despite this evidence of plural family/household structures, marriage and the nuclear family remain the chief focus of social and cultural debates in the United States. One highly visible marriage movement has waged a steady, recently quite successful, campaign to expand the legal definition of marriage to include committed same-sex couples and their children.⁴⁵ The most significant stable

41. See, e.g., MINN. STAT. ANN. § 13.46(2) (West 1997 & Supp. 2003) (preventing reporting of Minnesota Families Investment Programs ("MFIP"), Temporary Assistance for Needy Families ("TANF"), general assistance, or other data to nonrecipient family members whereas permitting it to be shared widely along government agencies).

42. See, e.g., Shirley L. Patterson & Flavio Francisco Marsiglia, "Mi Casa Es Su Casa": Beginning Exploration of Mexican Americans' Natural Helping, 81 FAMILIES IN SOC'Y: THE J. OF CONTEMP. HUM. SERV. 22 (2000) (discussing how providing help within the Mexican community to the extended family often includes providing help to strangers of the same cultural background who are not related by blood).

43. See Sandra L. Barnes, *Stressors and Strengths: A Theoretical and Practical Examination of Nuclear, Single-Parent, and Augmented African American Families*, 82 FAMILIES IN SOC'Y: THE J. OF CONTEMP. HUM. SERVICE 449, 450-51 (2001) (noting that augmented or extended families including relative and nonrelative members are often used to raise children as well as care for the elderly).

44. See Pauline I. Erera & Karen Fredriksen, *Lesbian Stepfamilies: A Unique Family Structure*, 80 FAM. IN SOC'Y: THE J. OF CONTEMP. HUM. SERVICE 263, 265 (1999) (noting that lesbian community members play familial roles toward children of a lesbian couple).

45. See, e.g., WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 44-48 (1996) [hereinafter ESKRIDGE, CASE] (discussing the history impacting the rise and strength of the same-sex marriage movement); WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 15-32 (2002) (hereinafter ESKRIDGE, CIVIL UNIONS). Though Eskridge is most identified with this movement, there have been numerous other arguments in favor of same-sex marriage. See, e.g., Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299 (1997) (discussing various family values for which gays want legal recognition and protection); Richard D. Mohr, *The Case for Gay Marriage*, 9 NOTRE

advances for this movement have occurred outside of the United States. The European Union has been much more supportive than American states toward extension of positive rights to gay and lesbian persons, including same-sex marriage. On March 16, 2000, its parliament passed a nonbonding resolution urging its fifteen member nations to grant same-sex couples equal rights, "particularly as regards tax law, pecuniary rights and social rights."⁴⁶ The human rights report that incorporated this resolution "noted that 'European citizens continue to suffer discrimination and disadvantages in their personal and professional life as a result of their sexual orientation,'" despite specific references in the EU's basic treaty against such discrimination.⁴⁷ These developments seem especially pertinent to the debate in the United States in light of the Supreme Court's references to the experience and views of European states on homosexual sodomy in *Lawrence v. Texas*.⁴⁸

A number of European nations have given practical form to these aspirational statements from *Lawrence*.⁴⁹ Belgium (2003)⁵⁰

DAME J. L. ETHICS & PUB. POLY 215 (1995) (arguing for the legalization of gay marriage through an analysis of the meaning of marriage); Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POLY & L. 291 (2001) (arguing that family policy objectives demonstrate a strong interest in supporting marriage by opposite-sex as well as same-sex couples). There are also numerous websites dedicated to advocacy and information about same-sex marriage. See, e.g., Partners Task Force for Gay and Lesbian Couples at www.buddybuddy.com; National Lesbian & Gay Journalists Association at <http://www.nlgja.org>. This movement has a substantial opposition among some Christian and other conservatives. ESKRIDGE, CASE at 46-50. See, e.g., David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 BYU. J. PUB. L. 201, 234-35 (1998) (posing the question of how to coexist in a society that draws different analogies to *Loving v. Virginia*, 388 U.S. 1 (1967) to support or challenge how marriage is defined); Richard F. Duncan, *From Loving to Romer: Homosexual Marriage and Moral Discernment*, 12 BYU J. PUB. L. 1239, 1249-51 (1998) (arguing that defining marriage as a union between man and woman does not discriminate individuals but rather preserves the true nature of marriage and celebrates how men and women complement each other).

46. See Demian, Partner's Task Force for Gay & Lesbian Couples, *Legal Marriage Report: Global Status of Legal Marriage*, at <http://www.buddybuddy.com/toc.html> (last visited Mar. 8, 2004) [hereinafter *Legal Marriage Report*]

47. *Id.*

48. 123 S. Ct. 2472 (2003). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. See Brief for Mary Robinson et al. as *Amici Curiae*, at 11-12 (noting "the right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent") *Id.* at 2483.

49. *Id.* with accompanying text.

50. See *Legal Marriage Report*, *supra* note 46 at 2; Demian, Partner's Task Force for Gay & Lesbian Couples, *Belgium Offers Legal Marriage*, at <http://www.buddybuddy.com/toc.html> (last visited Jan. 17, 2004). In addition, Belgium's report notes that reciprocating same-sex

and the Netherlands (2001)⁵¹ have moved to extending almost all of the rights of marriage to gay and lesbian persons, though they require legal residency as a condition of same-sex marriage.⁵² Denmark, Iceland, Greenland, Norway and Sweden also offer a form of legal status to gay and lesbian couples through domestic partnership statutes, with Denmark leading the way in 1989.⁵³ Similarly, Germany passed a life partnership law in 2001, which has been challenged in court, though unsuccessfully.⁵⁴ Numerous other countries as diverse as Australia, Finland, Namibia, and Hungary have extended some legal benefits and protections to same-sex couples through a diversity of means, including nondiscrimination law language changes, domestic partner laws, and the extension of common law marriage to same-sex couples.⁵⁵ Several other countries, such as the Czech Republic, Liechtenstein, Mexico, and Spain, are considering such laws.⁵⁶

France's 'civil solidarity pact' (PaCS) is of special interest for this article, for it permits any two unmarried adults to enter into a legal relationship regardless of gender or perhaps even without a sexual relationship, excluding certain close relationships such as parents and grandparents, children and grandchildren, and so forth.⁵⁷ Among other benefits, PaCS offers a substantial number of

marriage countries' residents who are marrying a Belgian citizen may legally marry in Belgium. *Id.*

51. See *Legal Marriage Report*, *supra* note 46, at 2; Demian, Partner's Task Force for Gay & Lesbian Couples, *Netherlands Offers Legal Marriage*, at <http://www.buddybuddy.com/toc.html> (last visited Jan. 17, 2004). See also ESKRIDGE, CIVIL UNIONS, *supra* note 45, at 94-97.

52. *Legal Marriage Report*, *supra* note 46, at 2.

53. See ESKRIDGE, CIVIL UNIONS, *supra* note 45, at 90-94 (describing the history of these developments). Eskridge notes that the numbers registered have ranged from 57 in Iceland to 10,804 in the Netherlands under its pre-same-sex marriage registered partnership bill. *Id.* at 95.

54. *Id.* at 103, *Legal Marriage Report*, *supra* note 46, at 28.

55. See *Legal Marriage Report*, *supra* note 46, at 5, 27, 31-33.

56. *Id.* at 27, 32, 33, 40. Spain has 30 cities who register civil unions and the areas of Catalonia and Navarra have domestic registries. *Id.* at 40-41. For a country-by-country breakdown, see *id.*

57. See ESKRIDGE, CIVIL UNIONS, *supra* note 45, at 101. The law generally prohibits PaCS among relatives with whom marriage would be legal incest, such as siblings, aunts and uncles, nephews and nieces, but not cousins. *Id.* Eskridge notes, however, that when the law was upheld by France's Conseil Constitutionnelle against constitutional attack, the Conseil "impute[d] a romantic and/or sexual component" to the relationship, which arguably could apply to couples, gay or straight. *Id.*

rights that married couples enjoy, including bereavement leave,⁵⁸ the right to purchase joint auto insurance, social security coverage, joint tax returns, and estate preferences with favorable tax terms.⁵⁹

In a case certainly likely to have even more impact on American legislation and court decisions than the European events, the Canadian parliament agreed to move on legislation to authorize same-sex marriages after the Court of Appeal for Ontario was the third provincial appellate court to hold, in *Halpern v. Attorney General of Canada*, that the denial of marriage to same-sex couples constituted a violation of the Canadian Charter of Rights and Freedoms s.15(1).⁶⁰ The Court of Appeal found that this provision of the charter, which provides the right to "equal protection and equal benefit of the law without discrimination,"⁶¹ was violated because the different-sex marriage law withheld a benefit from a historically disadvantaged class in a way that demeaned their dignity by excluding them from a fundamental social institution.⁶² Especially due to its proximity to the United States, it appears that Canada will become a promising destination for gay and lesbian Americans who are ready to marry now, because it will not require lengthy residency as a requirement of taking advantage of its civil union law.⁶³

Yet, the push toward same-sex marriage has taken on significant momentum in the United States in the past couple of years. In the past decade, American courts have supported equality in marriage-type rights for gay and lesbian couples at least four times. Of course,

58. *Id.* at 102.

59. *See id.* at 101-02. *See also*, Partner's Task Force for Gay & Lesbian Couples, *Civil Solidarity Pact, The French Approach*, at <http://www.buddbuddy.com/d-p-fran.html> (last visited Jan. 27, 2004).

60. *See Halpern v. Canada (Attorney General)*, 2003 CarswellOnt 2159, 36 R.F.L.(5th) 127, *affirming, in part*, *Halpern v. Toronto (City)*, 2002 CarswellOnt 2309, 28 R.F.L. (5th) 41 (Ont. Div. Ct.). *Halpern* cites *Hendricks v. Quebec (Procureure general)* 2002 CarswellQue 1890 [2002] R.J.Q. 2506, [2002] R.D.F. 122 (Que. S.C.) and *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 2002 CarswellBC 3178, 33 R.F.L. (5th) 318 (B.C.C.A. [In Chambers])B.C.J. No. 994 (May 1, 2003) (also holding that the prohibition against same-sex marriages was unconstitutional, but suspending the court declarations for periods up to two years.) After the *Halpern* decision, the British Columbia Court of Appeal lifted its earlier stay, permitting same-sex couples to marry in that province. *See New Around the World*, REC. N.N.J. at A11, July 9, 2003.

61. CANADIAN CHARTER OF RIGHTS AND FREEDOMS 638 (Eugene Meehan et al. eds., 2000).

62. *Halpern*, 2003 CarswellOnt, at 2166, 36 R.F.L.at 154.

63. *See* Joint Advisory from GLAD et al., *Thinking of Getting Married in Canada?*, at <http://nclrights.org/publications/pubs/marriageCA.pdf> (noting that Canada has no residency requirement for marriage) (last visited Mar. 8, 2004).

these cases are not new: challenges to different-gender marriage laws have been filed since at least the 1970's,⁶⁴ and several new cases were filed in the 1990's.⁶⁵ However, none of these challenges were successful until the Hawaii Supreme Court, in a surprise move, declared different-sex statutes to constitute a possible violation of the state's equal protection clause in *Baehr v. Lewin*.⁶⁶ That success was followed by a similar decision in the state of Alaska, *Brause v. Bureau of Vital Statistics*.⁶⁷ These victories, however, appeared to be short-lived until *Goodridge* was decided. The *Baehr* case was

64. See, e.g., *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), *cert denied*, 458 U.S. 1111 (1982) (denying challenge to INS law that excluded homosexual marriage partner from entry into U.S.); *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187 (1971) *rev. denied*, 84 Wash.2d 1008, 1974 WL 45234 (1974) (upholding Washington's statute against state Equal Rights Act, and Eighth, Ninth, and Fourteenth Amendment claims); *DeSanto v. Barnsley*, 35 Pa. D. & C.3d 7 (1982), *aff'd*, 328 Pa. Super. 181, 476 A.2d 952 (Pa. Super. 1984) (denying divorce action between two men); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky., 1973) (dismissing freedom of association, free exercise of religion, and cruel and unusual punishment claims against the marriage statute); *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972) (denying equal protection and due process challenges to the marriage law). See also *Koppelman v. O'Keeffe*, 140 Misc. 2d 828, 535 N.Y.S.2d 871 (N.Y. App. Term 1988) (protection for gay partner in rent-controlled apartment); *Ross v. Denver Dep't of Health and Hosp.*, 883 P.2d 516 (Colo. Ct. App. 1994) (denying same-sex partner's right to "sick leave" classification). For further information about these and other suits, see *Legal Marriage Report*, *supra* note 46.

65. See, e.g., *Storrs v. Holcomb*, 168 Misc.2d 898, 645 N.Y.S.2d 286 (N.Y. Super. 1996) (holding that New York's gender classification does not violate due process on equal protection grounds); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. App. 1995) (turning back a D.C. statutory claim, District of Columbia Human Rights Act claim, and Due Process Clause challenge to refusal to issue marriage license to same-sex couples). For information about additional suits, see *Legal Marriage Report*, *supra* note 46. On related issues, see *Rosengarten v. Downes*, 71 Conn. App. 372, 802 A.2d 170 (2002) (denying recognition of foreign same-sex civil union for purposes of marriage dissolution statute). See also *In Re Estate of Gardiner*, 29 Kan. App. 2d 92, 22 P.3d 1086 (2001), *aff'd in part, rev'd in part*, 273 Kan. 191, 42 P.3d 120 (2002) (denying comity for marriage license issued to transsexual in Wisconsin because such marriage was against state public policy and therefore void); *Lilly v. City of Minneapolis*, 1994 WL 315620 (D. Minn. 1994) (granting taxpayer's suit to invalidate Minneapolis City Council resolution to provide benefits for same-sex partners on the basis that same sex marriage is illegal in Minnesota).

66. 74 Haw. 530, 580, 852 P.2d 44, 67 (1993) *recons. granted in part*, 74 Haw. 650, 875 P.2d 225 (1993), *on remand* *Baehr v. Miike*, 80 Haw. 341, 910 P.2d 112 (1996) (holding that the state had not met its burden of proving a compelling state interest for the gender discrimination in the marriage statute.) See also *ESKRIDGE, CIVIL UNIONS*, *supra* note 45, at 18-25.

67. 1998 WL 88743 (Alaska Super. Ct. 1998) (holding that the decision to choose one's life partner is a fundamental right to which strict scrutiny must apply but dismissing plaintiff's claim as not ripe for adjudication).

essentially overturned by a state constitutional amendment declaring marriage to be available to one man and one woman in Hawaii,⁶⁸ as was the *Brause* case in Alaska.⁶⁹

Subsequently, in Vermont, where the state Supreme Court held that denying some form of similar legal protection to same-sex couples (albeit not necessarily marriage) was unconstitutional,⁷⁰ the state legislature acquiesced rather than fighting back, passing the first civil union law in the United States which legally recognizes marriage ceremonies for gay and lesbian couples.⁷¹ Other unsuccessful suits since 2000 have been filed in Indiana,⁷² New Jersey, and Arizona.⁷³ However, *Goodridge v. Department of Public Health* appears to be the political watershed case. Noting that "the Massachusetts Constitution affirms the dignity and equality of all citizens" and "forbids the creation of second-class citizens," the

68. Hawaiians chose to amend their constitution to specify that marriage was a man-woman relationship, Kerstin Marx, *Rights-U.S.: Gay Activists Battle Homophobia*, INTER PRESS SERV., Jun. 23, 1999, at 1999 WL 5949332. Eskridge details the complex negotiation of the amendment in the Hawaii legislature, which ended up producing a companion Reciprocal Beneficiaries Act, which provided about fifty of the more than 200 legal rights and benefits enjoyed by married couples under Hawaii law to same sex couples and some blood relatives. ESKRIDGE, CIVIL UNIONS, *supra* note 45 at 22-25.

69. See *Brause v. State Dep't of Health & Soc. Serv.*, 21 P.3d 357 (2001) (holding that plaintiffs' state and federal constitutional challenge to denial of marriage licenses had been mooted by Alaska's constitutional provision, art. I, sec. 25, adopted January 3, 1999; and that plaintiffs' federal equal protection challenge to Alaska's "little-DOMA" law was not ripe because plaintiffs had not alleged actual harm from denial of one of the 115 benefits they claimed married couples could take advantage of that were denied to them.) See also ESKRIDGE, CIVIL UNIONS, *supra* note 45, at 39-40.

70. See, e.g., *Baker v. State*, 170 Vt. 194, 744 A.2d 864 (1999). For the history of the Baker case see ESKRIDGE, CIVIL UNIONS, *supra* note 45, at 43-56. For the aftermath in Vermont, see *id.* at 56-82.

71. ESKRIDGE, CIVIL UNIONS, *supra* note 45, at 79-80.

72. For a discussion on the merits of the Indiana lawsuit, *Morrison v. O'Bannon*, see Indiana Civil Liberties Union, *Affirming Stable Families, The Indiana Suit for Legal Marriage*, at <http://www.buddybuddy.com/iclu-1.html> (last visited Jan. 27, 2004).

73. For a discussion on the merits of the New Jersey lawsuit, *Lewis v. Harris*, see *Legal Marriage Report*, *supra* note 46, at 55. For an update on the New Jersey suit, see Lambda Legal, *Cases: Lewis, et al. v. Harris et al.*, <http://www.lambdalegal.org/cgi-bin/iowa/cases/record?record=179> (last visited Jan. 5, 2004) (noting that a New Jersey state court judge held against same-sex couples challenging the state's marriage law). For the Arizona decision, see *Standhard v. Superior Court of Maricopa County*, 77 P.3d 451 (2003) in which the Arizona court held that the plaintiffs had no fundamental right to same-sex marriage under the federal or Arizona constitutions, and contra to *Goodridge*, holding that the state's marriage statute was rationally related to the state's legitimate interest in encouraging procreation and child-rearing within marriage. *Id.* at 459-64. The Arizona court also rejected the plaintiffs' claim that the statute was enacted because of animus toward homosexual residents, a challenge under the equal protection clauses of the federal and state constitution and *Romer v. Evans*, 517 U.S. 620 (1996). *Id.* at 464-65.

Supreme Judicial Court held that the state had no rational basis for refusing marriage to same-sex couples.⁷⁴ This ruling, and the court's subsequent holding that only marriage will comply with the state constitution, stand as a ringing endorsement not only of the right of same-sex couples to dignity in their intimate associations, but also of the sanctity of marriage. The Massachusetts court writes:

Without question, civil marriage enhances the "welfare of the community." It is a "social institution of the highest importance." Civil marriage anchors an ordered society by encouraging stable relationships over transient ones. It is central to the way the Commonwealth identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds. . . . Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity and family. . . . Because it fulfils [sic] yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.⁷⁵

Beyond these developments, both private and public employers have been extending benefits to same-sex and other domestic partners. The states of California, Massachusetts and Vermont continue to offer domestic partner registries, which permit couples to register their relationship, as do several municipalities.⁷⁶ Yet, the primary usefulness of such registration to date is to allow gay and lesbian partners to become eligible for health care and other benefits offered by local government employers and to provide them

74. *Goodridge v. Dep't of Health*, 440 Mass 309, 311, 337, 798 N.E.2d 941, 947, 966 (2003). For more on the controversy surrounding this case, see *Editorial: Civil Marriage is a Civil Right*, NEW BEDFORD STANDARD TIMES, June 22, 2003, at <http://www.southcoasttoday.com/daily/06-03/06-22-03/b02op056.htm> (last visited Jan. 27, 2003) (describing *Goodridge*); *Editorial*, METROWEST DAILY NEWS, June 3, 2003, at <http://www.metrowestdailynews.com/news/opinion/edit06032003.htm> (noting Catholic bishops' instruction to urge parishioners to support a constitutional amendment to prevent gay marriages).

75. 440 Mass. at 32, 798 N.E.2d at 954-55.

76. See, e.g., ESKRIDGE, CIVIL UNIONS, *supra* note 45, at 14. Eskridge notes that California was the only state to provide a statewide domestic partnership law in 1999. *Id.* at 115. See also Demian, Partners Task Force for Gay and Lesbian Couples, *Domestic Partnership Benefits: Philosophy and Provider List*, at <http://www.buddybuddy.com/d-l-l.html> (last visited Jan. 27, 2004).

with visitation access in hospitals.⁷⁷ On the other hand, now hundreds of local government entities and private employers offer, or have taken steps to offer, specific benefits such as health care insurance to domestic partners.⁷⁸

At the federal constitutional level, gay and lesbian advocates have also been more encouraged by the Supreme Court's recent decision in *Lawrence v. Texas*.⁷⁹ The case held that states could not constitutionally criminalize acts of sodomy between consenting gay persons.⁸⁰ Although the Court made clear it was not deciding whether states are required to acknowledge same-sex relationships,⁸¹ the language of the opinion arguably was sweeping in its protection for intimate relations between same-sex couples.

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.⁸² It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice. Persons in a homosexual

77. ESKRIDGE, CIVIL UNIONS, *supra* note 45, at 14; *Domestic Partnership Benefits*, *supra* note 76.

78. See, e.g., Lambda Legal, *Partial Summary of Domestic Partner Benefits Listings*, at www.lamdalegal.org/cgi-bin/iowa/documents/record?record=21 (last visited Jan. 11, 2004) (listing more than sixty local governments and seven states—California, Connecticut, Massachusetts, New York, Oregon, and Washington—that offer domestic partnership benefits, along with the U.S. Bureau of National Affairs, Civil Service, Department of Housing and Urban Development, House of Representatives, Office of Personnel Management, as well as school districts, transit units, libraries, and national laboratories, among others). Lambda also lists the major employers among the over 2000 companies now offering domestic partner benefits, from American Airlines and Apple Computer to Wells Fargo and Xerox Corporation. *Id.* at 4-6.

79. *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

80. *Id.* at 2484.

81. The opinion also noted that the case did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.*

82. *Id.* at 2475.

relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.⁸³

However, as of the date this article was written, Vermont remains the only state where a stable, relatively equal form of legal recognition is available to gay and lesbian couples, as it remains unclear what the Massachusetts legislature's response will be to the *Goodridge* decision. Moreover, providing equal recognition to such couples has been made more difficult for any state that follows either Massachusetts or Vermont because of federal legislation passed in the wake of the *Baehr* case, the Defense of Marriage Act (DOMA).⁸⁴ DOMA not only permits states with heterosexual marriage laws to refuse legal recognition to marriages performed in other states that might recognize same-sex marriages in the future, but also denies federal benefits to same-sex couples legally married in such states.⁸⁵ The federal DOMA subsequently has been followed by at least thirty-four 'junior DOMAs,' state laws that provide that their state courts should not recognize same-sex marriages legally performed in other states.⁸⁶

Thus, with few exceptions, same-sex couples who wish to obtain the full panoply of legal rights and protections accorded married couples must obtain them through contracts, joint property purchases, adoptions, and other legal means designed for different kinds of relationships.⁸⁷ Some of the benefits of marriage available to heterosexual couples, such as tax breaks, public benefits, insurance offered to married couples, and even critical decisions involving medical emergencies are not available at all to same-sex couples.⁸⁸ Some gay and lesbian couples simply have foregone these legal

83. *Id.* at 2478, 2482.

84. 1 U.S.C. s 7 (1996) provides, in pertinent part, "[T]he word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." *Id.*; see also ESKRIDGE, CIVIL UNIONS, *supra* note 45, at 32-39 for a legal history of the Act.

85. See, e.g., Charles Butler, *The Defense of Marriage Act: Congress's Use of Narrative in the Debate over Same-Sex Marriage*, 73 N.Y.U. L. REV. 841, 841-43 (1998).

86. See ESKRIDGE, CIVIL UNIONS, *supra* note 45, at 136.

87. See, e.g., *Developments in the Law, Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1623-1628 (1989); Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMP. L. REV. 511, 520-23, 532-534; Christine Jax, *Same-Sex Marriage - Why Not?*, 4 WIDENER J. PUB. L. 461, 490-91 (1995) (discussing domestic partnership laws).

88. See, e.g., *Developments in the Law, supra* note 87, at 1612-27; Jax, *supra* note 8, at 490-91 (discussing domestic partnership laws).

protections, pronouncing heterosexual legal marriage to be a problem and not a solution, for intimate relationships.⁸⁹ Still others argue that legal marriage should be extended to same-sex couples on the same terms as heterosexual couples, based on equal protection and fundamental rights principles.⁹⁰

At the same time, another marriage movement, shaped by the Christian tradition that marriage is part of the goodness of God's creation,⁹¹ has been pushing for modification of divorce laws to make it more difficult for men and women to leave their marriage or children.⁹² Among the first visible legal successes of this effort was Louisiana's covenant marriage law.⁹³ Similar laws were passed by two other states, Arizona (1998) and Arkansas (2001), and considered in several more.⁹⁴

Covenant marriage is a form of marriage that any couple, in the states providing it, may elect. The basic tenet of the covenant marriage is its requirement that couples promise a lifelong commitment to each other.⁹⁵ As a practical means to achieve 'enforcement' of that promise, the covenant marriage law requires electing couples to receive counseling about the seriousness of the obligations they are undertaking, counseling that must be resumed if the marriage runs into difficulty.⁹⁶ The law also demands that couples disclose any potential impediments to a successful marriage

89. See Robson & Valentine, *supra* note 87, at 511-13, 535-40 (citing to the work of numerous lesbian theorists).

90. See Jax, *supra* note 87, at 466-83; see also Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27 (1996) (imagining the possibility of privatizing all sexual relationships).

91. See Lynn Marie Kohm, *Marriage and the Intact Family: The Significance of Michael H. v. Gerald D.*, 22 WHITTIER L. REV. 327, 343-454 (2000). But see Comment, *Nostalgic Attempts to Recapture What Never Was: Louisiana's Covenant Marriage Act*, 77 NEB. L. REV. 567, 578-80 (1998) (noting opposition to the covenant marriage law by Roman Catholic, Jewish and Episcopal clergy, largely on the basis that the distinction suggests that other marriages are not as inviolable) [hereinafter *Nostalgic Attempts*].

92. See *What is the Covenant Marriage Movement?*, *supra* note 16; *Covenant Marriage Links*, *supra* note 15.

93. See LA REV. STAT. § 9:272 (West Supp. 1998). See also Melissa Lawton, Note, *The Constitutionality of Covenant Marriage Laws*, 66 FORDHAM L. REV. 2471, 2472 (1998).

94. See Hawkins et al., *supra* note 13, at 7 (noting that about twenty additional states were formally considering legislation similar to these states' covenant marriage). See also Lawton, *supra* note 93, at 2471 n.5 (1998) (listing bills introduced at that time).

95. See LA. REV. STAT. § 9:272, § 9:273A(1)-(3) (West Supp. 1998); *Nostalgic Attempts*, *supra* note 91, at 569.

96. See LA. REV. STAT. ANN. §9:272A; (nonbreaching party must show a complete and total breach of the commitment); §9.307 (stating grounds for dissolution of marriage).

to each other.⁹⁷ Perhaps most significantly, it narrows the grounds for divorce to a small number, including infidelity, imprisonment for a felony, abandonment for a year, or physical/sexual abuse.⁹⁸ It is, however, not an onerous bar to divorce, since one of the grounds for divorce is two years of unreconciled separation by the spouses;⁹⁹ and spouses whose reasons for divorce include "habitual intemperance of the other spouse, or excesses, cruel treatment or outrages" may obtain an order of legal separation and then a divorce twelve to eighteen months later.¹⁰⁰

As a legal movement, the covenant marriage movement seems to have lost public visibility, and perhaps some steam, in the last couple of years, although legislatures continue to consider covenant marriage bills in many jurisdictions.¹⁰¹ In part, that may reflect the fact that many religious denominations and other conservatives oppose covenant marriage because they fear it will stigmatize regular marriage and weaken it, or open the door to same-sex marriage.¹⁰²

The view I wish to explore in more depth in this article is that the covenant marriage and gay marriage movements share more assumptions than disagreements about the nature of marriage. Their common view — that social and legal bonds such as marriage are valuable for human intimacy and human community — gives American society the opportunity to rethink how it should support marriage without falling back on hackneyed 'conservative/liberal' battle lines. Both movements effectively argue for moving away from a purely contractual, autonomous model of marriage toward a more publicly responsible form of commitment.

Unfortunately, these movements do not go far enough in presenting an alternative vision to either the autonomous or so-called 'traditional' models, and simply substitute another form of contractualism that may continue to enervate the role of marriage and the family in modern society. First, it is useful to ask whether the picture of reality that the 'nuclear family' model purports to paint is an accurate one over time.

97. See *Nostalgic Attempts*, *supra* note 91, at 569 n.15.

98. See LA. REV. STAT. ANN. § 9:307A (West Supp. 1998); See Lawton, *supra* note 93, at 2475-76 (comparing covenant marriage grounds with no-fault grounds). Lawton notes that it is unclear whether the moving party must be innocent in cases of divorce obtained after a legal separation is effected. *Id.* at 2477.

99. See LA. REV. STAT. ANN. § 9:307B(5) (West Supp. 1998).

100. See LA. REV. STAT. ANN. § 9:307B(6) (West Supp. 1998).

101. See Hawkins, et al., *supra* note 13, at 7.

102. *Id.*

RECOVERING THE HISTORICAL HOUSEHOLD: TESTING THE TRUTH OF THE NUCLEAR FAMILY

The valorization of the nuclear family is based on the assumption that it is the latest and best permutation in a process of an evolving form of family. This set of assumptions, which I will call the 'evolving/nuclear household,' holds dear to the liberal view that history progresses, and that the family similarly is an institution that progresses over time, from a 'primitive' form to a more enlightened one. Yet, in order to consider whether supporting the nuclear family as the key legal form of intimate relationship in postmodern society is a good idea, we should ask whether the history of the family is indeed a history of progressive evolution from primitive and complex tribal structures to a more sophisticated and humane nuclear family. If the nuclear family model is the natural evolution of the family, it is still unclear what form will follow in the next century. Will the nuclear family evolve into something even more 'nuclear,' for example, a household largely composed of one individual with perhaps minor children? In more abstract terms, will the household reflect the triumph of freedom over community and responsibility? Or can we expect a return to a more traditional or at least social conception of the family?

Reliable reflection on the realities of actual households through the centuries does not obviate the need for a normative discussion, but Robert Cover's oft-quoted insight that the law serves always as a "bridge, linking a concept of a reality to an imagined alternative . . ."¹⁰³ seems particularly important in this case; only to remind us that 'what is' is important as we consider how laws should be framed. Given how significant the assumptions about the modern family loom in both the gay marriage and covenant marriage movements, it is necessary to reinvestigate the claim that the nuclear family formation is the 'traditional' form of family life, that family formation which has proven the best way of ensuring human well-being over time. Those who advocate covenant marriage advocate a particular method of preserving that nuclear family. Gay marriage advocates are also effectively advocating for extension of the nuclear family form to persons who have been traditionally

103. Robert Cover, *The Supreme Court 1982 Term, Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 9 (1983).

excluded from it, in the same way that advocates have argued for the extension of the vote to women and then young adults. If so-called traditionalists are correct and the husband-wife-child triad does indeed constitute the 'nucleus' of the household historically, their arguments to preserve it in its current form should not be rejected as morally reactionary or irrelevant in the modern age, even if it is unclear what form the family should take in the future.

Such an exploration, or perhaps more correctly, a 'remembering' of what has been learned by others, is particularly important in the American legal debate. American social debate, often mimicked by legal debate, is unusual in its historical myopia: where other countries describe 'traditions' dating back hundreds and thousands of years, it is not uncommon for an American cultural form to earn 'traditional' status if it can trace its provenance back only half a century or even less. Anything predating such a 'tradition' is considered too antique and therefore irrelevant to a modern discussion. Given that 'the family' is a key social institution, it is unlikely that a tradition that spans two generations, at most, would be a reliable indicator of what constitutes a successful form of social organization.

Before we explore whether the evolving/nuclear family is a predominant historical expression of the family, it is useful to consider the origins of the term, 'nuclear family.' Anthropologist George Peter Murdock, one of the first to define and study the family, receives credit for using the concept of the 'nuclear family' in 1949.¹⁰⁴ Murdock defined the family as "a social group characterized by common residence, economic cooperation, and reproduction. It includes adults of both sexes, at least two of whom maintain a socially approved sexual relationship, and one or more children, own or adopted, of the sexually cohabiting adults."¹⁰⁵ Murdock concluded that a nuclear family was "the most basic societal structure, 'a married man and woman with their offspring.'"¹⁰⁶ However, according to Prof. Ingoldsby, the purpose of Murdock's investigation was not to suggest that the nuclear family was the actual

104. Bron B. Ingoldsby, *Family Origin and Universality in FAMILIES IN MULTICULTURAL PERSPECTIVE* 83, 84 (Bron B. Ingoldsby & Suzanna Smith eds., 1995).

105. *Id.* at 83 (quoting G.P. MURDOCK, *SOCIAL STRUCTURE* 1 (1949)). See also CHERYL ANN COX, *HOUSEHOLD INTERESTS, PROPERTY, MARRIAGE STRATEGIES AND FAMILY DYNAMICS IN ANCIENT ATHENS* 131 (1998) (noting Xenophon's understanding that an *oikos*, or household, was a "unit of production, a unit of consumption, and . . . a unit of reproduction . . . based on landed wealth," of which "an integral part is the nuclear family.").

106. See Ingoldsby, *supra* note 104, at 84 (quoting MURDOCK, *supra* note 105, at 1).

structure of most historical families or even most modern families, but to expose the variety of family patterns in which the husband-wife-child triad was at the center of household formation throughout history.¹⁰⁷

It is instructive that Murdock did not claim that the husband-wife-child triad was the 'cell' of private life — for example, a fully whole body that, replicated many times over, constituted the living organism that we know as social life, except for perhaps some 'cancerous' families or groupings that should be excised from the body.¹⁰⁸ Rather, Murdock's only claim was that the nuclear family "stands on its own or serves as the basis for the more complex forms"¹⁰⁹ of the family, it may be the nucleus, the 'central mass' around which the family is structured, but it is not the model against which all forms of family should be studied. Indeed, Murdock's study of 250 ethnographic reports of cultures found that the nuclear family was the norm in only about twenty-five percent of the societies he studied; that the polygamous family was the norm in another twenty-five percent; and the remaining fifty percent of the societies primarily utilized the extended family—a married adult residing with spouse, children and some members of his/her parents' nuclear family (siblings, parents, etc.).¹¹⁰ It is perhaps a fortuitous irony that the representation of nuclear-only families in Murdock's study lines up so closely with the 2000 census of U.S. families.¹¹¹

Thus, Murdock's 'nuclear family' seems to work more as an imperfect starting point than as a fixed assumption providing a concrete understanding of household formations over the course of history. To be sure, it is difficult to deny the historical reality that the family is a enduring social construction across cultures. Ingoldsby, for example, attempted to find societies where either there was no family structure, a form lacking a married man and woman and their dependent children, or societies where the family does not perform Murdock's four basic societal functions, i.e., sexual intercourse, reproduction, socialization of children, and economic organization.¹¹² Ingoldsby was forced to conclude that such societies were possible, but that perhaps only three societies he could identify

107. See Ingoldsby, *supra* note 104, at 84.

108. *Id.*

109. *Id.*

110. *Id.*

111. See POPULATION REPORTS 2001, *supra* note 26, at 3 (noting that twenty-four percent of all families included married couples with their own children in 2000).

112. See Ingoldsby, *supra* note 104, at 90.

— Jamaica, the Israeli kibbutz, and the Nayar of India — actually lacked either the structure or function of the family, though they were not completely bright-line cases either.¹¹³

There is no significant sociological evidence that, until quite recently, the nuclear family was the overwhelming form of the Western household, or any other historical household:

Sociologists and historians of the family have demonstrated that the history of the family is a story of diversity and complexity. . . . Individual and family lives were far less predictable and structured [citation omitted] than many commentators of family decline assume today. . . . The “conventional family pattern” of the nuclear, two-parent, never-divorced family was actually a demographic anomaly. . . . Little empirical evidence exists to support the nostalgic belief that family life in past times was characterized by structural homogeneity and relational harmony.¹¹⁴

Any brief review of the work of family historians and anthropologists demonstrates that there is little support for the view that the family has steadily progressed toward a modern, nuclear form.¹¹⁵ What we do know about ‘the family’ as a unit of social organization is that across historical periods, it is multi-form, varying in type, size and complexity.¹¹⁶ While some historians have tried to prove that the form of the family has progressed, it is difficult to perfectly correlate the progression of the household and other social and economic institutions — for example, to prove that all societies that become technologically modern and economically capitalist will adopt the nuclear family as their

113. See *Id.* at 90-92. The Jamaican poor of the 1960's were considered outliers because couples did not marry and many did not even cohabit until they were past childbearing age, for economic reasons, and about two-thirds of all children were illegitimate. *Id.* Kibbutzim of the 1950's and before were outliers because their children resided, were socialized, and educated in common, and economic life was communal rather than couple-oriented. *Id.* at 91. The Nayar, a warrior Hindu caste of India, were a matrilineal culture in which a woman could marry as many husbands for as long as she liked, and men did not live with the women or their children, nor did they have socialization or economic responsibilities for them. *Id.* at 92.

114. Katherine R. Allen et al., *Older Adults and Their Children: Family Patterns of Structural Diversity*, 48 FAM. REL. 151 (1999) (citations omitted). See generally Glen H. Elder, Jr., *History and the Family: A Discovery of Complexity*, 43 J. OF MARRIAGE AND THE FAM. 489 (1981) (examining the interplay of historical research and theory building in the discovery of complexity in historical times).

115. See Elder, *supra* note 114, at 491-93.

116. *Id.* at 491-97.

primary family form.¹¹⁷ Indeed, the historical evidence suggests that families can take very different forms even within close geographical areas, shaped by a confluence of individuals' own life courses and choices¹¹⁸ with other elements such as occupations or trades, natural resources, religion and customs, and property understandings.¹¹⁹

To illustrate that family formation is more plural than unified and more dynamic than static throughout history, and that it defies such stereotyping as 'traditional' *v.* 'modern' or 'Western' *v.* 'non-Western' family forms, we might look at a few family studies from several dramatically different cultures. A few preliminary notes about the studies themselves are instructive for lawmakers attempting to borrow from other disciplines in their work in remodeling the law of the family.

For example, studies of the Japanese family in the seventeenth to nineteenth centuries and of nineteenth and twentieth century Nordic families illustrate that even the process of studying and theorizing about the family has undergone change, which makes a significant difference for what is perceived as 'true' about the family.¹²⁰ Human development theorist, Suzanna Smith, concludes, "there is no single, correct definition of family. Rather, there are multiple definitions formulated from a particular theoretical perspective. In other words, theory shapes our definitions and

117. See Vern L. Bengtson, *Beyond the Nuclear Family: The Increasing Importance of Multigenerational Bonds*, 63 J. OF MARRIAGE AND FAM. 1-4 (2001) (noting the hypotheses that the modern nuclear family emerged following the Industrial Revolution, that it declined as a social institution, and that there is an increasing heterogeneity of forms). Elder, *supra* note 114, at 2 (noting that standard accounts "from tradition to modernity . . . have given way to perceptions of multiple pathways and alternative routes. . .").

118. See Elder, *supra* note 114, at 510.

119. See *id.* at 494-513.

120. See L. L. Cornell, *Hajnal and the Household in Asia: A Comparative History of the Family in Preindustrial Japan, 1600-1870*, in FAMILY HISTORY AT THE CROSSROADS: A JOURNAL OF FAMILY HISTORY READER 144 (Tamara Haraven & Andrejs Plakans eds., 1987) (focusing on the traditional Japanese family and what has been learned about it in the most recent years); David Gaunt, *Rural Household Organization and Inheritance in Northern Europe*, in FAMILY HISTORY AT THE CROSSROADS: A JOURNAL OF FAMILY HISTORY READER 121 (Tamara Haraven & Andrejs Plakans eds., 1987) (discussing evidence from the Scandinavian Peninsula relating to the growth of privacy in generational relations, the primacy of the father-son dyad as the preferred method of land transfer and other issues).

expectations of family life."¹²¹ Professor Cornell has shown that investigatory models influence even how the facts of household life are described.¹²²

The Japanese family has been quite differently described by turn-of-the century statesmen and legal scholars, folklorists eager to identify the Japanese family with household and lineage institutions, American structural-functionalist anthropologists, and American-influenced Japanese sociologists who focus on the differences between the modern nuclear family and the traditional household.¹²³ Professor Cornell notes that no one has produced a synthesis that would describe 'the' Japanese family.¹²⁴ Similarly, Nordic families were studied by scholars with quite different agendas: late 19th century German legal historians searching for a 'clan-like kinship' structure they believed to have been the original organization of the Teutonic tribes;¹²⁵ researchers seeking "a common Indo-European primary group connected with agrarian communal living;"¹²⁶ cultural historians seeking primitive-to-classic evolutionary patterns in medieval Nordic societies;¹²⁷ anthropological scholars influenced by Margaret Mead and other Americans;¹²⁸ and finally, Scandinavian historians using the family or household to study other social, economic and demographic changes.¹²⁹

Moreover, the studies Cornell cites shows that there was a significant difference between what he calls "the ideational order," that is, cultural norms and values about who should be included in the household, and the "phenomenal order," or the actual pattern of household formation.¹³⁰ For example, in nineteenth century Japan, the ideational order proposed that the constituent unit for Japanese households was the *dozoku*, a patrilineal descent group, but this pattern did not actually arise in some parts of the country.¹³¹

121. See Suzanna Smith, *Family Theory and Multicultural Family Studies*, in *FAMILIES IN MULTICULTURAL PERSPECTIVE* 7 (Bron B. Ingoldsby & Suzanna Smith eds., 1995) (internal citations omitted).

122. See Cornell, *supra* note 120.

123. See *id.* at 144-45.

124. *Id.* at 145-46.

125. See Gaunt, *supra* note 120, at 122-23.

126. *Id.* at 122.

127. See John Rogers, *Nordic Family History: Themes and Issues, Old and New*, 18 J. OF FAM. HIST. 291, 291-92 (1993).

128. See Gaunt *supra* note 120, at 122-123.

129. See Rogers, *supra* note 127, at 291-92.

130. See Cornell, *supra* note 120, at 148 (citing Brown's research on the *dozoku*).

131. *Id.*

Similarly, Cox shows how scholars have assumed that the nuclear family founded in landed wealth described in Xenophon's *Oeconomicus* as the typical Greek *oikos*, when this discussion actually described only an idealized and stylized *oikos*; historical Greek households were complex and extended.¹³²

These historical discoveries should cause lawmakers to inquire more carefully before borrowing even from other serious disciplines, and they should certainly investigate into what assumptions motivate researchers whose paradigms and data they rely on to make laws. For example, before a legislator accepts a study that the family is in decline, or that single parent families exhibit more pathologies than two-parent families, or that gay and lesbian couples are less stable than heterosexual couples, he should find out what normative standards the researcher uses to define pathology or stability, and what resulting factors the researcher may have excluded in measuring his subjects. Moreover, such studies should give rise to the expectation that lawmakers will see some significant deviation between ideal-types for 'family' in our society and the reality of how households cope with their circumstances. Whether they should err on the side of 'encouraging' all families to organize like some idealized grouping or focus on responding to economic and social support problems of real household formations without trying to reshape them according to a normative agenda, similarly deserves careful consideration.

A third preliminary point: in considering where legal change will be most successful, it is important for lawmakers to consider what social forces are causes or driving forces and what social forces are results. Historian John Hajnal has argued that in many cultures, the formation of households is a primary social activity that dictates marriage and childbearing activity, rather than the other way around, as the American legal debate over marriage often supposes.¹³³ For example, if the custom in a society is for an adult child to leave when he forms a family, then individuals in that society may marry at very different ages, depending on when they can afford to maintain an independent household.¹³⁴ Such decisions

132. See Cox, *supra* note 105, at 132-135 ("Although scholars have always been aware that *oikos* was a complex term, meaning more than 'family,' historical interpretations have, nevertheless, in practice reduced the *oikos* to the nuclear family.").

133. See Cornell, *supra* note 120, at 146-47. Indeed, Cornell notes that whether the household is the primary way of understanding intimate life varies from culture to culture. In West African societies, for example, the household is not a chief organizing feature. *Id.* at 147.

134. *Id.* at 146.

have consequences for all kinds of 'family' issues, including how frequently adolescents will be employed in servant classes, whether women will be financially independent, and whether the public will need to provide for indigents.¹³⁵

If Hajnal is correct, lawmakers should not be so quick to load social and economic expectations upon marriage by making the nuclear family the test for social and economic burdens and benefits: it seems more likely that conferring certain legal benefits and burdens will influence people's marriage choices, rather than vice versa. As just one example, some lawmakers infer that making marriage the legal tool for the conferral of economic rights within the father-mother-child triad will encourage women to marry and form nuclear families with their children's father.¹³⁶ However, in a subgroup, such as African American women in poverty, who may be deterred from marrying an unemployed African American man who is the father of their children because he represents another mouth to feed,¹³⁷ programs that focus on paying incentives for marriage without attending to joblessness are bound to fail.

As to our central question, whether the evolution of the family from tribal to nuclear form can be demonstrated, the evidence suggests a much more complicated story than the nuclear/evolving family paradigm suggests. First, we note a seemingly obvious fact about family life cycles that is strangely overlooked in typical description of the legal family in the United States: anyone who cares to look can see that even the traditional 'nuclear family' evolves in a person's lifetime from two individual households to a combined couple, to a family with small or adolescent children, to an 'empty nest' dyad to a one-person household composed usually of a widow. Yet, traditional family law is largely built around the middle 'family with children,' as evidenced by the slow response of the legal culture to catastrophes faced by young singles and elderly widows who may need help with financial support, care, and companionship.¹³⁸

135. *Id.*

136. See *Get Me to the Church on Time*, THE ECONOMIST, July 12, 2003 (Bush Administration using "welfare policy to encourage poor to get married"); Karen S. Peterson, *The President's Family Man*, USA TODAY, July 30, 2002, at 1D ("[B]edrock of a child's life is a mom and dad who stay together in a healthy marriage.").

137. See FINEMAN, *supra* note 17, at 109 (quoting William Junius Wilson).

138. See, e.g., ELIZABETH T. BARTLETT & ANGELA P. HARRIS, GENDER AND LAW: THEORY, DOCTRINE COMMENTARY 425-26 (1998). For example, until fairly recently, most single persons between eighteen and sixty-five had virtually no guaranteed system of legal support from their

Studies of the family across cultures note quite different life cycle changes in household composition across cultures, including how households treat aging parents has varied from culture to culture and historical period to period.¹³⁹ While many extended households from ancient to modern times have included aging parents, the fate of the elders depended very much on economic circumstances and family customs. In nineteenth century England, the elderly often wound up in the poor house, while in France, elderly peasants often remained in charge of the family group or the community would support the elderly poor as beggars.¹⁴⁰ In European cultures, struggles occurred when a married child would decide it was time for his father to retire and turn the family farm over to him.¹⁴¹ Often, this struggle would result in a contract in which the adult child would formally agree to provide aging parents with housing, food, furniture, clothing and wood for the rest of their lives in exchange for surrender of the power in the household.¹⁴²

These differences in household lifecycle changes have profound effects on the composition of a family household in different cultures and different historical periods. For example, Hajnal proposed two “fundamental sets of rules” for forming households in preindustrial societies; in one system (the joint household), a new couple joined an existing household; in the other system (the simple household), a new couple would leave the household.¹⁴³ Even such a simple difference would have a profound impact on an individual’s life experience and whom he considers ‘family:’ in a joint household

families of origin or the government, if they became unemployed or suffered a serious physical or mental illness. Moreover, after equitable division of property became the reigning regime, younger wives who divorced might not walk away with anything but the property they brought into the marriage, and it would be difficult to recoup any investment they made toward spousal educations that ensured their divorcing husbands a healthy income for life. Middle-aged single divorcees similarly struggled to establish a continuing need for support because of educational, physical or emotional limitations, as it was assumed that they should pick up with their lives as they left them when they married. See, e.g., Weinrib, *supra* note 21, at 217-19. See also Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L. J. 1641, 1660-89 (2003) (discussing how widows continue to be regulated by the state from within the “shadow” of their former marriages).

139. See *supra* note 120 and accompanying text.

140. See Martine Segalen, *Life-Course Patterns and Peasant Culture in France: A Critical Assessment*, in *FAMILY HISTORY AT THE CROSSROADS: A JOURNAL OF FAMILY HISTORY READER* 218 (Tamara Haraven & Andrejs Plakans eds., 1987).

141. *Id.*

142. See *id.*; Gaunt, *supra* note 120, at 136-38 (describing a son’s complicated negotiations with his parents, the army, and the fee estate holder to take over his parents’ farm).

143. Cornell, *supra* note 120, at 146.

system, an individual "will share the household with cousins, aunts, and uncles; in adulthood with brothers, sisters, nephews and nieces; and in old age with members of younger generations. In a simple household one has only parents, servants or children."¹⁴⁴

Cornell points out the even greater variations in household composition that arise from variations on the theme of 'all children stay,' for example, cultures in which often only male children and their wives stayed within the household, or more rarely, only female children and their husbands stayed,¹⁴⁵ or only the eldest son or a chosen child stayed.¹⁴⁶ As a result of these variations, as well as other needs occasioned by death and disasters, the composition of households could vary dramatically in the same locality. For example, in seventeenth century coastal Finland, while the most common combination of complex households included parents and a married son or daughter, families might also include parents and two married children, married brothers and sisters and their children sharing a home, widowed mothers/sisters/brothers sharing with married couples, uncles and aunts or widowed sisters-in-law joining the family, and so forth.¹⁴⁷

The nature of family formation strongly influences not only when people will marry, but even how strongly society expects people to marry and how it treats the unmarried, a particular concern for paradigm-makers in a post-millennial culture in which the fastest growing household form is singles.¹⁴⁸ For example, in the European feudal model after primogeniture was established, the younger son's 'family' fate would depend upon external factors: if land or jobs were plentiful, these younger sons might someday be economically able to begin a new nuclear household and marry.¹⁴⁹ Otherwise, they might remain single, enter the priesthood, become

144. *Id.* at 151.

145. *See id.* at 150.

146. In the later feudal period in Europe, only the eldest son and his family would stay and inherit the land, while daughters would join their husbands' households and younger sons. *Id.* at 153-54. The 1999 Japanese civil code anticipates that the family would choose a child, often the youngest, to stay, forming a stem family (i.e. a household that can contain any number of married couples, but only one in each generation). *Id.* at 152.

147. *See* Beatrice Moring, *Household and Family in Finnish Coastal Societies 1635-1895*, 18 J. FAM. HIST. 395, 404 (1993). Similarly, eighteenth century Italian sharecropping households were quite often composed of two or more married brothers and their wives. David I. Kertzer & Caroline Brettell, *Advances In Italian and Iberian Family History*, in FAMILY HISTORY AT THE CROSSROADS: A JOURNAL OF FAMILY HISTORY READER 93 (Tamara Haraven & Andrejs Plakans eds., 1987).

148. *See* POPULATION REPORTS 2001, *supra* note 26, at 3.

149. *See* Cornell, *supra* note 120, at 153-54.

lifelong servants in another household, or die an early death in medieval cities where mortality was high, a very different existence than the model of medieval or even modern life imagined for them.¹⁵⁰

Even in some post-medieval societies, such as nineteenth century Scandinavia, there have been significant proportions of never-married persons, though they were more often than not included as part of someone's household.¹⁵¹ Similarly, celibacy was quite common in nineteenth century France in areas where real property was bequeathed to one heir; single brothers and sisters would often remain in the heir's household, "to be treated more or less as servants" by their brother, the household head.¹⁵² Other studies have shown that about 50% of the men and 75% of the women in seventeenth century Milanese patrician families never married, while 27-32% of Portuguese women over 50 "died as spinsters" between the late 1800s and early 1900s.¹⁵³ Yet, the American law of the family, and the legal benefits and burdens that flow from marital status or parental status, very barely recognizes the existence of unmarried adults, especially those who reside with family members.

Similarly, family organizations considered in population discussions to be an illegitimate aberration of modern 'post-60s' culture in fact show surprising resiliency throughout time. For example, the high incidence of modern single-parent or cohabiting Scandinavian families with illegitimate children is often noted in popular debates about the importance of marriage.¹⁵⁴ Yet, illegitimate

150. See *id.* at 153-54, 154-56 (describing the common practice of adolescent service prior to marriage between 17th and 19th centuries).

151. See Rogers, *supra* note 127, at 294-95. Such single status was due to any number of factors including restricted availability of land for setting up new agricultural households. *Id.*

152. See Segalen, *supra* note 140, at 217. These children often received a monetary award for their share of the family wealth because land often could not be economically parceled out due to an obligation felt by the child to keep it in the family. *Id.*

153. See Kertzer and Brettell, *supra* note 147, at 103. The authors note that these facts confound the so-called "Mediterranean" pattern of early marriage of young women to older men. *Id.* By contrast, among 19th century rural Bulgarians, virtually no women or men remained unmarried, though the age of marriage varied dramatically by religion and occupation. See Ulf Brunnbauer, *Families and Mountains in the Balkans, Christian and Muslim Household Structures in the Rhodopes, 19th-20th Centuries*, 7 *HIST. OF THE FAM.* 327, 338 (2001). Christians usually married by 30 for women or 35 for men, while Muslims usually married by 25 and 30, respectively. *Id.* at 338.

154. See Franz Rothenbacher, *Social Change in Europe and its Impact on Family Structures*, in *THE CHANGING FAMILY: FAMILY FORMS & FAMILY LAW* 9, 17 (John Eekelaar and Thandabantu Nhlapo eds., 1998) (noting Popenoe's views on the decline of familism as a cultural value in Sweden, and rise on cohabitation in Nordic countries as an alternative to marriage).

births in Nordic areas have been increasing since the mid-eighteenth century, while non-marital cohabitation and the number of families with a husband who did not father the family's children began increasing there by the end of the nineteenth century.¹⁵⁵ In Italy, some evidence extrapolated from foundling data suggests that illegitimacy rose from the mid-sixteenth to the mid-eighteenth century, and then peaked dramatically in the mid-nineteenth century,¹⁵⁶ in Carinthia, more than eighty percent of the births during the second half of the nineteenth century were illegitimate.¹⁵⁷

Indeed, much maligned 'modern' premarital sexual practices were in fact permitted in many regions in many centuries, including nocturnal visits from suitors.¹⁵⁸ Premarital cohabitation was not only common in the Middle Ages but even legalized through an engagement contract in some regions.¹⁵⁹ In others, premarital cohabitation, or even a 'trial marriage,' was utilized to determine whether the woman was fertile and thus whether the marriage contract between the families was worth making.¹⁶⁰ Marriage among the poor and servants was particularly restricted, with predictable

155. See Rogers, *supra* note 127, at 296. Illegitimate births varied from six to eleven percent in Denmark, Norway, Sweden and Finland during the 19th Century, whereas in Iceland, the proportion of these births ranged from fourteen to twenty percent. *Id.* Illegitimate children were treated the same as legitimate children by law in Sweden, but some historians suggested that women conceiving out of wedlock were ostracized or subject to a public requirement of repentance. *Id.*

156. See Kertzer & Breitell, *supra* note 147, at 101-02.

157. See Andre Burguiere, *The Formation of the Couple*, in FAMILY HISTORY AT THE CROSSROADS: A JOURNAL OF FAMILY HISTORY READER 47 (Tamara Haraven & Andrejs Plakans eds., 1987). In Florence, 43% of all children born in the 1830's were abandoned. Kertzer & Breitell, *supra* note 147, at 101-02. These numbers do not precisely correlate to illegitimacy, as increasing numbers of foundlings were children born in legitimate working class families who could not afford to support them, a practice which was similarly followed in Spain and Portugal. Kurtzer and Breitell, *supra* note 147, at 101-102. However, this practice would be considered even more aberrational in modern America, in some respects, than illegitimate births to single mothers. FINEMAN, *supra* note 17, at 114 (quoting a study noting that approximately forty percent of babies born between 1785 and 1797 were born to first-time single mothers).

158. See Burguiere, *supra* note 157, at 46-47 (discussing such customs as arranged marriages in which the promised bride was allowed to cohabit with the future husband well in advance of marriage).

159. See Rogers, *supra* note 127, at 296.

160. See Burguiere, *supra* note 157, at 45-46. See also Rogers, *supra* note 127, at 296 (noting that as many as two-thirds of brides were pregnant when they married in the 19th century, as engaged couples were considered to be married in most people's eyes. Church attitudes and commoners' views about premarital sex in Sweden were also quite different — some communities strictly supervised young people, while others permitted "bundling," overnight sleeping between boyfriends and girlfriends).

results¹⁶¹ and while some anti-illegitimacy campaigns had long-lasting effects, others seemed to produce quite unintended results, as in two strong Counter-Reformation areas, Bavaria and Austria, which experienced the highest rates of illegitimacy in Europe at the beginning of the nineteenth century.¹⁶²

Moreover, even the prevalence of nonfamily household members, such as servants, has varied over time and place, and not necessarily in a historically linear fashion. Most educated persons are familiar with the extended nature of medieval aristocratic households, which could include upwards of seven hundred servants.¹⁶³ Indeed, large households were so complex that they were sometimes broken down into separate parts — the great household (“the full permanent establishment”),¹⁶⁴ the riding or foreign household, and a secret household that remained with the noble at those times when he did not wish to maintain hospitality.¹⁶⁵ Many aristocratic households included poor people who were fed or lodged, or other guests who just came to supper, who could add several dozen more to the household.¹⁶⁶ Medieval households also took in short-term guests and long-term lodgers, many of whom would pay for their room and board, just as they do in a modern day hotel.¹⁶⁷

However, servants, boarders and other nonrelatives have also been ‘members of the family’ in other cultures and other times as well, reflecting a less fractured relationship between a household’s economic activity and its private noneconomic activity than in modern times. For example, the Greek term for household, *oikos*, referred to any number of groupings including the physical space occupied by the household unit, which might contain a shop, factory, bank, or even a grouping of several physical dwellings, each populated by a different wife of the master and her children; or

161. See Burguiere, *supra* note 157, at 47 (noting that illegitimacy was aggravated by the restrictions on marriage for the poor).

162. *Id.* at 48-49.

163. See C.M. Woolgar, *THE GREAT HOUSEHOLD IN LATE MEDIEVAL ENGLAND* 9-10 (1999).

164. *Id.* at 15.

165. *Id.* at 15-16. For the Duke of Buckingham in 1507-1508, the great household (all who depended upon the institution) averaged 157 people; the riding household, the retinue that accompanied the nobleman when he traveled averaged 57 persons. *Id.* The Earl of Northumberland in 1511-12 had a riding household of 36 persons, a secret household of 42. *Id.* at 16.

166. *Id.* at Tbl. 1 at 12-13, 23-24 (noting that guests at the Duke of Buckingham’s ranged from 54 to 80, depending on the day, while other households seemed to have a special day of the week for hosting the poor.)

167. *Id.* at 25.

landed estates scattered over many miles.¹⁶⁸ Indeed, in Athens, like other later European, Asian and African societies, concubines were in certain respects an extension of the household, inasmuch as even 'free concubines' or their blood family members might make contracts providing for their support or property during the relationship, and their children might, by living with members of their father's 'legitimate' family, come to be recognized as kin of a legitimate marriage.¹⁶⁹

In medieval households, servants and family members often became intermixed by assigning younger bluebloods as household servants to greater noblemen as a means of acculturating the younger man to the responsibilities of his aristocratic birth for example.¹⁷⁰ Ties between servants and the household head were by both blood and money.¹⁷¹ For example, it was commonplace for medieval young people between the ages of twelve and twenty-five to be in service for a year at a time, often to relatives, as a means for poorer, lower-status families to forge stronger ties with relatives from higher classes.¹⁷² The practice of sending young people out to be servants in other households persisted into the nineteenth century in southern Europe.¹⁷³ The young servants were also joined in the household by apprentices, who would board with their masters from the ages of twelve on, for perhaps five to ten years, for which the masters would be paid a fee by their parents.¹⁷⁴

Nor is the household presence of servants and other nonfamily members confined to noble families or to medieval periods. One painstaking study of an 1820s central Finnish household estimated that forty-two persons resided in its four rooms in the winter; and another oral history of a 1940s family identified twenty persons centered around three married siblings.¹⁷⁵ Family historians have

168. See Cox, *supra* note 105, at 136-40.

169. *Id.* at 172-80.

170. See PETER FLEMING, FAMILY AND HOUSEHOLD IN MEDIEVAL ENGLAND 75 (2001).

171. *Id.* at 72-73.

172. *Id.*

173. See Kertzer and Brettell, *supra* note 147, at 102.

174. See FLEMING, *supra* note 170, at 72-74.

175. See Gaunt, *supra* note 120, at 126-29. Gaunt notes that these were not typical households; the mean central Finnish household in the 1820's was 4.0-4.6 persons, and less than 4% of households had more than fifteen members. *Id.* at 126. But these varied from area to area, in one parish near the Soviet Border, 12% of the households had more than twenty-one members; greatly extended households in this area fluctuated from 34% in 1820 to 15% in 1830 to 17% in 1840 to 21% in 1850 (excluding stem families, and commonly married brothers and their families residing together). *Id.*

shown that nonfamily members, including servants, were prevalent in households in both England and the United States until the end of the 1930's, and in Japan until the 1950s.¹⁷⁶ Indeed, Morioko notes that in the United States, as in other countries, nonrelatives were present in significant numbers until the end of the nineteenth century; and the decline in this family composition corresponds to the parallel rise of single-person households in these countries.¹⁷⁷

One might argue that the existence of extended households is not evidence that the nature of the legal family — the group who understands themselves as having moral and legal obligations to each other — has changed over time. It seems quite clear, however, that the relationship between legal obligation and familial obligation was much more fluid in earlier times than the modern model, which imposes legal obligations largely on the basis of blood and marriage. Indeed, in the medieval period, households themselves were recognized as legal entities to which rights might be granted.¹⁷⁸ Moreover, medieval households, for example, quite clearly understood that household heads had legal obligations to their servants.¹⁷⁹ Some of these obligations inhered in the fact that the servants were blood relatives, others in the documents of indenture that spelled out in extensive detail the perquisites that accompanied service in the great household.¹⁸⁰ For example, the 1312 indenture of William, son of Ralph DeMerk, shows that William traded a nobleman part of William's estate for sixty acres of land, "reasonable food and drink fitting for an esquire, together with a horse and groom," "a yearly allowance of two sets of clothes," and identification of the table at which he would sit for meals.¹⁸¹ As suggested, similar legal support contracts were common practice from the seventeenth through the nineteenth centuries in Scandinavian countries where sons succeeded their parents on the land.¹⁸²

Similarly, legal obligations for support of kin have often extended beyond the nuclear family. In the United States, until

176. See Kiyomi Morioka, *A Japanese Perspective on the Life Course: Emerging and Diminishing Patterns*, in *FAMILY HISTORY AT THE CROSSROADS: A JOURNAL OF FAMILY HISTORY READER* 247 (Tamara Haraven & Andrejs Plakans eds., 1987).

177. *Id.*

178. See WOOLGAR, *supra* note 163, at 8.

179. *Id.* at 8-9.

180. *Id.*

181. *Id.* at 9.

182. See, e.g., Gaunt, *supra* note 120, at 136-39 (describing how sons when assuming responsibility of their father's land were obligated to provide a living allowance of sorts, which can include, food, clothing, firewood, and money to his father).

recently, legal responsibility for aging parents was commonplace.¹⁸³ Communist China, which has been cited by some as promoting aberrant communal family life, statutorily codified the Confucian tradition that adult children had the legal duty to support their aging parents if they have "lost the ability to work or have difficulty providing for themselves," and grandchildren had the same duty to their grandparents.¹⁸⁴ Under the law, Chinese children and grandchildren who mistreated their aging parents or grandparents could be punished by up to two years in prison, and those who refused to support them by up to five years in prison.¹⁸⁵

In terms of critiquing the 'evolving/nuclear family' conception, perhaps the most striking thing about family history studies is how a community model of 'the family' can vary quite dramatically within the same geographical area. These studies to some extent give the lie to the argument that 'the American family' is changing in ways unprecedented in human history, and that regional variations — between, for example, the stereotypical 'Bible-belt' traditional family and the San Francisco gay family — are historical aberrations. For example, Hajnal posited a fundamental cultural "Western European marriage pattern" which assumed that individuals would marry late, or not marry at all due to the scarcity of land; yet, in reality, this pattern did not obtain in many areas because of occupation — areas where fishing, mining or textiles were frequent trades showed lower ages of marriage than agricultural areas, for example.¹⁸⁶

183. See, e.g., Terrance A. Kline, *A Rational Role for Filial Responsibility Laws in Modern Society?*, 26 FAM. L. Q. 195, 198-201 (1992) (noting that twenty-eight states continued to have laws requiring the support of ageing parents in 1992, though most had not been enforced since the 1960s).

184. See William Meredith and Douglas A. Abbott, *Chinese Families in Later Life*, in FAMILIES IN MULTICULTURAL PERSPECTIVE 216 (Bron B. Ingoldsby & Suzanna Smith eds., 1995) (noting that the duty of grandchildren to grandparents occurred when the grandparents' children were deceased).

185. *Id.* at 216-217 (citation omitted) (noting that detention or public surveillance are alternative punishments).

186. See, e.g., Rogers, *supra* note 127, at 294-95. In many areas, the household's economic activity seems to have been a more critical factor in household composition than local custom or law. In fifteenth century Tuscany, for example, the "average" family may have differed in composition largely because of the family trade: 31% of sharecropping households (a majority of sharecroppers) lived in households with two or more nuclear families, while only 19% of the artisans lived in such households; see also Kertzer & Brettell, *supra* note 147, at 93. Similarly, in early 20th century Bulgaria, more than 40% of all Pomak (Muslim) families, who largely farmed, lived in extended or multiple family household, (most often including a grandparent or a married son and daughter-in-law, as compared with about sixteen percent of the Greek Orthodox families in the same region who sought other trades such as masonry and textiles).

Family composition also varied dramatically even in the same general geographical areas. Danish rural households in the eighteenth century onward typically included parents and children with family nearby, but about one-third of Icelandic and Norwegian families were extended, in Norway usually by grandparents, in Iceland by adult siblings.¹⁸⁷ Even regions within a nation-state might have very different households: Voinonmaa noted that Southwestern Finns in the early seventeenth century were almost all nuclear, whereas in middle Finland, from a quarter to almost a third of all households were extended family types.¹⁸⁸ Similarly, though many areas of Italy commonly employed a complex family household from the ninth century into the nineteenth century, in southern Italy, nuclear families predominated during this latter period.¹⁸⁹ Contrary to the progressive 'evolving/nuclear family' view, the number of Italian families living in multiple family households actually rose from about thirty percent of all families in the fifteenth century to seventy-six percent by the nineteenth century, including twenty-eight percent with three or more nuclear units within one household.¹⁹⁰

The U.S. Census figures for 2000 mirror these historical household complexities. Beyond the 24.1% of households that fit the nuclear paradigm, the census reports that 28.7% of all U.S. households are married couples without their own children, 16% are family households without a married couple, 25% are single-person households, and 5.7% are nonfamily households composed of unrelated individuals.¹⁹¹ Significant trends noted by the Census Bureau: nonfamily households (especially singles) are increasing while family households are declining; the median age of marriage continues to rise while an increasing number of young adult men (as well as women) are living with their parents; and the number of self-identifying cohabiting couples has risen sharply to more than three million.¹⁹²

Brunnbauer, *supra* note 153 at 331-32, 336

187. Rogers, *supra* note 127, at 299.

188. See Gaunt, *supra* note 120, at 124. Gaunt notes that in Finnish areas where farming was "slash-and-burn," and men were commonly away from home looking for arable land, large household numbers were required to find and prepare land, which was not considered 'property' but simply a place to be used to farm and dwell, not unlike indigenous people's understanding about land. *Id.* at 124.

189. See Kertzer & Brettel, *supra* note 147, at 92-93.

190. *Id.* at 93.

191. See POPULATION REPORTS 2001, *supra* note 26, at 3.

192. See *id.* at 3, 9, 10, 12. The report notes that this number is probably unrepresentative

Beyond these statistics one can see that a wide variety of American household and kin organizations provide economic and social support, especially for children but also for adults. Professor Bengston argues that there is a new emergence of extended intergenerational kin taking responsibility for children in their family.¹⁹³ More than four million minor children live with grandparents or great grandparents, due to parents' imprisonment, additions, young age, violence, psychiatric disorders, or for various other reasons.¹⁹⁴ Moreover, about twenty-nine percent of single-parent families double up, with about one-third living with a noncohabitant adult, often the mother's parent; about one-fourth with a married couple, often kin; and about twenty-eight percent with an unrelated male cohabitant.¹⁹⁵ Single-parent families who live with other single parent families seem to do so out of dire necessity, because these are the poorest of single parent families, with incomes at fifty percent of the poverty guidelines.¹⁹⁶ Their experiences, while not ideal, can be contrasted with single poor mothers living alone in rural areas, who report being overwhelmed by their children's discipline issues, illnesses, irresponsible fathers, and lack of appropriate child care when needed.¹⁹⁷

Modern American ethnographic studies show similar patterns of extended family behavior, particularly when one looks at families from non-European cultures. Researchers have noted that in the African American community, beyond the nuclear and single-parent family models, a very common grouping is the 'augmented family,' in which aunts and uncles, grandparents and/or live-in non-relatives provide significant care to minor children.¹⁹⁸ Studies on Mexican

because the census only counts the head of household and his partner, not other cohabitators in the house, and requires respondents to identify themselves as cohabitators rather than roommates. *Id.*

193. See Bengston, *supra* note 117, at 3-4, 6-8.

194. See Richard K. Caputo, *Grandmothers and Co-Resident Grandchildren*, FAMILIES IN SOCIETY: THE J. OF CONTEMP. HUM. SERV. 121 (Mar.-Apr. 1999); Bengston, *supra* note 117, at 7.

195. See Anne E. Winkler, *The Living Arrangements of Single Mothers with Dependent Children: An Added Perspective*, 52 AM. J. OF ECON. AND SOC. 1, 2, 4 (1993). Winkler also notes the rise in single-mother households from eight to twenty-two percent from 1960-1990 (involving 13.9 million children in 1990). *Id.*

196. *Id.* at 13.

197. See Marion H. Wijnberg & Kathleen M. Reding, *Reclaiming a Stress Focus: The Hassles of Rural, Poor Single Mothers*, 1999 FAMILIES IN SOCIETY: THE J. OF CONTEMP. HUM. SERV. 506, 509 (1999).

198. See Barnes, *supra* note 43, at 451. While a number of these families, too, report significant stress, most exhibit considerable adaptation and resilience to their circumstances, including strong family communication. *Id.* at 458.

American families also note that their extended families include primary kin, extended kin and close friends and neighbors, and entails "a deep sense of obligation by its members to each other for economic assistance, encouragement and support."¹⁹⁹ This ethos results in Mexican American 'helpers' who regularly offer a home to distant relatives and even unrelated persons in trouble for periods from a few months to over a year.²⁰⁰ One interesting study of modern Micronesian households in both Micronesia and southern California showed that the American Marshallese households were even more likely than those in the Marshall Islands to include distant relatives, including married couples with children.²⁰¹

In sum, actual studies of different households throughout history confirm that the 'evolving/nuclear' paradigm, is at best a conceptual building block for understanding how real households function. In reality, in many societies, pluriform households have formed under a wide variety of rules for identifying legal and social responsibility to near and distant kin as well as unrelated members of the household. Even in modern America, the nuclear family as the major option for structuring household responsibility is clearly mythic. Even though it is clear that nuclear families have existed in many modern cultures and in significant numbers, to the extent that the proponents for the nuclear family rely on tradition or prevalence to claim prominence in ordering legal relationships in the United States, the evidence largely goes against this claim.

COVENANT AND GAY MARRIAGE PARALLELS AND THE PROBLEM OF CHOICE

The covenant marriage movement and the gay marriage movement may not, on the surface, appear to share much, since they are identified with wider ideological chasms in American society. Indeed, those on the right, many of whom have applauded

199. See Patterson & Marsiglia, *supra* note 42, at 24.

200. *Id.* at 26.

201. See Michael L. Burton et al., *Who Can Belong to a Micronesian Household: Representations of Household Composition Across Social Contexts*, 14 *FIELD METHODS* 65, 85 (2002). Researchers posited that this may be due to the high cost of housing in Southern California, which requires relatives to double up. *Id.* The homeland Marshallese studies corroborate previously discussed findings on variety of households: researchers identified both a matrilineal and matrilocal family structure, including twenty kinship categories in ninety-two households, which are most often extended to include the wife's relatives, the head of household's siblings and mother, and grandchildren or great-grandchildren of the head. *Id.* at 76, 78-79.

the covenant marriage movement, are quick to deride the idea of gay marriage as, in Professor Duncan's terms "an oxymoron,"²⁰² arguing that marriage is by definition between male and female because of natural complementarity.²⁰³ Some of those in the gay community who oppose the extension of the institution of marriage to gay and lesbian couples suggest that gays and lesbians who ask for marriage are sacrificing something essential to their identity or the core values of the gay community, particularly tolerance for diverse lifestyle choices.²⁰⁴ To extend the analogy, for them, for a lion to ask to be a gazelle represents a form of disloyalty to lions everywhere.

It seems fair to say that both the gay and covenant marriage movements share certain commitments and optimism about the human condition — one might venture to say a mix of practicality and naive romanticism — that represent both the promise and the limitations of the American institution of marriage. As I will suggest, both respond to modern anxieties about the future of the family by affirming core traditional assumptions about the value of marriage. Yet neither, in my view, gets away from a key problematic in a liberal culture: whether the legal family that the state should recognize should be conformed around the concept of 'choice.' I will suggest that this concept should be modified to include households that are not the product of individual choice, as most commonly construed by reference to contract notions.

Gay Marriage and Covenant Marriage: Similarities

To their credit, both the covenant marriage and the same-sex marriage movement attempt to make a positive response to

202. See Richard F. Duncan, *Homosexual Marriage and the Myth of Tolerance: Is Cardinal O'Connor a "Homophobe"?*, 10 NOTRE DAME J. L. ETHICS & PUB. POL'Y 587, 589 (arguing that under current state law, homosexual marriage does not exist since the legal definition requires a man and a woman).

203. See, e.g., Teresa Stanton Collett, *Recognizing Same-Sex Marriage: Asking for the Impossible?* 47 CATH. U. L. REV. 1245, 1256, 1261-62 (1998) (arguing that "[t]he expansive nature of married love between complementary persons is most fully realized in the creation of children," and that heterosexual unions join "intrinsically different individuals" whose "innate desire and unique capacity for union" is "captured by the word 'complementarity'"); Duncan, *supra* note 202, at 595-96 (noting the complementary reproductive and other capacities of men and women).

204. See, e.g., Warner, *supra* note 18, at 286-88 (arguing that the marriage debate has widened the gap among gays, and demanding that marriage advocates account for the harmful consequences of their policy to the queer ethos). For a summary of feminists' arguments against the extension of marriage to lesbian couples, see Robson & Valentine, *supra* note 87, at 538-40.

anxieties over perceived changes in the nuclear family by proposing legal amendments to the existing social structure, instead of merely expressing disgust, anger, or fear at the perceived unraveling of the social structure of the traditional family. The covenant marriage movement has offered a quasi-contractual legal form of marriage that returns the 'fault' regime of divorce to center stage, providing an additional option for people to cement their legal relationships.²⁰⁵ The same-sex marriage movement proposes not the elimination of legal marriage, but extension of all of legal benefits and responsibilities of marriage to same-sex couples, often objecting to civil unions and other legal attempts to confer less than a full complement of marital rights on gay and lesbian couples.²⁰⁶

While these attempts to find a way out of the marriage battleground are progressive, both of these movements can be fairly called conservative. Both are reactive rather than ultimately idealist because they propose to remedy perceived excesses of 'unlimited freedom' in relationships that are held responsible for the high rate of family breakups and serial uncommitted relationships in American society by modest extensions of the existing marital form.²⁰⁷ Both of these movements also attempt to assimilate their relationships to a traditional ideal of marriage, including a monogamous lifelong relationship between two adults, although it is not always clear whether the covenant marriage movement embraces the equal partnership model the gay marriage movement aspires to emulate.²⁰⁸

Similarly, both movements display some realization that they are politically unlikely to achieve complete social acceptance of their ideal, yet reason that providing some better option for those who are willing to undertake it is at least a worthwhile goal. Many of those who advocate gay marriage, for example, also are willing to work for civil union or registered partnership legislation, acknowledging its

205. See Hawkins et al., *supra* note 13.

206. See ESKRIDGE, CASE, *supra* note 45.

207. See, e.g., ESKRIDGE, CASE, *supra* note 45, at 8-10, 82-84 (noting that same-sex marriage might "civilize" and liberate "sexually venturesome" gay males from harmful promiscuity, stereotyping and a cult of youth worship); Testimony of John Crouch, Maryland House of Delegates H.B. 1076—Covenant Marriage, March 16, 1999, at <http://www.divorcereform.org.tes.html> (last visited Jan. 30, 2004) (noting that covenant marriage would reduce the incentives that encourage adultery or distrust that one's partner will commit adultery).

208. At least one study has identified support for covenant marriage with "conservative, religiously active individuals with traditional gender ideologies." Hawkins et al., *supra* note 13, at 16.

obvious limits.²⁰⁹ Despite excessive posturing on both sides, neither of these movements has proposed more significant changes, such as extended families, purely contractual marriage, mother-child dyads as proto-families, the abolition of marriage, or the return to a male-dominated family form.²¹⁰

To their credit, both movements insist that human relationships must be affirmed and supported by external social institutions (especially the law) if they are to thrive.²¹¹ Both also affirm that an approach toward the organizing of human intimate structures that utilizes a 'core model' with some basic features and protections applicable to all families is ultimately going to be more successful at preserving human security than a model in which all of the terms of the relationship must be defined by the two individuals entering into it. Indeed, both movements seem to acknowledge that no extremes — e.g., the patriarchal marriage in which the male has unlimited freedom to control both the fact and the incidents of marriage, or the 'easy exit' relationship in which one person may desert the other without accountability — represent an acceptable approach to the formation of intimate relationships.²¹²

209. See, e.g., ESKRIDGE, CIVIL UNIONS, *supra* note 45, 144-46, 158 (discussing how members of Vermont's legislative body were better able to appreciate the plight of the gay and lesbian community after the opportunity to listen to testimony from such individuals during hearings to determine whether to legalize same-sex marriage).

210. See, e.g., Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER & L. 505, 515-16 (1998) (arguing for an inclusive family that would include adults to whom the child was attached); FINEMAN, *supra* note 17, at 230-33 (proposing that the mother-child dyad be recognized as family); see also Weitzman, *supra* note 21, at 1249-76 (proposing that marriages be privately contracted); Nastich, *supra* note 21, at 114-15 (arguing that the arguments in favor of same-sex marriage justify abolition of marriage).

211. See, e.g., ESKRIDGE, CASE, *supra* note 45, at 710-72; Laura Sanchez et al., *Is Covenant Marriage a Policy that Preaches to the Choir? A Comparison of Covenant and Standard Married Newlywed Couples in Louisiana*, Bowling Green State Univ. Working Paper Series 02-06 4-5, at http://www.bgsu.edu/organizations/cfdr/research/pdf/2002/2000_06.pdf (last visited Jan. 17 2004) (noting lawmakers' views that covenant marriage strengthens marriage "by restoring legal efficacy to the marital vows" and giving couples security in their marriage investment in a way that will stabilize marriage) (internal citation omitted).

212. See ESKRIDGE, CASE, *supra* note 45, at 71-73, 76 (describing virtues of life-long commitments and disagreeing that marriage is the main explanation for the subordination of women); ESKRIDGE, CIVIL UNIONS, *supra* note 45, at 214-17 (arguing that same-sex marriage will destabilize oppressive gender roles); Sanchez et al., *supra* note 211, at 4, 6-7 (noting the purpose of covenant marriage legislation to encourage "serious, undiluted commitment" to marriage and arguments that covenant marriage protects women's and children's well-being, gives women greater protection in divorces, and lessens the chance of spousal abuse).

The Role of Choice in Marriage: Revisiting the Issue

One key aspect of both covenant marriage successes and same-sex marriage advocacy is that they largely retain the 'choice' model for understanding marriage. Covenant marriage advocates have accepted, perhaps reluctantly and perhaps for pragmatic reasons, that mandating covenant marriage is unlikely to be completely successful, and have constructed a model in which both parties must choose a covenant marriage, rather than having a 'fault' regime imposed by law as an aspect of marriage itself.²¹³ At least some gay marriage advocates advocate an extension of a 'choice' of models, including contracts and civil union, to gay and lesbian couples.²¹⁴

This emphasis on choice as the key aspect of the marital relationship in these two movements is perhaps unsurprising. In the United States, the modern law of marriage is grounded in an image of relationship and community that is deeply rooted in liberal individualism. The evolving/nuclear family model adopted by these movements proposes to validate marriages based on their ability to demonstrate three fundamental elements that mimic the contractual form regnant at least since the twelfth century — the couples' choice and intention to enter into marriage; the act of establishing a relationship, and public acknowledgement of the relationship, which are simultaneously present in the marriage ceremony in modern culture.

The problem is that many forms of intimate relationships may fail to exhibit one or more of these elements, at some or even all times of their existence. This means that the validity of marriage itself is constantly called into question by the prospect of choice. Gay marriage advocates ultimately seem to adopt the modern contractual solution to this problem: you may exit the agreement without moral consequence if you are willing to pay the 'damages' either explicitly agreed upon in an antenuptial or other contract, or the implicit property division implied by a partnership model.²¹⁵ Covenant

213. See Hawkins et al., *supra* note 13, at 7 (noting Katherine Spaht's view that covenant marriage would be more incremental and more politically palatable than other efforts to reinstate fault based divorce).

214. See, e.g., ESKRIDGE, CASE, *supra* note 45, at 78-79; CIVIL UNIONS, *supra* note 45, at 121-26 (describing menu of options for commitment for all couples, including domestic partnership, cohabitation, civil unions, and covenant marriage).

215. See, e.g., ESKRIDGE, CIVIL UNIONS, *supra* note 45, at 230 (noting the modern view that couples should weigh costs and benefits of marriage carefully, and the postmodern view that a menu will "empower couples to choose which institution best fits" their needs).

marriage advocates want to return to an earlier contractual model, in which the choice to exit is morally faulty, though not legally impossible, unless the other partner has 'defaulted' first by wrongful behavior or some fact like impotence that makes the contract 'impossible' to perform in the first instance.²¹⁶

The intention of both parties to enter into marriage has been a key legitimating factor in recent Western marriage law that is based on Christian tradition.²¹⁷ In modern times, the relationship of intention to enter into a marriage and public acknowledgment of the marriage is inseparable because the acts leading up to the completion of the marriage ceremony usually have no legal significance, despite whatever social importance they may retain as a ceremonial rite of passage.²¹⁸ Until the final vows are taken and the marriage license is signed, modern couples have virtually no legal rights against each other because of their prior, non married relationship, and no cause for complaint if one of them backs out.²¹⁹

However, this was not always so. While Catholic theologians stressed the importance of the couple's consent from the earliest times, and the freedom to contract into marriage was an aspect of the medieval canon law of marriage, John Witte's study of marriage in medieval and early modern times suggests that the validity of the couple's decision to marry varied from century to century as property conflicts between parents and children rose and waned.²²⁰ Moreover, once merely a private agreement between the couple or their families, marriage did not become a fully public and 'legal' institution until the sixteenth century, as Witte and Mary Ann Glendon have shown in their work on the history of marriage.²²¹

216. See, e.g., Katherine Shaw Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63, 81-83 (1998) (covenant marriage bill author arguing that moral judgments should be made in dissolution cases).

217. See LYNN D. WARDLE & LAURENCE C. NOLAN, *FUNDAMENTAL PRINCIPLES OF FAMILY LAW*, 128-29 (2002).

218. *Id.*

219. *Id.* at 155 ("Licensed marriage is authorized by statute in all states, and mandated in most of them"), 176-77 (discussing so-called "heart-balm" actions (breach of a promise to marry) and their virtual nonexistence in most states today).

220. JOHN WITTE, *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION AND LAW IN THE WESTERN TRADITION* 25-26, 38, 59-60 (1997) (stating that pressure to control the shift in family wealth that could occur because of marriages influenced the requirement of parental as well as the couple's consent before the couple could marry); MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 28 (1989) (stating Lutheran-influenced jurists required both parental consent and the couple's consent).

221. Church laws regulated sexual practices, forbidding such action as pedophilia, adultery, and sodomy from the earliest times. Witte, *supra* note 220, at 19. The Church did not require

First, marriage was purely in private hands: couples came to the church door to marry each other, later with a preference for a priest, and finally marriage took on legal form through the requirement that the church legitimize and bless the marriage.²²² However, it was only after the Reformation, between the sixteenth and eighteenth centuries that marriage was secularized, licensed, and regulated by the state in the ways that we understand it today.²²³

A key theological transition that influenced this development was the transition from common understanding of marriage as a natural but private association to an official Church sacrament to a finally a secular estate. From the twelfth century, a systematized Roman Catholic tradition that dominated Western 'law' held the view that marriage was a complex institution, "as a created, natural association, subject to the laws of nature; (2) as a consensual contract, subject to the general laws of contract; and (3) as a sacrament of faith, subject to the spiritual laws of the church."²²⁴

As a natural association, marriage illustrated the importance of the inclination of the couple for each other, a direction of one's natural desire to an individual person, in a way that is not compelled from the outside (and in that sense voluntary) but perhaps well beyond calculation.²²⁵ Second, as a contractual form, marriage functioned as a much more intentional decision to mutually exchange the spouses' "bodies for perpetual use in the procreation and nurture of children,"²²⁶ "an 'association in which each partner obligates [] himself to the other by virtue of mutual

any marriage formalities until the Council of Trent ending in 1563, when the Church began to require parental consent, announcement of the banns of marriage, no premarriage cohabitation, and witnesses. *Id.* at 26, 28, 38.

222. *Id.* at 38 (stating that a properly contracted marriage would result in a priest recording the couple's and their witnesses' name in a register).

223. See GLENDON, *supra* note 220, at 30-34. Glendon notes that France did not make a civil marriage ceremony and state marriage registration mandatory until 1792. *Id.* at 33. Civil marriage did not appear in England until 1836, and informal marriages not performed under ecclesiastical auspices were valid until Lord Hardwicke's Act in 1753. *Id.* Luther's view that marriage was a secular institution resulted in statutes in the later sixteenth century requiring either a government official as a witness to marriage vows, or an announcement in a secular building, while in some places, the church was assigned a legal role in registering couples and celebrating the marriage. *Id.* at 60-61. John Calvin's Marriage Ordinance of 1545 began to require civil registration much earlier, after the Marriage Ordinance was adopted as a statement to be used for Geneva's common law of marriage in 1561. WITTE, *supra* note 220, at 84-85.

224. WITTE, *supra* note 220, at 23.

225. *Id.* at 24.

226. *Id.* at 25.

consent."²²⁷ In this aspect, the couple's intention in recognized marriage did resemble the conscious, almost arm's length decision making now associated with human autonomy and choice: as with other contracts, force, fear, fraud or coercion by parents or others were sufficient to nullify the legal bond.²²⁸

Third, as a sacramental institution, marriage was a symbolic embodiment of the relationship between Christ and the Church and the means of grace by which God sanctifies the married couple and their children in their roles in the family.²²⁹ As such, it does not resemble the modern model of autonomous choice. First, there are minimally three parties to the agreement — the husband, the wife, and God. It is only when the contract conforms to divine intention and is given "with the consent of God," if you will, that it is a valid contract.²³⁰ Second, the agreement has a critical, public importance beyond itself, enacting a symbolic union between God and his followers that makes its terms a visible manifestation of such relationship.²³¹ Third, in the canonical discussions about whether sexual intercourse would suffice to create a marriage among consenting adults when a family was against it, decisions arose in which the role of mutual consent of the couple won out in the church and in secular regulation,²³² it is clear that the decision of the couple to enter into the relationship might better be characterized as one of conscience rather than choice. Theologians distinguished between intercourse without the intention to marry, and intercourse that was intended to establish a bond with theological ramifications beyond the desire of the couple themselves.²³³

227. *See id.* (quoting Hugh of St. Victor).

228. *See id.* at 26.

229. *See id.* at 26-27.

230. *Id.* at 29 ("In essence, the parties consented to bind themselves to each other and to God and the Church and thus to accept God's sacramental grace.").

231. *See id.* at 26-27.

232. *See* GLENDON, *supra* note 220, at 29-30. Glendon notes that the rise of the required public ceremony before a priest and witnesses was, as Glendon suggests, in response to the problem of informal marriages that allowed some people to disclaim valid marriages and others to falsely claim a secret marriage to gain an inheritance. *Id.* at 29. Witte notes that the canon law distinguished three forms of consent in the process of contracting into a marriage: The promise to marry in the future (betrothal), the promise to marry in the present which constituted a marriage; and voluntary sexual intercourse in order to consummate the marriage. WITTE, *supra* note 220, at 32. Either a promise to marry in the present, or a betrothal plus consensual sexual intercourse were considered sufficient to constitute marriage. *Id.*

233. *See* WITTE, *supra* note 220, at 27-28.

While Protestants rejected the sacramental aspect of marriage, the public aspects and social aspects of marriage were strengthened in the Protestant traditions which resulted in state secular assumption of the power to confer the legal benefits of marriage.²³⁴ Though the Lutheran conception acknowledged the natural law assumptions of the Catholic model and stressed the intention of the two parties to enter into the marriage, the language of 'calling' that Luther used to describe marriage even more clearly illustrates that Lutherans perceived marriage as a duty imposed by God upon people (though some were called to be celibate), a duty which they had the religious and moral obligation to accept.²³⁵ As one of three key institutional forms given by God to preserve and nurture human community, along with the state and the church,²³⁶ marriage was no more of a private choice than one's government. Moreover, for Lutherans, marriage retained the symbolic if not salvific aspects of Catholic marriage; it was to serve as a reminder of Christ's relationship with the church, imposing upon the couple an ethical duty to carry out their family responsibilities with love and virtue.²³⁷ Similarly, the dissolution of the marriage estate was not simply dependent on the will of the parties involved, since it was assumed that sinful and willful self-concern would not be a justification for destroying what was a God-given social institution.²³⁸

Calvinist denominations that primarily followed a covenantal understanding of the relationship among God and Christians similarly understood human intention and consent to be a key requirement in the creation of a valid marriage.²³⁹ However, Calvinist denominations also held that the covenant of marriage was a sacred and solemn third-party agreement entered into with God.²⁴⁰ Since a key element of the Calvinist covenantal model is the

234. See *id.* at 52-56. ("[B]ecause marriage is a social estate of the earthly kingdom, not a sacrament of the heavenly kingdom, it is subject to civil law and a civil authority, not canon law and the church.").

235. See *id.* at 48-51; GEORGE FORELL, *Faith Active in Love*, in MARTIN LUTHER: THEOLOGIAN OF THE CHURCH: COLLECTED ESSAYS 28-29 (William R. Russell ed., Supp. 1994)

236. *Id.*

237. See WITTE, *supra* note 220, at 49, 52.

238. See *id.* at 52-53.

239. *Id.* at 83, 94-95. The early Calvinist Marriage Ordinance was written at a period when Calvin was generally following Luther in his understanding of the Two Kingdoms doctrine; the covenantal theology of marriage came later. *Id.* at 94-95. Witte notes that the consent of parents, especially fathers, were also vital to a valid betrothal, and even community members could register objections to the marriage. *Id.* at 83-85.

240. *Id.* at 7, 83-85. In covenantal theology, the couple's parents (instructors in marriage), the witnesses (to the sincerity of the couple's promises and the fact of marriage), the ministers

fidelity of the parties, Protestants who employed this model understood marriage to be indissoluble except when the most egregious of violations was committed by the other party.²⁴¹ In Witte's narrative, these forms have given way to an Enlightenment — driven, secular and contractual imagination about marriage, where for a marriage to be effective, the full, free and rationally considered consent of the parties is all that is required.²⁴²

Perhaps more than the contemporary law of marriage itself, the covenant marriage and the gay marriage movements both deeply recognize the vital importance of fidelity in intimate bonds, though the covenant marriage movement wants to adopt the symbolic weight of the Protestant covenantal tradition, where the gay marriage movement has largely confined itself to endorsing a robust 'loving contract' model with some recognition of the ways in which marriage does not fit the contract model of human relationship. As William Eskridge, a proponent of same-sex marriage, acknowledges:

the duties and obligations of marriage directly contribute to interpersonal commitment.²⁴³ [V]erbal assurances [of warmth and love] are useful, but actions speak more loudly. Discussions about whether to move in together or get married are an important way partners communicate with one another about the level of commitment they feel.

The promise and the reasonable expectation of commitment are valuable for a variety of reasons, starting with the personal security that comes from knowing that one can depend on someone else for better or for worse (with an emphasis on the latter). Conversely, commitment provides an intense focal point for one to transcend the self and to deepen one's identity through intimate interaction with another being . . . the status of spousehood protects people's capacity for intimacy and thereby fosters a stable sense of self over time.²⁴⁴

who blessed the union and admonished the couple about their responsibilities, and the magistrate who ensured the legality of the marriage, registered it, and protected the marriage all performed their respective responsibilities as God's agents in the marriage. *Id.* at 95.

241. With the exception of adultery and sexual dysfunction, Calvin refused to expand the grounds for dissolution, though he treated desertion or separation as forms of adultery in some cases. *Id.* at 100-03.

242. *Id.* at 10-11 (To Enlightenment scholars, "The essence of marriage was the voluntary bargain struck between two parties who wanted to come together into an intimate association.").

243. ESKRIDGE, CASE, *supra* note 45, at 71.

244. *Id.* at 71-72.

Covenant marriage proponents echo this focus on the intrinsic and functional goodness of marital promises and the stability which such promises bring to the lives of those married. They also want to claim that covenant marriage will ensure that the covenantal bond is treated as a sacred bond, well beyond the normal commitments which people make to each other in daily life. Recognizing some points of irreparability, covenant marriage still represents the notion that most of the injuries married people cause each other are not just reasons for forsaking their vows of faithfulness.

Perhaps ironically, the criticisms leveled at both gay marriage and covenant marriage tend to be from liberals who romanticize the capacity of the individual to make morally worthy choices. Critics of covenant marriage believe the covenant marriage option traps women in uneven and loveless marriages.²⁴⁵ These critics would join critics of marriage in general who argue that in contractual forms of marriage, both men and women can exit on essentially the same terms, so that women do not have to put up with the physical or other abuse their spouses inflict.²⁴⁶ In their view, covenant marriage also restrains the individual spouse's opportunity for growth, by denying relationship and work choices that would be available in a more egalitarian system.²⁴⁷

Similarly, the same-sex marriage movement has been criticized by some in the gay rights movement for institutionalizing the current patriarchal, abusive system of marriage as a paradigm for couple relationships, thereby dooming any 'liberation' lifestyles available to that gay and lesbian couples due to the fact that they are not legally and socially bound by marital conventions.²⁴⁸ One advocate argues that lesbians should think of the process of forming intimate relationships as "negotiating a contract rather than

245. See, e.g., *Nostalgic Attempts*, *supra* note 91, at 581-82; Lawton, *supra* note 93, at 2478, 2510. Some commentators have suggested that covenant marriage increases the risk of domestic abuse. Sanchez et al., *supra* note 211, at 6 (citing Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719 (1997)).

246. See, e.g. Robson & Valentine, *supra* note 87, at 525-26 (describing work of lesbian feminists who advocate for contractual solutions, but noting problems with contract as the response to the problem of legal marriage).

247. See, e.g., Lawton, *supra* note 93, at 2510-11 n.347 (quoting Ashton Applewhite, who suggests that "advancements in women's social and political status correlate with access to affordable divorce").

248. See, e.g., Robson & Valentine, *supra* note 87, at 536-39; see also Warner, *supra* note 18, at 269 (arguing that the politics of same-sex marriage distracts people from inequality and reinforces privilege).

enforcing standards or issuing ultimatums."²⁴⁹ and another that "contracts can acknowledge . . . the depth and richness in a relationship while at the same time providing guidelines for the 'what ifs' every couple faces."²⁵⁰ In the liberal view of gay relationships, open-ended contractual models, based on the autonomous and egalitarian choice of partners, are capable of achieving desirable ends, while traditional marital models are thoroughly problematic because of power differentials.

Moreover, even nonliberal feminists, such as Professor Martha Fineman, who have mounted a devastating critique of the failure of the 'sexual family' to meet both the needs of gender equality and social dependence, ultimately embrace a largely private contractual model for marriage.²⁵¹ Professor Fineman has made a very persuasive case that the nuclear family has been used to label all nonnuclear forms of the family as deviant to justify state interference in those 'defective' forms of family and the state has dumped all of the responsibilities for dependents within the nuclear family upon women, all in the name of family self-sufficiency and independence.²⁵² Yet, rather than calling for more public accountability for male-female relationships, she wants to abolish traditional nuclear family marriage as the paradigm or model for the family in favor of a mother-child dyad, and relegate sexual unions to an even more private place than they currently hold.²⁵³

Thus, despite criticism of their efforts for failing to be sufficiently liberal, both the advocates and critics of gay and covenant marriage share strongly in the 'choice' tradition described in the term 'informed consent.' For example, covenant marriage arguments continue to be premised on the assumption that the critical basis for justifying enforcement of responsibilities upon one of the married partners is his uncoerced and fully informed choice to make a commitment, rather than external, community or the partner's, expectations or needs. Louisiana's covenant marriage law uses the language of the autonomous self: "A covenant marriage

249. See Robson & Valentine, *supra* note 87, at 525 (quoting P. CALIFA, *SAPPHISTRY: THE BOOK OF LESBIAN SEXUALITY* 57 (1980)).

250. See Robson & Valentine, *supra* note 87, at 525 (quoting D. CLUNIS & G. GREEN, *LESBIAN COUPLES* 65-66 (1998)).

251. See, e.g., FINEMAN, *supra* note 17, at 107-14.

252. See *Id.*

253. *Id.* at 228-30.

is a marriage entered into by one male and one female who *understand* and *agree* that the marriage between them is a lifelong relationship.²⁵⁴

Indeed, participants in covenant marriage are required to seek mandatory premarital counseling, presumably so they can make voluntary and fully informed choices.²⁵⁵ They are also mandated to disclose, before marriage, "everything which could adversely affect the decision to enter . . . marriage."²⁵⁶ Similarly, most gay marriage proponents such as William Eskridge do not argue that gay and lesbian couples should be *expected* to marry because of their history, social expectations, or the other person's need, however, they should be given the *choice* to marry if they agree it would be in their best interests.²⁵⁷

As compared with the actual history of family relationships as well as the traditions that Witte has sketched out, this conception of intention in forming human relationships is an idealized one. The modern imagination about marriage has divided the Western history of marriage into two periods: a primitive or traditional earlier period, in which parents or kinfolk arranged marriages and the children had no right to consent or object in the choice; and the 'modern' period, in which children have had the right to choose a spouse and the parents or kinfolk had no say in the matter, except perhaps moral suasion.²⁵⁸ However, that description would seem to be another example of oversimplification in the evolving nuclear family metanarrative.

Instead, we might substitute the notion of a 'willingness to marry' as a more consistent and embracing theme in Western history. In the image of marital 'choice' embedded in the American law of marriage, each member of the couple freely, independently, and rationally evaluates the value of marriage and decides to marry and chooses a particular mate from a group of several other available alternatives.²⁵⁹ He or she also decides to make an emotional commitment to that person and consciously steers his or her sexual inclinations to that person, to the exclusion of other important relationships if a conflict arises.

254. LA. REV. STAT. ANN § 9:272 (West Supp. 1998) (emphasis supplied).

255. LA. REV. STAT. ANN. §9:272 (West Supp. 1998).

256. LA. REV. STAT. ANN §9:272-73 (West. Supp. 1998).

257. See, e.g., ESKRIDGE, CIVIL UNIONS, *supra* note 45, at 210-12.

258. See Bron B. Ingoldsby, *Mate Selection and Marriage*, in FAMILIES IN MULTICULTURAL PERSPECTIVE, 143, 150 (Bron B. Ingoldsby & Suzanna Smith eds., 1995).

259. See WITTE, *supra* note 220, at 194-95.

Yet, not even the modern romantic ideal about marriage would suggest that it can be pared down to a pact between two individuals freely and knowingly choosing to enter a lifelong marital contract. In reality, real marriages call this legal imagination into question in any number of ways. In many American subcultures, individuals feel pressure to enter into marriage because of social or moral expectations that 'normal' people get married, including expectations of kinfolk.²⁶⁰ Others may be swept away by sexual passion or emotions they do not fully understand, such as grief at the loss of family or friends, a desire to have children, or attraction to some specific aspect of the mate's personality or status or resources.²⁶¹ These and other common experiences count against the idea that marriage is always, or even usually, a freely and fully considered option.

The notion of willingness, by contrast, suggests that marriage represents the confluence of many influences, decisions, and experiences, so that a 'valid' family is created by the history of a common relationship and not a set-in-time decision or ceremony. This familial relationship is created unless both partners are strongly unwilling to enter into such a relationship. If we understand families as being validly formed when the partners are willing, though they do not follow the modern model of consent, the options for understanding how families might be identified and supported by the law open up considerably. Indeed, we might see how closely the current model of household formation under attack by conservative groups — the so-called cohabiting couple — in fact relates back to the way households were created prior to the 'legalization' of marriage first by the Catholic Church and then by the state.²⁶²

In its support, the concept of willingness honors the realities of 'natural association' among persons — admitting that how we affiliate in intimate relationships is governed partly by situation, historical accident, biological, psychological and other influences that are only partly conscious and 'rational.' For example, we might argue that most couples who cohabit are willing participants in the

260. See, e.g., Dorian Solot & Marshall Miller, *Unmarried Bliss Living Happily Ever After Doesn't Necessarily Require a Marriage License*, at <http://www.unmarried.org/unmarried-bliss.html> (last visited Jan. 11, 2004) (discussing expectations of kinfolk and general societal pressure to get married).

261. *Id.*

262. See generally WITTE, *supra* note 220, at 16-41 (discussing marriage as a sacrament in the Roman Catholic church).

relationship and have some moral and even legal obligations to each other, even if they did not make the more complicated and thoughtful series of choices that at least the ideal story of betrothal and legal marriage would present.²⁶³

Second, the concept of willingness recognizes the real force of external influences upon our so-called 'choices' to affiliate in an intimate relationship, marital or otherwise. This concept has the ability to honor the role that parents, family and friends, and even social mores play in decisions whether to form families and with whom, without denigrating those who are partially guided by these influences as somehow making invalid, immature or defective decisions.

Third, the concept of willingness embraces those religious traditions, including Catholic and Protestant, that understand marriage and family as a conscientious response to a 'call' or expectation from the divine about care and sacrifice on behalf of the beloved, rather than an autonomous decision that is free from any moral constraints in its inception.²⁶⁴ Claims that now seem strange to modern ears because of nuclear family stereotyping, for example, the notion that a lesbian feels that she was led and joined to her partner by God, or that an uncle felt conscientiously obliged to care for his young niece who was abandoned by her parents, can be recognized by the state without privileging or recognizing either these views or any opposing religious or secular views about what constitutes a family.

Fourth, the concept of willingness does not privilege the Western concept of romantic love over alternative customs for selecting mates and forming marriages. Even those traditions that rely on arranged marriages can be honored, so long as care for the child meets some minimal standards of the liberal state regarding coercion on fundamental rights — e.g., that the child is agreeable to the marriage and the process of mate selection.²⁶⁵ This recognition is particularly important in light of the increasing diversity of Western communities, and the lack of evidence that marriages originating in romance are more lasting than those created by nontraditional arrangements.²⁶⁶

263. See Solot & Miller, *supra* note 260.

264. See WITTE, *supra* note 220, at 16-41.

265. *Id.*

266. See, e.g., Meena Thiruvengadam & Brooke Adams, *Arranging a Modern Marriage*, SALT LAKE TRIBUNE, Aug. 13, 2003, at D1. (discussing evidence of a one percent divorce rate

Moreover, the concept of willingness does not subtly or overtly disparage as foolish or less worthy those who find themselves in households that do not resemble the 'ideal nuclear family' by suggesting that they have 'made the choice' for that 'lifestyle' and must pay the consequences for that choice, when in fact, many such persons find that circumstance has circumscribed their life-choices. For example, it is far from clear that most single persons who constitute single-person households in the U.S. have made a 'choice' for singleness: it may be happenstance whether suitable partners are available or not, and many people may find themselves single because they did not find themselves in the social surroundings or economic circumstances that would produce a mutual lifelong commitment. That single person households should be automatically excluded from the benefits given to family households because singles have made the 'choice' not to marry seems false, if not unfair.

When we look beyond marriage, we see that many households are more similar to the traditional model than the modern arms' length contract. Some grandparents who are raising their grandchildren, for example, have not contracted for or pursued that particular family formation in the same way a business owner seeks out a supplier; but when only worse alternatives such as foster care are available, they accept the responsibility for parenting their grandchildren. Similarly, families who double up to make rent payments or brothers whose families cwork a farm may not have sought out a multiple family situation because it was the most ideal they could imagine, but because it was the best alternative under the circumstances. Moreover, even heterosexual 'cohabiting couples,' who are often treated in the literature as individuals who have explicitly chosen against marriage, frequently describe themselves as much more committed and mutually dependent on the household than one might assume by the fact that they have not married.²⁶⁷ They have not made the choice against marriage so much as they have not yet made the choice for it.²⁶⁸ Indeed, such couples often express the idea that if there is a 'need' to marry or if the time is 'right,' which sometimes is dependent on economic self-sufficiency, they will marry.²⁶⁹

in India, where ninety-five percent of all marriages are arranged).

267. Solot & Miller, *supra* note 260.

268. *Id.*

269. *Id.* (noting that most unmarried cohabitants end up marrying, and that having children is a common reason for doing so).

In demonstrating how much economic and social factors influence household forms, historians have provided evidence that the extended families of the past have been constructed more with a 'willingness' model of marriage than a pure modern 'choice' model.²⁷⁰ The studies of households suggest that the point of typical marriage is very much dependent on economic and social circumstance rather than 'informed consent.'²⁷¹ In societies where marriage marks the formation of a new household, young people marry when they are able to support that new household economically, whether that means having sufficient land or a trade.²⁷² In societies where marriage and the formation of a new household are not so closely linked, people marry much younger, but marriage is treated much more like the acquisition of new human resources for the whole household²⁷³ rather than as a private intentionally entered contract for emotional support.

In terms of the deformation of the household, a socially and legally expectant model which focuses on 'willingness' rather than 'choice' normatively offers less freedom to, or puts less social pressure upon, individuals to leave relationships, marital or otherwise, during those stretches when the relationship does not live up to some romantic ideal of perfect equality, freedom and responsibility. A model for family formation that suggests that commitment is the result of a history of relationship, dependencies and expectations formed over time and that any dissolution of a family or household must be guided by that history rather than a momentary decision that a relationship is not personally fulfilling is more likely to result in stable households than a 'choice' model of families. For example, sociologists have documented that men who move in with women who already have children often end up supporting those children,²⁷⁴ demonstrating their willingness to treat the household as an important commitment.

On the other hand, any model for the household that fails to consider the possible detriments of a focus on the 'willingness'

270. Cornell, *supra* note 120, at 150-54 (describing the different ways people decide who and when to marry).

271. *Id.*

272. *Id.* at 153.

273. See, e.g., Brunnbauer, *supra* note 153 at 337 (noting that in Pomok families the son marries early in order to compensate for the loss of the daughter's labor).

274. See, e.g., Winkler, *supra* note 195, at 12 (noting that live-in boyfriends provide some financial support to children that are not their own, especially when the couple has joint children).

understanding of family commitment is also fairly subject to criticism. The advent of a 'choice' model of marital commitment has redounded largely to the benefit of women, though not entirely so. Though arranged marriage customs have hampered men in some respects, women have suffered from traditional family formation systems much more than men. Since the majority of cultures that formed multigenerational households have formed them by severing the bride's relocation from her own family to join her husband's family,²⁷⁵ traditional marriages essentially required the bride to give up virtually everything of value to her as the price of becoming married and respectable.²⁷⁶

Moreover, until the recent gains in economic independence and equality for women in public life, the legal system has, intentionally and through neglect, furthered the abuse of women by failing to give them any equal bargaining power either to induce reformation of the marital relationship with their male partners, or to leave the relationship. Marital rules from custody presumptions prior to the twentieth century, power over the couples' property during marriage, double standards for marital 'fault,' and the rights of husbands to coerce their wives into sexual performance²⁷⁷ have reinforced the ability of husbands to exercise abusive control over their wives' lives. Property division rules that have unevenly placed family responsibilities on women while awarding income and property to men have made exit difficult in even the worst family situations.²⁷⁸ Without a 'choice' paradigm for family relationships, one might argue, women's inadequate options to escape such nightmarish relationships might be severely restricted.

On the other hand, we might question whether a 'choice' model does not, in some ways, exclude the notion of public responsibility

275. See, e.g., Max E. Stanton, *Patterns of Kinship and Residence*, in *FAMILIES IN MULTICULTURAL PERSPECTIVE*, 102, 104 (Bron B. Ingoldsby & Suzanna Smith eds., 1995) (noting George Peter Murdock's finding that 58% of societies employed patrilocal residence patterns, and, in addition, 42% of societies were patrilineal); Cornell, *supra* note 120, at 151 (describing the differences in household formations in simple and joint household societies).

276. See, e.g., Brunnbauer, *supra* note 153, at 337, 339 (noting that daughters-in-law were subject to their parent-in-law's authority, causing considerable strain); Cornell, *supra* note 120, at 151 (noting that the women in such a system will enter a household as an outsider and have to prove herself to get resources of the household).

277. See, e.g., Jana B. Singer, *The Privatization of Family Law*, 1982 WIS. L. REV. 1443, 1462-63; FINEMAN, *supra* note 17, at 77-79 (describing the move away from a presumption in favor of the father to a presumption in favor of the mother, and movement back again to father dominance).

278. See BARLETT & HARRIS, *supra* note 138, at 421-22 (discussing various views about the effect of no-fault divorce on women's economic circumstances).

and public review for one's family behavior, and thus contribute to the development of unequal and abusive marriages. In terms of power imbalances within the relationship, at least in pre-modern times, for example, a husband's abuse could be met by community disapproval and revocation of social standing and privileges, clergy failure to grant religious rites to the abuser, and even physical 'persuasion' by the wife's family,²⁷⁹ options which are all considered distasteful in a 'choice' regime. Moreover, the 'choice' model can be used to further the unequal bargaining power between spouses and other family members by holding the threat of immediate exit over the head of the dependent spouse or children as a means of enforcing their compliance with the dominant member's wishes.

Despite these very real concerns, reconceptualizing the intentionality element of the legal household would permit legal institutions to more justly recognize legal responsibilities among household members when their acts, as well as their words demonstrate a willingness to form a household, even when they have not entered into contractual or formal arrangements. Where members of a household are all willing to be legally recognized as such, including for tax and Social Security purposes, the state's refusal to recognize this household as a legal entity unless they comply with a single legally recognized form, that is, the institution of marriage and/or the procreation of children, seems an unjustified privileging of what Fineman terms the sexual (nuclear) family over all others.²⁸⁰ The state's concern about proving whether the household is indeed a 'real' or a 'fraudulent' household could be obviated by a requirement that the members declare their willingness to be treated as a household for purposes of that particular law (as they do when they submit a tax return listing a household head and dependents) coupled with any appropriately limited forms of proof that household members indeed function as a household (such as by the submission of proof of residence, joint bank accounts, joint spending habits, etc.).

In those cases where members of the household disagree about whether they should be treated as a household, this 'willingness' model need not exclude choice as a factor in determining legal responsibilities among household members. In the current legal regime, even in those legal regimes that permit nonnuclear family formations, such as domestic partnership registries or the Food

279. WITTE, *supra* note 220, at 85, 91, 160.

280. See FINEMAN, *supra* note 17, at 145-46.

Stamp program, the law essentially raises a presumption that a group is *not* a household if there is no husband-wife-child relationship among the parties.²⁸¹ This presumption is rebuttable as to some laws Michelle Marvin, for example, can establish a contract in lieu of a marriage, or a gay couple can go to court to prove that they have functioned as a family, as in *Braschi v. Stahl Associates*.²⁸² It is virtually irrebuttable in other situations, for example, a caretaker aunt can rarely gain permanent custody over the children of a sporadically appearing biological mother unless the mother's rights have first been terminated.

This current presumption against nonmarital, household relationships could easily be reversed: the law could presume that individuals who hold themselves out and behave in a way that suggests that they are households would indeed be presumed to be households. This presumption could be rebutted by demonstrating that the individuals involved were not economically interdependent, or the individuals could register their intention not to be treated as a household or even by signing antenuptial-type agreements with other household members that would obviate the legal presumption that they should be treated as a unit. The householder would then have the option of preventing the accrual of official household responsibility by limiting his responsibility for his guest, terminating the relationship after a period of time, or filing his intention not to be responsible.

*Preserving the Economic and Social Functions of the Family —
How the Legal Household Might Fare*

In the modern model of the 'evolving/nuclear family,' the couple carries the weight of five secular vital functions that independent households serve in the human community: sexual communion, reproduction, childhood socialization, economic interdependence, and a complex of social support needs often termed 'emotional support.'²⁸³

The great weight of the cultural debates about the future of marriage and the nature of the family is focused on whether marriage is a necessary institution to bear those functions, or

281. *Id.* at 146-47, 155-57.

282. 543 N.E.2d 49 (N.Y. 1989).

283. See Ingoldsby, *supra* note 104, at 85-87 (describing functions as sexual, reproductive, childhood socialization, economic, and companionship/emotional support functions).

whether private contracts between adults are a better way to handle these critical social functions.²⁸⁴ Moreover, there is frequent debate over the question whether the family unit is 'breaking down,' by which critics mean that it is failing in its obligations to fulfill these functions, and over what should be done to strengthen it. Less frequently, critics of the nuclear family ask whether marriage is a sufficient institution to bear the weight of all of these needs.

When the nuclear family recedes in importance as the sole community about which we are asking these questions, the emerging social pattern is that these functions are appearing in different combinations within different relationships and institutional forms. Some relationships, marital and nonmarital, combine sexual expression, economic interdependence, and emotional support, but do not perform childhood socialization or reproductive functions.²⁸⁵ Certain relationships, including some involving unwed fathers and mothers, utilize sexual intercourse and reproduction, possibly with some childhood socialization undertaken by the parties, but do not perform the other functions.²⁸⁶ Many households of friends, adult siblings, parents and adult children, group homes for the disabled, and so forth provide only economic and social support; some households combine child socialization with economic and social support, but not sexual relations or reproduction.²⁸⁷ Some relationships, both marital and nonmarital, attempt to perform all of these functions.²⁸⁸

A review of the history of the household suggests that this state of affairs is not unusual, though the number of single-person households and families not organized around at least one marriage certainly is on the rise.²⁸⁹ Shifting the focus of legal institutions from marriage to the household makes it possible not only to respond to these patterns more effectively, but it also supports those who are performing such functions in a socially effective manner by

284. See, e.g., Weitzman, *supra* note 21, at 1249-50, Singer, *supra* note 277, at 1533-40 (discussing pros of contractual ordering of marital relationships); *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1997, 2075, 2098 (2003) (arguing that judges should combine contractual and partnership approaches to marriage by undertaking a substantive fairness review of antenuptial agreements).

285. See Weitzman, *supra* note 21, at 1214-15 (discussing how procreation may not be the goal of certain relationships).

286. See *id.* at 1254-55 (describing different relationships and how they contracted to achieve their desired results).

287. Solot & Miller, *supra* note 260 (discussing examples of real relationships).

288. *Id.*

289. POPULATION REPORTS 2001, *supra* note 26, at 3-6.

eliminating legal barriers and aiming public benefits toward their support. Fineman argued effectively that the current pattern of legal response to the family unfairly rewards sexually-based families that demonstrate apparent self-sufficiency, while punishing other families, including those headed by single parents, or who need help in performing these functions.²⁹⁰ Refocusing legal attention on the household entity will better aim legal resources toward dealing with problems that may arise, while providing all households with an appropriate shield against noninterference on those matters in which law and government are usually inept.

THE LEGAL HOUSEHOLD AS A MODEL FOR ECONOMIC AND SOCIAL SUPPORT FUNCTIONS

In recent times, the nuclear family has been the model for provision of economic support and social interdependence.²⁹¹ As the history of the household suggests, perhaps the paramount factor in explaining the shape of households throughout time has been economic: the need to find an optimal household organization that will permit household members to sustain themselves economically has driven the size and composition of households. Where economic concerns, such as the availability of land, human labor requirements, and dependencies, have dictated, households have been both sizeable and have included related and unrelated members.²⁹² In fact, where economics permit, the nuclear family is not the simplest form of household organization: even single person households will occur in great numbers.²⁹³ On the other hand, the presence of smaller-size households does not necessarily mean that all such households have found an optimal configuration for purposes of social and economic support or for raising children. For example, except for the social code that tells adult children they should leave their families of origin when they finish school, more family households with parents and adult children, or adult siblings living together with or without their children, might well be found.²⁹⁴ As

290. See FINEMAN, *supra* note 17, at 101-03, 124-25, 145-48.

291. See *id.* at 15, 150-55.

292. See POPULATION REPORTS 2001, *supra* note 26, at 2 (explaining that household composition depends on values, laws, the economy, fertility, and other factors).

293. *Id.* at 7 (noting that "several demographic factors" are responsible for the "shift from two-parent to one-parent families," including the presence of economic resources).

294. Carol Sanger & Eleanor Willemsen, *Minor Changes: Emancipating Children in Modern Times*, 25 U. Mich. J.L. REFORM 239, 311-12 (1992) (contending that cultural

it is, despite this code, economics have dictated that the number of households containing adult children is significantly rising over previous contemporary periods.²⁹⁵

Moreover, some small households, such as single parent families and single persons, must come to rely on the state more because the traditional social code based on nuclear household concepts discourages them from forming long-term or permanent relationships with other such families with whom they might achieve relative economic self-sufficiency.²⁹⁶ Among the stigmas embedded in this code is the assumption that single adults living in the same household for a period of time must be a 'sexual family.'²⁹⁷ If longtime householders are of the same gender, there is often community speculation about whether they are gay or lesbian persons engaged in a sexual relationship, and if they are of different genders, they are assumed to be, as the euphemism goes, unmarried cohabitants.²⁹⁸ When acknowledging the possibility of latent homophobia in a society where status and privileges are linked with a few forms of socially approved sexuality, it should not be a surprise (nor necessarily homophobic) that unmarried individuals would feel as if they were being judged for their presumed sexual activities with housemates if they lived as a household for a long period of time.

A second part of this code is that everyone aspires to and will have the opportunity to join a nuclear family someday.²⁹⁹ Consequently, no household-like social or economic interdependencies should be viewed as permanent because they will be superseded by a marriage or a marriage-like relationship that prevents the formation of households that make either short-term or long-term economic sense. This common sense is reflected in several ways. For example, architects do not design living spaces that easily and comfortably permit single mothers and their children to live with

expectations regarding leaving one's parent's home is prevalent in America and that moving out is associated with "responsibility, self-sufficiency, and independence").

295. See POPULATION REPORTS 2001, *supra* note 26, at 10-11 (mentioning that young adults between the ages of eighteen and twenty-four were likely to live with their parents or cohabit with a roommate).

296. See *Id.* at 7-8 (explaining that one-parent families were more likely to have family incomes below the poverty line).

297. See FINEMAN, *supra* note 17, at 46.

298. See, e.g., *Family Rule Penalizes Virginians of All Walks*, THE VIRGINIAN PILOT, Jul. 22, 2003, at B10 (Virginia law requiring benefits to pass only to married and related cohabitants discriminates against many adults cohabitating in nonsexual relationships).

299. See FINEMAN, *supra* note 17, at 146-47.

each other, or encourage single noncohabitants to create a common household.³⁰⁰ Single-family residences are built for nuclear families, very rarely with even a 'mother-in-law' apartment, and apartment houses are largely organized around the same model, with few spaces for common, interdependent economic and social activities such as joint purchase of food and other necessities, cooking, socializing, group child care, or engaging in other family activities.³⁰¹ Even if architects and builders were creative enough to start building residences that encouraged extended households, zoning laws continue to highly favor single-family dwellings in residential areas and disfavor group home construction.³⁰²

Where they are not hounded out of town by zoning laws and citizens' groups, group homes are created for those who least resemble the social ideal of the nuclear family — mentally, physically and chemically disabled persons, troubled kids and orphans.³⁰³ The likely social assumption is that those who are temporarily dependent or disabled will eventually move out of such homes into a nuclear family model.

Of all of the functions associated with the family, stable economic and related social relationships are those most effectively influenced by the government. Moreover, such economic and social relationships are one of the foundations for a third function that families have traditionally performed, providing economic security and socialization for children, even though they are not the only necessities for that task.³⁰⁴ It is hardly necessary to look far beyond census figures that attest to numerical decline in traditional nuclear

300. Lucie McCauley, *A Woman's Place* (Dec. 1989), available at <http://www.newint.org/issue202/place.htm> (acknowledging that the needs of single-parent families, single people, the elderly and employed people are ignored by designers and builders).

301. *Id.* (arguing that cooperative households are better suited for single-parent households because they have "shared kitchen and dining areas").

302. See David P. Lazarus & Susan DiMaria, *Housing Discrimination and the Disabled*, 170 N.J. LAW. 20, 22-23 (1995) (describing use of zoning to exclude group homes for the disabled); Jeffrey M. Lehmann, *Reversing Judicial Deference Toward Exclusionary Zoning: A Suggested Approach*, 12 J. AFFORDABLE HOUSING & COMM. DEV. L. 229, 230-32 (2003) (describing methods and reasons for exclusion of multifamily dwellings).

303. Katherine A. Hort, Note, *Is Twenty-Two Months Beyond the Best Interest of the Child?* ASFA's Guidelines for the Termination of Parental Rights, 28 FORDHAM URB. L.J. 1879, 1906 (2001) (recognizing that group homes often are created for orphans and children with special needs).

304. Robert E. Oliphant & Susan E. Oliphant, *Domestic Relations and the Eighth Circuit Court of Appeals*, 16 WM. MITCHELL L. REV. 645, 670 (1990) (noting that a family provides economic security for its members).

families to realize that the evolving nuclear family fails to provide economic security to all of society's children.

While children lucky enough to live in two-parent or even full extended families receive the economic blessing of the government in many ways, children in single parent households, grandparent-grandchildren families, and parent-boy(girl)friend-children homes are virtually invisible to legal institutions other than those who deal with children in crisis.³⁰⁵ Indeed, some programs like TANF and its predecessor AFDC have historically discouraged single mothers with children from forming a meaningful multiadult, long-term household that could provide adequate nurturing for the children, effectively encouraging them to find someone to marry or to carry the burden of their families alone.³⁰⁶ The legal household model holds out the possibility of giving more children the opportunity to grow up in multiadult households, perhaps by providing an incentive for adults to create complex economic and social relationships that continue through time.

At the same time, the focus on the nuclear family as the key unit of legal organization rather than the household guarantees that cohouseholders (whether cohabitant or not) have neither the responsibility nor the incentive to make a long-term commitment to the upbringing of children in their household. In his brief for same-sex marriage, Professor Eskridge notes that a full citizen carries legal responsibilities as well as rights.³⁰⁷ This situation does not occur with nonblood-related householders and the children they raise in the current regime. Although a few cases have begun to recognize the rights and responsibilities of so-called '*de facto*' fathers

305. See generally Amy E. Hirsch, *Income Deeming in the AFDC Program: Using Dual Track Family Law to Make Poor Women Poorer*, 16 N.Y.U. REV. L. & SOC. CHANGE 713 (1988) (discussing the effects deeming of income have on low-income women).

306. Between the 1960s and the Reagan-era 'reforms,' government programs encouraged teenaged single mothers to live alone by "man in the house" and immorality rules that would punish welfare mothers for cohabiting. Income deeming also discouraged others from residing with these mothers. As of 1981, stepparents' income began to be deemed available to children, and later, siblings' child support was similarly considered available to meet the needs of welfare children. Finally, the TANF program, finally awakening to the fact that single teenaged parent/child households left something to be desired, began to pressure teen moms to stay at home by threatening to deny all welfare benefits; still, income imputation of grandparents and siblings continued. See *id.* at 714-720; Jodie Levin-Epstein, *Parent Provisions in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 4 GEO. J. ON FIGHTING POVERTY 323, 326, 327 (1997) (noting that minor parents are required to live with an adult unless they are exempted, and grandparents' income is generally deemed available under TANF to the grandchild being supported by TANF).

307. See, e.g., ESKRIDGE, CIVIL UNIONS, *supra* note 45, at 185-187.

and 'parents by estoppel,'³⁰⁸ for the most part, the law places no obligation on that cohouseholder to provide for the children, even when they have come to rely on the support of the cohouseholder over a period of years.³⁰⁹

Also, the law does not provide much in the way of incentives to that unrelated adult to provide economic and social support within a household setting. For example, married couples can file taxes jointly, allowing both parties to take advantage of credits and deductions that account for joint support of their children.³¹⁰ By contrast as between, two unrelated women who provide maternal support and care to their group of children, only one will be able to achieve similar savings by claiming the status of household head.³¹¹

Similarly, some public assistance programs like AFDC have refused to provide support to grandparents or other family members raising children unless they legally exclude the mother from custody and care of the child,³¹² thereby weakening the system of family support for the child. While these programs have been significantly reformed in the past two decades to avoid encouraging unemployed fathers from moving out of the house, the same is not true for unrelated adults who may be helping to care for the children, their needs as contributing members of the household are completely invisible to most of these social programs.³¹³

308. See, e.g., *Developments in the Law*, *supra* note 284, at 2052, 2063-64. Under the recent ALI Principles statement, parenthood by estoppel includes individuals with an obligation to pay child support, a man who lives with a child for two years under the *bona fide* belief that he is the biological father, a person who has lived with a child since birth and accepted his full responsibility as a parent, or someone who has lived with the child for two years under a written agreement assuming parental responsibilities. *De facto* parents are those who have taken care of a child for at least two years with consent of the legal parent. However, these classifications are proposed guidelines for the law that are to some extent, ahead of most courts. *Id.* at 2060-62.

309. *Id.*

310. Lewis A. Silverman, *Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of the Child of the Union*, 102 W. VA. L. REV. 411, 437 (1999) (explaining that married couples are entitled to file taxes jointly by combining their "income, gains, losses, deductions, and credits").

311. Bay Area Homeless Alliance, *What's My Filing Status?*, available at <http://www.baha.org> (acknowledging that "only one person per household can file as head of [the] household in a given tax year") (last visited Jan. 20, 2004).

312. See Mary C. Rudasill, *Grandparents Raising Grandchildren: Problems and Policy from an Illinois Perspective*, 3 ELDER L.J. 215, 270 (1995) (noting that many states have refused AFDC benefits to grandparents, while others require them to obtain legal custody, and still others provide benefits unequal to those provided to foster parents).

313. See Martha Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181 (1995); Silverman, *supra* note 310, at 413 ("two individuals may perform all tasks and equal...all the functions of a parent and child. Yet if they are not related by blood

Indeed, the social disapproval leveled at low-income cohabiting couples combined with evidence that children are better off with single mothers alone than with them and their boyfriends,³¹⁴ broadens the concept of family to include households of unrelated persons. This evidence might well offer single mothers a socially acceptable alternative to a romantic relationship that meets more of their family's needs. The replacement of the family with the household as the key legal concept for allocating economic rights and duties has the potential to ameliorate the harmful effects of the exclusionary family model.

Problems in Defining the Legal Household

Perhaps the first objection one might encounter toward the replacement of the nuclear family with the household concept is the clarity and stability of its legal definition, which is a key consideration in replacing a long-used legal category. Initially, this concern may be overcome by the evidence that the household is already used as the legal concept for a number of programs, including the United States census.³¹⁵

However, opponents might argue that the nuclear family generally provides a more bright-line test for identification of legal relationship, which could be viewed as a more significant relationship than the census' interest in who happens to live with whom at any one time. Members of the nuclear family are already preidentified by the law.³¹⁶ Married couples have obtained licenses from the state and their children are identified through birth certificates or adoption decrees; conversely, legal proceedings,

(or at least adoption) they will not be considered...in the eyes of the law.") (internal citations omitted).

314. See, e.g., Gregory Acs & Sandi Nelson, The Urban Institute, Series B, No. B-48, *The Kids are Alright? Children's Well-Being and the Rise of Cohabitation*, NEW FEDERALISM - NAT'L SURVEY OF AMERICA'S FAMILIES (2002), at http://www.urban.org/UploadedPDF/310544_B48.pdf (last visited Mar. 7, 2004) (noting that low-income children with single mothers who cohabit with nonfathers are more likely to be poor, insecure in terms of being able to meet basic needs such as food, and exhibit behavioral problems than those who live with single mothers).

315. See POPULATION REPORTS 2001, *supra* note 26, at 1 (using the term 'household' as a legal concept).

316. Joan C. Bohl, *Hawk v. Hawk: An Important Step in the Reform of Grandparent Visitation Law*, 33 U. LOUISVILLE J. FAM. L. 55, 63 (1995) (noting that common law recognizes and protects the nuclear family).

producing relatively trustworthy legal records, are required to terminate either the relationship of spouses or of parent and child.³¹⁷

This argument is circular: if processes were available for others besides spouses and children to register and deregister their households, as there currently are in those countries, states and localities that offer domestic partner registries or civil unions,³¹⁸ similar bright-line evidence of household status would be available for these groupings. The same legal incentives that spur couples to seek the legal status of divorce would encourage these non traditional households to deregister if registration would be made widely available. Since registration and deregistration procedures currently are simpler than divorce and termination of parental rights proceedings,³¹⁹ nontraditional households may be more likely to utilize these procedures.

Moreover, the use of marriage licenses and birth certificates is over-inclusive as a test for identifying stable functioning households: many nuclear families split apart and organize separately functioning economic and social units without bothering with the process of 'deregistering' their families through divorce or termination of parental rights.³²⁰ To the extent that the state wants to reward and regulate nuclear families actually functioning as such, the use of marriage/divorce papers and birth certification/termination of parental rights proceedings as the identifying marks are not very helpful.

A third argument against substituting the concept of the legal household for the traditional nuclear family might be simply empirical: studies may well indicate that nonnuclear households are much more likely to dissolve as compared to nuclear families,³²¹

317. HOSPITALITY GROUP NETWORK, MARRIAGE LAWS (2002), available at http://www.usmarriagelaws.com/search/united_states/getting_married/index.html (explaining that marriage requirements typically involves obtaining a marriage license and participating in a civil or religious ceremony); see also Ilse Nehring, "Throwaway Rights": Empowering a Forgotten Minority, 18 WHITTIER L. REV. 767, 800 (1997) (recognizing that married couples may separate by mutual or written agreement without going to court).

318. See, e.g., ESKRIDGE, CIVIL UNIONS, *supra* note 45, at 12-14, 121-22.

319. See, e.g., CALIFORNIA SECRETARY OF STATE, DOMESTIC PARTNERS REGISTRY, <http://www.ss.ca.gov/dpregistry> (visited August 1, 2003) [hereinafter DOMESTIC PARTNERS REGISTRY] (permitting people to download and complete registry and deregistration forms.)

320. Aaron Larson, *Expert Law: Legal Separation*, at http://www.expertlaw.com/library/pubarticles/Family_Law/legal_separation.html (last visited Jan. 20, 2004) (recognizing that married couples may separate by mutual or written agreement without going to court).

321. See, e.g., DAVID POPENOE & BARBARA D. WHITEHEAD, SHOULD WE LIVE TOGETHER? WHAT YOUNG ADULTS NEED TO KNOW ABOUT COHABITATION BEFORE MARRIAGE 2, at

leading to uncertainty about whether an individual is part of a household over a long period of time, a possible destabilizing influence for the law. Yet, this argument may well exemplify the problem with using the nuclear family as the legal paradigm: if there are no legal incentives and support for a nonnuclear household to stay together, it stands to reason that they are more likely to dissolve.³²²

The Functions of the Legal Household

For purposes of considering how we might constitute a legal household and determine what rights and duties should flow from one's membership in it, we might consider four broad categories of legal relationship where the nuclear family has functioned as the key legal concept: (1) cases where the state is regulating the household economic system for general public purposes, such as income taxation; (2) cases where the state is supporting the household economic system over and above the services it provides to all households (e.g., welfare benefits rather than sanitation, roads and public safety); (3) cases where the state is regulating relationships between household members and other private entities, (e.g. legal requirements that employers provide maternity leave or family leave to care for ill members, as in the Family Medical Leave Act);³²³ and (4) cases where members of the household themselves are in dispute about their circumstances.

Government regulation of the household

Cases where the federal government is regulating or taxing the economic unit would seem to be the easiest cases for using the household model, since the federal government has already shown

<http://www.smartmarriages.com/cohabit.html> (last visited Jan. 23, 2004) (noting that cohabiting parents break up at a substantially higher rate than married parents, with longlasting and "devastating" effects). However, as Eskridge points out, this is not necessarily true. ESKRIDGE, CIVIL UNIONS, *supra* note 45, at 175. While there is a substantial incidence of nonmarital separation among gay and lesbian couples, it is not remarkably different from the separation between heterosexual couples. *Id.* Moreover, in Denmark where gay and lesbian couples are permitted to enter into 'civil unions' or other forms of legal commitment, the separation rate is actually lower than the divorce rate, and even the divorce rate has fallen. *Id.*

322. ESKRIDGE, CIVIL UNIONS, *supra* note 45, at 203 (stating that marriage recognition would reinforce the interpersonal commitment homosexual couples share).

323. 26 U.S.C. § 2601 (2003).

that the household can be used in place of the nuclear family as the organizing concept.³²⁴ Currently, the Internal Revenue Service defines those who are entitled to be counted in the household for purposes of tax exemptions much more broadly than the nuclear family paradigm.³²⁵ Household heads may claim as their dependents their descendants, without any limitation as to generation, stepchildren (even if they are not legally obligated to support them), siblings and stepsiblings, parents and other ancestors, stepparents, nieces and nephews, sons/daughters/mothers/fathers/brothers/sister-in-law or even more broadly, any "individual . . . who, for the taxable year of the taxpayer, has as his principal place of abode the home of the taxpayer and is a member of the taxpayer's household."³²⁶ For these cases, the United States government apparently believes that mere attestation of household relationship and support is sufficient without requiring any actual proof, subject to the possibility that a head of household might be audited.

Of course, even tax regulations are not devised only for strictly economic purposes: they reflect public aspirations for social organization by supporting favored institutions and behaviors with tax deductions/credits and exacting financial penalties for disfavored ones. Suggesting that the household concept could replace the nuclear family concept in every case in which governmental regulation is involved only returns us to the main question, which is whether there is value in recognizing, supporting, and fairly treating those households that are not nuclear families.

Government Provision of Economic Support

The second set of cases, so-called 'public benefits' legal regimes, should not be any different, for they also involve government regulation and involvement in the economic situation of the household. Moreover, the same mix of economic and noneconomic social purposes is theoretically involved as in government regulation, although public benefits cases purport to elevate noneconomic social purposes such as family stability over economic ones.³²⁷ To that extent, the particular purpose behind a social program needs to be examined to determine whether there is some essential reason to

324. See 26 U.S.C. § 152(a)(9) (2003).

325. See *id.*

326. *Id.*

327. See, e.g., 42 U.S.C. § 9908(b)(12) (2003).

employ the nuclear family model as the legal unit of relevance. Moreover, these programs are popularly imagined as 'giving' hard-earned community dollars to struggling individuals rather than 'taking' their income.³²⁸

Yet, even if one accepts prevalent social biases about 'sponging' and 'cheating' in public benefits programs³²⁹ and thus would demand more than mere attestation of household status, it is clear that replacing the nuclear family with the household as the key legal concept is not difficult. Since there is a social presumption that people who need government help will cheat the government more often than people who are paying taxes,³³⁰ public benefits programs currently have much more rigorous and invasive standards for proving eligibility and household relationships than the IRS utilizes in the income tax system.³³¹

Yet, the federal government's success in using the household as a legal model is proof of its viability. Both the federal Food Stamp and energy assistance programs, keyed toward protection of the economic stability of low-income households, have adopted the household as their eligibility unit.³³² Each of these programs recognizes that many so-called 'nontraditional families' actually do function as an economic unit, pooling their food and money toward shared expenses such as food and utilities.³³³ Indeed, the use of the household as the legal paradigm expresses a normative preference in favor of cost-sharing by not only permitting but encouraging unrelated groups of people to pool economic resources and seek assistance together, a move that should reduce both their individual needs and their combined needs as presented to the government.

As an example of how simple the definition of household can be in public benefits programs, consider the federal energy assistance program, designed to meet the needs of low-income 'households,' where the term "household" means any individual or group of individuals who are living together as one economic unit for whom residential energy is customarily purchased in common or who

328. See, e.g., Larry Cata Backer, *By Hook or By Crook: Conformity, Assimilation and Liberal and Conservative Poor Relief Theory*, 7 HASTINGS WOMEN'S L. J. 391, 400-01 (1996).

329. *Id.* at 399-402.

330. *Id.*

331. Compare 42 U.S.C. § 1437n (2003) (describing eligibility for assisted housing) with 26 U.S.C. § 152(a)(9) (2003) (defining taxpayer's household).

332. 7 U.S.C. § 2014 (2003) (describing eligible households).

333. 7 U.S.C. § 2012(i)(1) (2003) (defining household).

make undesignated payments for energy in the form of rent."³³⁴ In the Food Stamp program, which uses a similar definition, those who wish to be counted as a household, if they are not spouses or parent-child groups, must show that they purchase and cook meals together.³³⁵ That program has devised relatively simple and clear proof regulations for establishing the relationship of members to the household.³³⁶ Some other programs, such as those assisting mentally disabled persons, actually encourage joint households.³³⁷

Opponents of the extension of the household concept to other public benefits programs might argue that the real problem is not fraud per se, but the fact that household information used to make eligibility determinations may rapidly become outdated because of their relatively short lifespan and membership fluidity. However, virtually all of today's public benefits programs have rigorous reporting requirements, mandating that recipients to report promptly, and in great detail, any changes in income, household status, and other matters relevant to their eligibility for programs.³³⁸ Thus, a shift in favor of the household concept is not

334. See 42 U.S.C. § 8621 (defining eligibility); 42 U.S.C. § 8622 (5) (defining household).

335. See 7 U.S.C. § 2014 (defining eligibility of households); 7 U.S.C. § 2012(i) (defining households, in part, as follows:

(1) 'Household' means -

(1) an individual who lives alone or who, while living with others, customarily purchases food and prepares meals for home consumption separate and apart from the others; or

(2) a group of individuals who live together and customarily purchase food and prepare meals together for home consumption.

Id.

336. See 7 C.F.R. § 273.2 (f)(1)(x) (2003) (requiring State agencies to "verify factors affecting the composition of a household, if questionable. Individuals who claim to be a separate household from those with whom they reside shall be responsible for proving that they are a separate household to the satisfaction of the State agency."). As another example, the federal statute providing funds for rural housing for the elderly and handicapped care defines an eligible person to include:

two or more elderly (sixty-two years of age or over) or handicapped persons living together, one or more such persons living with another person who is determined. . . to be essential to the care or well-being of such persons, and the surviving member or members of any family described in the first sentence of this paragraph who were living in a unit assisted under this subchapter, with the deceased member of the family.

42 U.S.C. § 1471(b)(3).

337. See, e.g., 42 U.S.C. § 8013 (encouraging group homes for persons with disabilities).

338. See, e.g., Maria Fazzolari, Comment, *The Brown v. Giuliani Injunction: Combating Bureaucratic Disentitlement*, 23 FORDHAM URB. L.J. 413, 422 nn.63, 65 (1996) (describing welfare procedural requirements and their production of error rates disentitling eligible persons from benefits).

likely to create any more difficulties in determining eligibility accurately than those that currently occur.

Indeed, those programs that have adopted the household as the legal paradigm for the granting of benefits demonstrate what might happen if public benefits programs would affirm rather than punish the decisions of distantly related or unrelated adults to share their lives and pool their resources. As just one example, the utilization of the household as the key legal concept in the Food Stamp program can provide the economic stability necessary for group homes aimed at adult disabled persons to provide a 'family setting,' including long-term private relationships between disabled adults who can become as close as blood families.

As suggested, government subsidy programs can also be used to encourage a whole range of behaviors that help to form viable social and economic households. The range of government subsidies and tax incentives to produce certain kinds of housing, from home mortgage deductions to tax incentives to construct lower-income housing to publicly-owned housing itself,³³⁹ could be structured to encourage both extended family and nonrelated groups of people to live together and become socially and economically interdependent. One can imagine, for example, tax credits for builders who produce apartment houses with both private and shared living spaces so that families can achieve the economies of scale that come with joint food purchase and meal preparation, shared utilities and repair costs, even the opportunity for easily exchanged babysitting for single parents.

There is a potential downside to the move from a nuclear family definition to the use of the household as the legal concept benefit eligibility: the state may use the concept only to exclude and punish, but not to assist and support. The story of federal welfare programs since the Reagan era is the story of ever increasing implicit use of the 'household' to terminate benefits to families by imposing requirements on people who live with them but are not legally obligated to support them. For example, the AFDC/TANF programs have used the household concept to reduce aid to households where there is a nonlegally obligated stepparent in the home, or to punish other members of the household when some members do not meet work requirements.³⁴⁰ Obviously, limited use of the household

339. See, e.g., 26 U.S.C. § 42 (2003) (providing tax credit for new or rehabilitated low-income housing construction).

340. See, e.g., Joel F. Handler, "Ending Welfare As We Know It:" *The Win, Win Spin or the*

concept only to exclude families from support or to punish them for not conforming to social norms will accomplish none of the goals that legal marriage is intended to achieve.

Regulation of Private Third Party Interactions with the Household

The third set of economic decisions implicated in such a paradigm shift concerns the regulation of private third parties' obligations toward the household, most significantly employers' provision of benefits to employees and their household members. Of course, any number of objections could be raised against extension of employers' legal duties to provide economic benefits to more families, but few of them necessarily relate to the distinction between 'nuclear families' and other forms of household.

Even without legal regulation, the expansion of employer benefits to nontraditional families has grown, as shown by the exponential growth in domestic partner benefits over the past ten years.³⁴¹ Since state-mandated legal requirements for such benefits have not kept pace with voluntary provision by employers, conservative commentators who always opine that 'the market will take care of' such problems may not be so far from the truth. Yet, it is hard to imagine that such significant changes would not have occurred for domestic partners, without the pressure of other social and legal changes pushing toward recognizing them as a legitimate form of 'family.'

Two somewhat separate theories have inspired legal regulation of employer relationships with employees. Perhaps the most visible justification for legal regulation of private party conduct is the equal protection/civil rights-type argument that differential treatment of families constitutes discrimination on the basis of status. Whether

Stench of Victory, 5 J. GENDER RACE & JUST. 131, 132-33, 161 (2001) (noting denial of family TANF aid for mothers who do not cooperate in establishing paternity or procedural requirements in the work program, and deeming of grandparent income to families headed by teen mothers); Margorie Engel, *Pockets of Poverty: The Second Wives' Club—Examining the Financial [In]security of Women in Remarriages*, 5 WM. & MARY J. WOMEN & L. 309, 320 n.68 (1999) (noting AFDC deeming of stepparent income to AFDC-eligible children).

341. See, e.g., National Lesbian & Gay Journalists Assoc., Domestic Partner Benefits Overview, DIRECTORY OF NEWS MEDIA COMPANIES/UNIONS WITH DOMESTIC PARTNER BENEFITS, at <http://www.nlgja.org/pubs/DP/Dpovrvw.html> (last visited Jan. 27, 2004) [hereinafter, DOMESTIC PARTNER BENEFITS] (reporting growth from ten media companies who offered domestic partner benefits in 1994 to seventy-seven companies and unions, including sixty of the top 100 newspapers, by October 2001).

an employer's refusal to change from a nuclear family concept to a household concept in the provision of private benefits should be assimilated to the discrimination model probably awaits much more thorough research. Legislators should know whether the social harms flowing from 'household discrimination' are as grave as social harms from discrimination on the basis of other statuses such as gender, race, and sexual orientation. It is difficult, however, to argue with the claim that nuclear families are legally privileged over other household forms.³⁴²

The second type of justification for government regulation of private employer decisions has been that such decisions can cause wider social harm if they are not properly regulated.³⁴³ Labor regulation is guided by the presumption that government's failure to regulate how employers treat organized labor would throw parts of the economic system into chaos, affecting the entire community.³⁴⁴ In OSHA, wage and hour, and worker's compensation regulations, one key argument is that oppressive or harmful working conditions will shift the costs borne by the employee to the general public and injured workers will eventually have to be supported by the state, when the private employer is actually responsible for their circumstances.³⁴⁵

Intuitively, it seems logical to argue that third parties should support households in the same circumstances that the government requires them to support nuclear families. For example, for purposes of extending benefits such as family leave, if employers are not bound to recognize employees' efforts to find the most viable — or even a minimally viable — economic arrangement that permits them maximum economic self-sufficiency, the public at large might end up taking up the slack. There is no logical *economic* reason that an employer should be legally required to support a nuclear family and not provide benefits to other households.

Just one example of how a shift to the household as the model unit for regulating of employer responsibilities will illustrate this point. Currently, working parents and their children are one of the fastest-growing segments of the population in homeless shelters in

342. *Id.*

343. *See, e.g.,* *Brotherhood of R. R. Trainmen v. Chicago R. & R. I. Co.*, 353 U.S. 30, 40 (1957).

344. *Id.*

345. *See* 29 U.S.C. § 1651(a) (1998) (describing burdens on interstate commerce from workplace injuries, including disability compensation and medical payments).

cities across the country.³⁴⁶ Studies have shown that as many of seventy percent of individuals living within the low-income bracket confront the difficulty of being unable to afford food, housing, and health insurance at the same time.³⁴⁷ Were employer benefit plans required to include any household members and not just nuclear family members, these household members might be able to afford housing by creating a joint economic unit with another adult or family, a unit that could theoretically share both a home and their health insurance costs.

Of course, as with all previous forms of government regulation designed to shift public burdens to the private sector, including federal mandatory extension of parental leave and the raising of the minimum wage, public discussion will likely center upon the size of the cost to be borne by employers if they must extend such programs to include nonnuclear family members. However, knee-jerk fiscal reactions should not suffice to negate this idea out of hand. For example, studies on the extension of both public and private employer benefits to gay and straight domestic partners report a negligible public fiscal impact ranging up to two percent more to systems that have adopted them.³⁴⁸

Intrahousehold Legal Disputes

In the fourth area, the use of the household as the legal rubric for organizing intrahousehold disputes may present more complicated problems, particularly in terms of the proof necessary to show that one 'belongs to' a certain household so that legal obligations accrue in an equitable manner. Indeed, this is the area most resistant to change: legislatures and courts have demonstrated reluctance to replace the nuclear family model when it comes to

346. See Stanley Herr, *Children Without Homes: Rights to Education and Family Stability*, 45 U. MIAMI L. REV. 337, 341 (1991) (noting that as of that date, one-third of the homeless population consisted of families with children).

347. See Sharon K. Long, The Urban Institute, Series B, No. B-54, *Choosing Among Food, Housing and Health Insurance*, NEW FEDERALISM - NAT'L SURVEY OF AMERICA'S FAMILIES, at http://www.urban.org/UploadedPDF/310775_B-54.pdf (last visited Jan. 23, 2003) (noting also that a fair number of moderate and higher-income adults have had either a food, a housing, or a health care hardship, including lack of insurance, in the previous year).

348. See, e.g., Domestic Partner Benefits Overview, *supra* note 341 (noting that health insurance benefits for gay and straight domestic partners rarely covers more than two percent of an employer's total health care costs at most).

such matters as child custody, property division, inheritance, income support obligations, and the right to make health care decisions for another.³⁴⁹

One major objection to using the household as a rubric for establishing such legal relationships is that public investigation of the relationships of household members is antithetical to the time-honored place that family privacy holds in U.S. social life.³⁵⁰ (A considerable and often overlooked exception involves families dependent upon poverty programs, where public intrusion into the most intimate details of a person's life is the order of the day.)³⁵¹ Indeed, even in divorce, where intrusive judicial investigation of the couple's behavior and financial circumstances was once the norm, no-fault divorce and the increasing move toward equal property division regardless of circumstances have only strengthened the 'zone of family privacy' presumption.³⁵²

In recent years, however, the rise of domestic partner laws have shown that the privacy objection can be eliminated simply by duplicating the registration and deregistration scheme that marriage and divorce law provide, which already provides a couple a way to control just how invasive government inspections into the household might be.³⁵³ Just as the formal marriage license and ceremony, with its witnessed declarations of intent to marry, create legal obligations among nuclear family members, so civil union and domestic partnership laws have provided registries, some with very marriage-like ceremonies with mutual pledges of commitment and fidelity, for those who wish to register their intent to become households.³⁵⁴ Similarly, such couples may deregister rather than face scrutiny about actual interdependence if they change their relationships.

Of course, most such legal forms currently pertain only to couples resembling the husband-wife dyad. Moreover, few of them confer anywhere near the panoply of economic responsibilities between the parties that marriage does.³⁵⁵ For example, domestic

349. See Singer, *supra* note 277.

350. *Id.*

351. *Id.*

352. See *id.* (discussing the 'privatization' of many areas of family life).

353. See, e.g., VERMONT SECRETARY OF STATE, THE VERMONT GUIDE TO CIVIL UNIONS, at <http://www.sec.state.vt.us/otherprg/civilunions/civilunions.html> (last visited Jan. 24, 2004) [hereinafter, VERMONT GUIDE TO CIVIL UNIONS]; CALIFORNIA REGISTRY, *supra* note 319.

354. *Id.*

355. See, e.g., Lamda Legal, *Why Marriage Equality Matters*, at http://www.lamdalegal.org/binary-data/LAMBDA_PDF/127.pdf (last visited Mar. 6, 2004).

partnership laws rarely bestow a right on one party to demand economic support from the other, the right to mutual property division upon break up of the relationship, the right to inheritance absent a will, or the right to obtain benefits or damages from a government or private third party when the partner is injured or killed.³⁵⁶ These limitations seem to stem largely from the fear that civil registration will decenter the nuclear family as the ideal rather than from any intrinsic procedural or proof problems with using the domestic registry as a substitute for proving a committed relationship.

Yet, requiring a formal attestation process may be both too much and too little to establish legal rights and duties among economically interdependent persons in a household. It has become clear that many persons who organize households do not follow attestation processes because they are legally prevented from doing so (as in the case of gay or lesbian couples), but rather because they either choose not to follow them or neglect to do so.³⁵⁷ In addition to the numerous dual-gender cohabitants who fail to get married though they are free to do so, studies have shown that the number of gay and lesbian partners who have bothered to create legal relationships either through private agreements and wills, or through domestic partner or civil union registries, is underwhelming.³⁵⁸

If attestation procedures for the legal recognition of households are relatively inexpensive and available, courts will still have to grapple with whether legal households can be recognized for purposes of economic issues like income support and property division even when the members of the household fail to follow attestation procedures. Conversely, legislators will have to decide whether such attestation procedures will confer the entire panoply of economic rights now available to spouses and children, as current domestic partner registries do.³⁵⁹ Moreover, they will have to determine whether an 'easy exit' deregistration procedure should resolve retroactively what property and other rights the parties

356. *Id.*

357. See, e.g., Partners Task Force for Gay & Lesbian Couples, *Attitudes Toward Legal Marriage: Results from Partners' Survey of U.S. Lesbian & Gay Couples*, at <http://www.buddybuddy.com/toc.html> (last visited Jan. 20, 2004) (noting that only fifty-three percent of self-selected gay and lesbian respondents reported having not prepared legal documents to protect their partners).

358. *Id.*

359. See THE VERMONT GUIDE TO CIVIL UNIONS, *supra* note 353; CALIFORNIA REGISTRY, *supra* note 319.

have against each other, a standard objection to existing domestic partner registries.³⁶⁰

Of course, attestation, like the formal marriage ceremony, may provide the best evidence that all parties in the household intend to be bound to a set of legal rights and duties towards each other. Attestation may not, however, provide the only viable evidence. A key problem in deciding whether attestation procedures should be an absolute prerequisite to a finding of a legal household is in determining what to make of the fact that many existing cohouselholders have not chosen to follow even those formalities currently available to them.³⁶¹ Apart from the symbolic reasons that unmarried couples give for not getting married — for example., partners don't believe in the ideal or traditional patriarchal form of marriage — several possibilities present themselves.³⁶² The first, that such formalities are too time consuming and expensive,³⁶³ can be easily alleviated by making such processes cheap, well-publicized and easy to use.

A second possible reason for failure to enter into such relationships is the presence of uneven bargaining power amongst the parties in the relationship. Although, recent research suggests that 'ordinary cohabitation' generally occurs at a higher rate among low-income couples.³⁶⁴ To the extent such relationships might be the result of a power imbalance in cases such as *Marvin v. Marvin*,³⁶⁵ it seems more just to treat informal families as exactly that, rather than to allow the Lee Marvins of the world to coerce and control relationships with loving but economically vulnerable partners.

Yet, the law has traditionally respected an individuals'

360. See, e.g., ESKRIDGE, CIVIL UNIONS, *supra* note 45, at 25, 123 (noting that reciprocal beneficiaries and domestic partners can, for the most part, eliminate any obligations to their partners simply by deregistering).

361. See, e.g., Popenoe & Whitehead, *supra* note 321, at 2 (noting rise from 500,000 to 4 million unmarried couples from 1960-1977, and the estimate that about twenty-five percent of unmarried women between 25 and 39 are living with a partner, and about fifty percent have done some at some time in the past, while over 50% of marriages are preceded by cohabitation).

362. See Ann L. Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1386-87 (20-01) (providing a broad-based and comprehensive survey of current population patterns of cohabitation).

363. *Id.* at 1387-88.

364. See *id.* at 1388.

365. *Id.* at 1381-82 (noting that in the end of her lawsuit to recover from a cohabitating partner, Michelle Triola Mitchell received nothing from the actor Lee Marvin, and ended up in a similar relationship with actor Dick Van Dyke).

fundamental right *not* to marry,³⁶⁶ and a scheme that would impose the duties of marriage against the express wishes of one of the parties seems to contradict that value. Given this countervailing value, the question is whether the law should protect the right of a more powerful partner to say "no" to a legally binding relationship, thereby benefiting from an intimate relationship while essentially remaining free from any of the duties. More directly, has the traditional law been just in imposing such a duty upon only the less vulnerable and perhaps less business-savvy partner to bargain for legal protection at the inception of an intimate relationship? Such a requirement effectively forces all intimate relationships into an 'arms-length,' 'buyer-beware' dynamic that may not reflect the social ideals we have for committed relationships. The 'palimony' cases essentially resolve this problem by adopting the contract model for resolving nonmarried partner disputes.³⁶⁷ This model virtually concedes that the more powerful partner is entitled to get all of the benefits with none of the duties if he can use his bargaining strength to achieve these results, while remaining open to reading an ambiguous situation as a contract.³⁶⁸

A third likely reason that people do not follow attestation procedures, including marriage, is that they are afraid of the implications of a long-term commitment. For them, a commitment to a small change in the status quo is likely easier to handle than a promise to surrender their autonomy in perpetuity to a predetermined legal list of some serious responsibilities. To expect that household members will flock to follow attestation procedures that entail long-term legal interdependence among cohouseholders may be especially unrealistic given the social cues that individuals should wait for the perfect partner before constituting a nuclear household.

Where one person has enough bargaining power to achieve the benefits of intimate relations without giving up anything and where people are afraid of the long-term implications of their commitments, the current system of elevating personal choice as the exclusive value that defines the legal household seems both unfair and unwise. Most human relationships are an amalgam of

366. See BARTLETT & HARRIS, *supra* note 138, at 670.

367. Estin, *supra* note 362, at 1391-95 (noting that while some states provide more equitable division of property under partnership or common law marriage theories, provide very limited contract-like remedies).

368. *Id.*

dependence and independence; they have a history that is entitled to be honored down the road when one cohouseholder decides to dissolve any household, even if that history becomes only one factor in legal decisions about dividing up the household.³⁶⁹ Moreover, as I have previously suggested, the problem of establishing and disestablishing a legal household is not an evidentiary problem: it is possible through a number of coordinating means to establish that a legal household was intended without completely scrapping intention as a necessary factor in creating a legally binding household relationship.³⁷⁰

To the objection that Good Samaritans who take people into their homes might be unfairly 'stuck' with legal obligations under a *de facto* rule, it is possible to easily protect those who clearly do not wish to be bound to those living with them. Just as attestation procedures, such as domestic partnerships, can establish cohouseholders' intention to form a household, a legal 'reverse attestation' procedure can be made available for those who want to preclude such a possibility.³⁷¹ That is, individuals can preserve their freedom and avoid the acquisition of legal duties by filing attestations stating that they do not wish to be considered members of a household with others with whom they live. These reverse attestations could also be subject to the same notice and service of process requirements that civil and criminal complaints are subject to. A simple email to the appropriate state agency, for example, would suffice if properly noticed and served to the other members of the household. In cases where both parties indeed would consider themselves just 'roommates,' such an attestation should cause no burdensome household difficulties.

However, if the parties have very different views about their responsibilities to each other, the benefits of a reverse attestation procedure would be multiple. First, they will force intimate partners who may be blinded by romantic considerations into realistically taking stock of their need to protect themselves legally. For example, if Lee Marvin had been required to file an attestation that he was not obligated to support and share his property with Michelle Triola Mitchell before he could escape liability for any *de facto* household relationship he had created by his conduct or oral

369. See generally Woodhouse, *supra* note 21 (urging that an expanded definition of kinship be used to identify legal rights and responsibilities).

370. See ESKRIDGE, CIVIL UNIONS, *supra* note 45.

371. See *id.* at 25, 123.

representations, Michelle would have had clear notice that he did not intend to undertake any obligations to her.³⁷² Even those in a romantic fog about their partners would find it difficult to ignore such a clear indication of present noncommitment, and would likely be spurred to negotiate a mutually consensual arrangement or find a more committed partner. Moreover, the courts would not be faced with the inevitable task of determining whether an oral express or implied contract of support was made, as in the *Marvin* case.³⁷³

Indeed, there is an element of fairness in requiring the party who wishes to get the upper hand in a loving relationship to declare his intention to do so. Any domestic partner tempted to exploit the trust and love of his housemate by an oral or implicit commitment would bear the burden of either confessing his real designs or being saddled with the responsibilities that accompany the benefits of trust relationships. Similarly, those who currently fail to marry or file domestic partnerships because they fear what future obligations they would have to undertake would be forced to articulate to themselves (and explain to other household members) the reasons they did not want to make such a commitment.

However, some households will fail to file either an attestation that they wish to be recognized as households, or one that they do not. To protect the rights of household members not to become legally bound as 'family' to their cohouseholders, the requirements for establishing a *de facto* household where neither formality has been observed can be made stringent enough so that only those households would be legally recognized where there was no significant doubt that the intention to form a relatively permanent household existed.

*Braschi v. Stahl Associates*³⁷⁴ established factors for determining when a gay couple was the equivalent of a family, and common law marriage cases provide examples of how a legal regime can investigate many factors to ensure that members intended a household commitment, and can justly be legally bound to each other.³⁷⁵ *Braschi*, for example, looked at "the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their

372. See Estin, *supra* note 362, at 1381-82 (discussing *Marvin v. Marvin*).

373. *Id.* at 1395-96 (noting difficulties plaintiffs are encountered in proving such contracts.)

374. 543 N.E.2d 49 (N.Y. 1989).

375. See Stuart J. Stein, *Common Law Marriage: Its History and Certain Contemporary Problems*, 9 J. FAM. L. 271 (1969).

everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services."³⁷⁶ The *Braschi* court also laundry-listed the numerous practical ways in which financial and similar interdependence can be established.³⁷⁷ Similarly, common law marriage statutes and cases have been both rigorous and flexible in finding a common law marriage. For example, Texas' common law statute, even though grudgingly applied in particular cases, has essentially required only proof of public representation that the parties are married and cohabitating, which allows an inference of an agreement to marry, the third requirement of the law.³⁷⁸

Permitting a course of conduct to establish household members' intent to be economically dependent should be a more equitable means of determining their actual choices than asking them at either the inception or the dissolution of a relationship. Ideas about commitment at the beginning of a marriage are likely to be unrealistic and relatively shallow, because it is impossible to imagine the actual depth and dependency that grows in the course of an ongoing relationship. This is true not only where romantic or sexual relationships are involved — long-term friendships similarly take on depth and dependence that is almost imperceptible until they are disrupted or challenged.

Similarly, at the moment of a relational break-up, both partners' retrospective views of their historically intended commitments to each other are likely to be grossly distorted by anger and self-justification. Typically, each party will try to take as much as he possibly can out of the relationship, once the commitment to the other's welfare has been so brutally cut off. For the law to recognize either the moment a relationship starts or the moment it ends as an accurate reflection of a couple's intentions would be a false reflection on the nature of the commitment over time, indeed at the time when

376. *Braschi*, 543 N.E.2d at 55.

377. *Id.* (noting multiple forms of proof that the surviving partner was able to produce about his coresidency, including driver's license, passport, and mail address; knowledge of the relationship by building staff, and statements made to family and friends. Moreover, the survivor was able to show significant financial interdependence: a joint household budget, joint safe-deposit boxes, joint checking and savings accounts, and joint credit cards. He could also produce a power of attorney for the decedent's financial, medical and personal matters, for him during his illness and evidence that he was the chief beneficiary of the decedent's life insurance policy, as well as the primary legatee and executor of his estate).

378. See Kathryn S. Vaughn, Comment, *The Recent Changes to the Texas Informal Marriage Statute: Limitation or Abolition of Common Law Marriage?*, 28 HOUS. L. REV. 1131, 1151 (1991).

most of the resources were actually being accumulated, which would seem to be more relevant intentions. Yet, that is what current palimony law, antenuptial agreements and to a lesser extent, divorce laws essentially do.

Moreover, as *Braschi* suggests, a key criterion that legislators or common law courts can employ to draw the line between people living together and legal households is the longevity of the arrangements.³⁷⁹ Both common law marriage regimes and emerging cases allocating property and support obligations between nonmarital partners have found it useful to employ the presumption that longevity is key to establishing the intent to make deep economic and social commitments of a kind similar to marriage.³⁸⁰

While there are certainly counterfactuals, cases in which long-term households do not in fact function interdependently and yet remain in the same living quarters, the same can be said for some marriages, in which the parties lead separate financial and social lives for most of the existence of the marriage. Indeed, in order to spare the confusion of case-by-case judicial determinations, there is no reason why a minimum longevity requirement could not be required by public regulation or benefits programs for legal households, or that courts could not employ a longevity presumption in adjudicating rights between sparring cohouseholders.

Even in the case of the least urgent resource division matters, such as inheritance rights, moving to a household concept may be a better means of truly effectuating the intent of the property owner over time. Professor Foster has documented the ways in which the legal presumption in favor of blood relatives in inheritance disputes not only unjustly enriches those blood relatives with tenuous links to the deceased, but also deprives those truly important to the deceased of both necessary support and rewards for the contributions that they have made to the deceased's life.³⁸¹ The classic case of human indecision in legal matters, which proves the rule that formal attestation alone is insufficient to guarantee legal autonomy, is the widespread failure of individuals to make wills.³⁸²

379. *Braschi*, 543 N.E.2d, at 211.

380. See, e.g., *id.* at 55. Typically, common law marriages were established when a couple had lived together and held themselves out as married for a period of years, even though that was not a formal requirement of common law marriage. See Bowman, *supra* note 21, at 713, 758-59.

381. See Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 203-210, 270 (2001).

382. See Bruce H. Mann, *Essay: Formalities and Formalism in the Uniform Probate Code*,

It is doubtful that people do not make wills because they do not care about exercising their autonomy over what happens to their property after their death. Rather, it is more likely they do not make wills because human choice making is more complex than the legal model presupposes, and, in the case of inheritance, includes much psychological denial of the death that precipitates an inheritance dispute.³⁸³ Yet, inheritance law continues to deny the reality of denial, by indulging in the presumption that blood relatives must have been the natural objects of the deceased's bounty, even where a testator's history would clearly suggest that nonrelatives householders or even friends are more 'like family' to him than his own family.³⁸⁴

Finally, some persons who have made harmonious private, nonwritten arrangements and not public, formal agreements simply do not anticipate the need for legal protection until it is too late — until the relationships have reached such a stage that one or both parties are unlikely to assent to the assumption of duties because of discord. Again, however, to the extent that support and property division disputes relate to the period between inception and demise of a household, what occurs between those two points, as people live and interact in a household, is far more likely to be an accurate reflection of their intentions for the great bulk of the relationship than what they are feeling at its beginning or end. At this point, the accumulation of extrinsic evidence should be telling: for example, two individuals who really are just roommates are unlikely to be pooling income, purchasing property jointly on a regular basis, supporting each other's children, signing each other up for employee benefits, and so forth; while individuals who plan a more long-term and perhaps permanent, commitment likely will do these things if they are provided some legal security for their willingness to become interdependent.

Children's Security and Social Nurturance

As suggested, one key agreed-upon emphasis in the discussions over covenant and gay marriage has been the role of the legal family in raising children. Both advocates and detractors argue that absent a loving, stable family life, preferably with more than one adult who

142 U. PA. L. REV. 1033, 1052-53, n.72 (1994).

383. *Id.*

384. See Foster, *supra* note 381, at 257-59.

takes responsibility for the family's children, children are at risk for any number of destructive behaviors both as adolescents and later in life.³⁸⁵ Advocates of gay marriage argue that this is precisely one of the reasons that the legal institution of marriage should be extended to lesbian and gay couples, while opponents argue that such couples represent poor prospects for the healthy development of children.³⁸⁶

Similarly, advocates of covenant marriage argue that children are much more likely to grow up to be secure and competent adults if their parents must make extraordinary efforts to obtain a divorce.³⁸⁷ Covenant marriage opponents argue that the covenant marriage form simply holds unstable and destructive families together, when a single-parent household would in fact be less chaotic and destructive for the family's children.³⁸⁸

However, the same-sex marriage debate has produced considerable evidence on at least one point: that preservation of the emotional security and the socialization of children can also be served by other household arrangements, including domestic partners, extended families, intergenerational families, and even unrelated adults taking responsibility for children.³⁸⁹ While there may be legitimate debate on the relative value of biological parents rather than adoptive or unrelated adults caring for their children, it seems increasingly clear that no matter what pressures the law imposes on individuals to stay married and care for their own children, many will not be willing or able to do so.³⁹⁰ Indeed, noncustodial fathers risk jail time every day to avoid support orders, which are one of the least onerous forms of taking responsibility for the upbringing and socialization of children.³⁹¹

If some children will not have a married father and mother or a committed same-sex couple raise them despite the many social and economic pressures on parents to stay married, what purpose

385. See, e.g., ESKRIDGE, CASE, *supra* note 45, at 112-113; Wald, *supra* note 45, at 300, 321-22.

386. See, e.g., ESKRIDGE, CASE, *supra* note 45, at 112-113.

387. See Sanchez et al., *supra* note 211, at 6.

388. See *id.*

389. See, e.g., Barnes, *supra* note 43, at 455 (discussing augmented families); Bengston, *supra* note 117, at 9-10 (discussing intergenerational families); Erera & Fredriksen, *supra* note 44, at 263 (discussing lesbian families).

390. See, e.g., NATIONAL CENTER FOR HEALTH STATISTICS, 43% OF FIRST MARRIAGES BREAK UP WITHIN 15 YEARS, at <http://www.cdc.gov/nchs/releases/01news/firstmarr.htm> (last visited Jan. 25, 2004).

391. See, e.g., U.S. Dep't of Health & Human Services, *Chronic Child Support Defaulters Arrested in Nationwide Sweep*, at www.hhs.gov/news/press/2002pres/20020731b.html.

would government serve by denying those adults willing to form a household to raise such children legal protections on the same terms as it provides to married parents? To the extent that the government wishes to encourage families to stay together, it would seem to be operating based on a logical fallacy. If marriage is the most solid foundation on which to build stability and security for children, then providing additional support to that foundation while denying it to other, more fragile household forms raising children seems at least counterintuitive.

Similarly, if children know that they can count on the adults who have raised them to continue to care for them, and that the law will intervene to ensure that those adults keep such commitments to them, they are more likely to pass on the stability and security they have experienced to a new generation. If nonmarried adults in a household know that the law will hold them jointly responsible for the care of children, each person is more likely to embrace the responsibility to meet the child's real needs. For example, the legal recognition of the household as engendering duties to all of its members is more likely to enable one adult to forego earning income in order to protect against a future cohouseholder's exit, which would provide more time to spend caring for the children in the household.

Moreover, as with marriage, legal recognition of rights and duties among household members can forge trust and lower the anxiety accompanying relationships where expectations are less clear, resulting in more attention to the children's long-term needs rather than the adults' immediate emotional concerns. If indeed more adults in the household creates a better childhood, then a household concept of determining rights and duties owed to children is more likely to result in a network of adults, biologically related or not, caring for and continuing to have contact with children over time.

Such a move does not necessarily require abandonment of a presumption in favor of a biological or adoptive parent when disputes arise. In the case where children are not being raised by their original parents, the use of the legal household as the operating legal concept simply provides more protection for adult household members' responsibilities and rights to raise such children against the outside world, without demanding that such persons fight for their rights by creating guardianships and other legal forms.

By contrast, where a biological or adoptive parent is one of the disputing parties, and the existence of an economic and socially interdependent household has been established, family courts may simply make a somewhat less absolute presumption in favor of total control by the biological or adoptive parent. Whereas the nuclear family model has, until recently, excluded nonparents (even grandparents and stepparents) from any rights to the custody of the child in the case of a dispute unless the biological or legal parent makes serious parenting errors,³⁹² a household model may require the legal parent, for example, to justify her refusal to allow nonparent cohousholder visitation or consultation on important matters involving the child.

Substituted Autonomy

The current legal nuclear family also provides for decisions on behalf of children and the mentally incompetent, and in some cases, physically disabled adults. Yet, the nuclear family model excludes many household members, including intimate partners, from serving as substitutes to exercise decision-making authority on behalf of an adult who cannot exercise her own authority for a host of decisions such as medical care and the right to receive visitors in the hospital.³⁹³ Absent any preregistered wish by the incompetent person through a medical power of attorney or living will, generally members of the incompetent person's nuclear family are designated first to make the medical decisions for him, with a pecking order established in the case of serious conflicts that may arise, such as withdrawing life support.³⁹⁴ The same holds

392. See, e.g., Young, *supra* note 210, at 519-20 (noting the exclusion of unwed fathers and stepparents in the case of disputes). But see John DeWitt Gregory, *Defining the Family in the Millennium: The Troxel Follies*, 32 U. MEM. L. REV. 687, 718-24 (2002) (noting the uncertain status of statutes permitting grandparent or third-party visitation statutes after *Troxel v. Granville*, 530 U.S. 57 (2000), which invalidated a grandparent visitation statute as violative of a parent's fundamental rights to make decisions regarding their children).

393. See, e.g., T. P. Gallais, *Aging and the Nontraditional Family*, 32 U. MEM. L. REV. 607, 621-22 (2002) (noting that the Uniform Health Care Decisions Act of 1993 provides for non-family members to make such decisions, but only if none of the designated family members are "reasonably available.")

394. *Id.*

true for substituted judgment on behalf of children, although in these cases, the legal model is sometimes 'best interests' rather than 'substituted judgment'.³⁹⁵

In decisions for the incompetent adult, the abundance of medical ethics reports on familial medical decision conflicts suggests that simply substituting the judgement of identified family decision makers such as spouses, children or parents does not obviate familial conflict or make the decision any easier.³⁹⁶ In these cases, experience has proven that the nuclear family paradigm is, once again, both over-inclusive and under-inclusive. By providing for automatic default to a spouse, parent or child if the patient is incompetent and cannot convey his wishes on these matters, the law often places key decisions in the hands of persons whose own needs often overwhelm their ability to identify what choices the incompetent person would make. Children's guilt or anger at dying parents may cause them to needlessly prolong biological life or end it early even in cases where it is questionable that their parent would have made the same choice.³⁹⁷ Spouses faced with the overwhelming burden to care for an incompetent person or the sense that the patient's loss of life is their own may be less able to objectively identify the patient's wishes than a friend or other family member, even if the spouse knows the patient better.³⁹⁸ Moreover, as cases such as Sharon Kowalski's attest, those who live in a household with the deceased may know his or her current wishes on these matters better than a blood relative such as a parent who is depending on a (perhaps distorted) historical memory of the child to make medical decisions.³⁹⁹

An ideal legal regime would put force individuals to express their wishes through living wills or formal documents conveying medical power of attorney. However, it would also call for a more flexible legal inquiry about with whom the proper locus of decision-making authority rests if the patient defaults on his responsibility

395. Ardath A. Harmann, *Family Surrogate Laws: A Necessary Supplement to Living Wills and Durable Powers of Attorney*, 38 VILL. L. REV. 103, 117 (1993) (discussing the best interest test).

396. *Id.* at 151-52 (noting conflicts within families and between families and health care providers).

397. *Id.* at 150.

398. *Id.* at 164-65.

399. See, e.g., David Link, *The Tie That Binds: Recognizing Privacy and the Family Commitments of Same-Sex Couples*, 23 LOY. L.A. L. REV. 1055, 1134-39 (1990) (discussing the Kowalski case and the problem of determining her wishes)

to name a decision maker, including consulting and perhaps even designating a cohouseholder of long standing who may know the patient's desires and needs more intimately than those who do not live with the patient. Such a regime stands at least an equal chance of preserving a patient's autonomy and minimizing conflict between affected parties as a strict regime that identifies decision makers only by blood or marriage.

CONCLUDING THOUGHTS

It is incumbent upon anyone proposing such a significant legal change to enumerate its possible drawbacks, some of which I have previously outlined and attempted to refute. However, it is also important to acknowledge what tradition tells us, insofar as it is a significant factor in determining whether such a legal change is viable. Despite the fact that the household has functioned as a key organizing social principle in many cultures, it is only honest to acknowledge that the key legal relationships in most traditional households were those based on marriage and blood ties, that is, the 'so called' extended family.⁴⁰⁰ As discussed, the relationships within the blood family were not the only ones that counted, but surely, these relationships counted most significantly in the legal organization of private life.

However, it is important to place this fact in some context. Until the modern age, the key legal relationship of interest was the real property relationship. Classical contract law, understood as recognizing the intentions of the parties, did not become a significant aspect of legal ordering of relationships until the nineteenth century,⁴⁰¹ and the legal regulation of commerce beyond contract is a development of the twentieth century.⁴⁰² Contractual ordering of family law is a fairly recent development.

It is perhaps not surprising that family law and property law were effectively the same body of law prior to the nineteenth century, given two distinct differences between the modern construction of the family and its pre-modern construction. First,

400. See *supra* Part II.

401. See Jay M. Feinman, *Critical Approaches to Contract Law*, 30 U.C.L.A. L. REV. 829, 831-33 (1983) (noting that before that time, "contractual obligation arose not solely or even principally from agreement, but from implied community standards of behavior").

402. See, e.g., *id.* at 829 n.1, 836-37 (noting that modern contract law emerged from the adoption of the Uniform Commercial Code in 1960).

pre-modern societies understood that social life was maintained by linear historical continuity, that is, by ensuring stability in social forms from one biologically-linked generation to another.⁴⁰³ The bloodline model of social construction was the easiest way to accomplish the transfer of a stable social structure from one generation to the next, since it was arguably simpler in an earlier age to identify who was in one's blood family. Second, the key legal need in pre-modern societies was to protect transfers of real property, because all economic production was tied to land. Generally, the key value that property law served was to ensure that real property holdings remained intact in sufficiently large 'chunks' to make agricultural life economically viable.⁴⁰⁴

In modern societies, neither of these factors are present; indeed, they are virtually beyond the imagination of ordinary persons. Almost no modern Western societies are organized around the principle that continuity of social organization from one generation linked by blood to the next is vital to the maintenance of social stability.⁴⁰⁵ Indeed, we might say that the twentieth century disrupted any notion that Western families would carry on the traditions of forebear generations, in favor of the expectation that each succeeding generation would live radically different lives and would have dramatically different occupations than the family generation preceding it.

Moreover, real property has arguably receded as the central organizing principle for the creation and transmission of wealth. In the Western world, relatively fewer people participate in long-term real property economies. For example, in the United States, only about two percent of those working are employed in the agricultural sector.⁴⁰⁶ An adult who succeeds even one previous generation on the farm is even becoming unusual; it is uncommon to find a farmer who can trace his family's holdings back more than two generations.⁴⁰⁷ In urban areas, this disruption of the relation

403. See, e.g., Barbara R. Hauser, *Born a Eunuch? Harmful Inheritance Practices and Human Rights*, 21 L. & INEQ. 1, 12-14 (2003) (discussing the importance of the law of primogeniture in preserving the family line).

404. *Id.* at 13-14.

405. *Id.* at 14 ("Primogeniture was abolished early in the history of the United States...").

406. See U.S. Dep't of Agriculture, *States Farm and Farm-Related Employment, 1997*, at http://www.ers.usda.gov/Data/FarmandRelatedEmployment/ViewData.asp?GeoAreaPick=STAUS_united%20states&YearPick=1997 (last visited Jan. 25, 2004).

407. See, e.g., Val Farmer, Saskatchewan Soil Conservation Association, *Stewardship of the Farm and Family*, at <http://www.ss-ca.ca/1999proceedings/Farmer.html> (last visited Jan. 25, 2004) (describing why children do not choose to succeed their farmer parents and proposing

between real property and family continuity is even more pronounced, for example, it is a rarity to find anyone who admits to living in his great grandparents' house.

Thus, the chief reasons for aligning legal rights with bloodline families have largely dissipated, while the need for more diverse forms of household support and resource-sharing has increased. Indeed, we might identify a reverse correlation between the need for a large household and the wealth of the chief householder. Whereas in ancient and medieval times, the smaller nuclear family was more often located among the poorer classes because they did not have the resources to support an extended household,⁴⁰⁸ in a postmodern technological market-based era, in which work and money are separated from one's 'personal life,' single persons are more likely to successfully maintain economically viable units than larger groups of people, especially those with only one adult capable of holding down a traditional full-time job.⁴⁰⁹ Thus, the need for a concept of the household as the key organizing principle in the private sphere of the *oeconomia* is more severe lower down the socioeconomic ladder.

Second, the most immediate objection to changing from the nuclear family to the legal household as the primary building block for legal rights is that it violates the basic legal preference for incremental over revolutionary change.⁴¹⁰ This concern recognizes not only the economic costs of rebuilding statutory and common law around a new model, but the social costs entailed when dominant groups lose privileged status to nondominant or visible groups in society. As evidenced in the Civil Rights movement, the social costs of granting even symbolic parity between subordinate and dominant groups are severe. In addition to the widespread emotional sense of impending social chaos, change of paradigms forces individual

some solutions).

408. See David I. Kertzer & Caroline Brettell, *Advances in Italian and Iberian Family History*, in *FAMILY HISTORY AT THE CROSSROADS: A JOURNAL OF FAMILY HISTORY READER* 91, 92 (Tamara Haraven & Andrejs Plakans eds., 1987).

409. See U.S. CENSUS BUREAU, *Table No. 660: Money Income of Families-Distribution by Family Characteristics and Income Level: 2000*, STATISTICAL ABSTRACT OF THE UNITED STATES, 437 (2002).

410. Hon. Russell M. Nigro, *Emerging Issues in State Constitutional Law, Forward: The Importance of Interpretive Theory in State Constitutional Law*, 73 TEMP. L. REV. 905, 908 (2000) ("Courts 'are cautious and reflective, if not by nature, then by nurture; legal education is respectful of precedent and favors incremental changes' over revolutionary modifications in the law.") (citing Boris I. Bittker, *Interpreting the Constitution: Is the Intent of the Framers Controlling? If Not, What Is?*, 19 HARV. J.L. & POL'Y 9, 51 (1995)).

renegotiation of human relationships at all levels of social life. As both the African American and gay rights movements have painfully illustrated, these costs are measured in many ways: violence against the subordinated group; backlash movements against social equality that attempt to reinstate norms and social relationships that predate present arrangements; interpersonal and intergroup suspicions and stereotyping; and more incidents of personal discrimination as individuals from dominant groups sense threat from their neighbors' new status.⁴¹¹

The change from the family concept to the household concept presents all of these potential threats. It is quite possible that threatened dominant groups will attempt to reach back into a historical past to restore norms and relationships that existed in an imagined time of social stability and perfection. Yet the move from the nuclear family concept to the household concept is not without precedent nor is it a revolutionary concept in Western history or even American life. As suggested, many federal statutes are recognizing the new realities and moving incrementally to the household as their key legal organizational concept.⁴¹²

One must also respond to the argument that such a change is unnecessary, since virtually all household legal arrangements may be created by contract if people want to deviate from the nuclear family model. Same-sex marriage advocates have constructed a fair piece of their argument on equality principles: excluding gay and lesbian couples from marriage is unfair because of the vast number of legal relationships dependent upon spousal relationship.⁴¹³ In rebuttal, however, critics of same-sex marriage such as Prof. Collett have argued that these claims are overstated, implying that many of the rights and responsibilities that heterosexual married couples enjoy can be duplicated by other legal arrangements.⁴¹⁴

In my view, as with those who argue for the extension of marriage to gay and lesbian couples,⁴¹⁵ this argument understates

411. See Elizabeth Martinez, *Beyond Black/White: the Racisms of Our Time*, 20 SOC. JUST. 22 (1993) (arguing that backlash against the 1960s civil rights movement increased racism and increased tensions among racial and ethnic groups).

412. See *supra* Part III.

413. Mary N. Carnell, Note, *Extending Family Benefits to Gay Men and Lesbian Women*, 68 CHI.-KENT L. REV. 447, 447 (1992) ("Providing opportunities to obtain family status to person who live outside of traditional families is both equitable and worthwhile in advancing the goals traditionalists promote.").

414. See Teresa S. Collett, *Benefits, Nonmarital Status, and the Homosexual Agenda*, 11 WIDENER J. PUB. L. 379, 390-91 (2000); see also Collett, *supra* note 203, at 1265-69.

415. See, e.g., ESKRIDGE, CASE, *supra* note 45, at 66-70.

the relevant differences between statutory presumptions and contractual arrangements. In some cases, such as duties of financial support and limited rights to make decisions for others, including children, the chief value of marriage is that it becomes the automatic test for determining these rights and responsibilities. If one enters into a legally valid marriage, one need not do anything else to create the legal rights and responsibilities entailed by the institution.

Others, to achieve a comparable legal status, must carefully follow specific procedures for each right or responsibility they wish to create — for example, absent a civil union or domestic partnership law, lesbian and gay individuals who want to provide for comparable intestate protections for their partners must follow statutory will requirements to the letter in order to take advantage of this protection, whereas straight spouses are protected at least in part by intestate succession and taking against the will even if they do nothing. Similarly, if homosexuals want to create a right to make health care decisions for their partners, they must follow a quite different set of procedures.

The dual track for creating rights and responsibilities has little to say for it. It may have the advantage of ensuring that those who live in the same household for convenience do not inadvertently bind themselves to their house mates in significant ways. However, in a society that complains that individuals do not make commitments to others, it would seem more fitting to adopt a presumption of commitment rebuttable by those who do not intend one. Because this system should encourage reliance, it is preferable to the current presumption of noncommitment that must be rebutted by the partner who has relied.

Moreover, even in committed relationships, the requirement that each right be formally legalized in a separate proceeding discourages nonmarital partners from taking advantage of all the rights and protections potentially available to them, even if they intend to create a comprehensive legal relationship. Apart from the time and expense involved in identifying and legalizing each separate right and responsibility, the process of negotiation itself can undercut the relationship. Any person who has been involved in creating a prenuptial agreement can so attest.

When all questions of the relationship are contested, opportunities for intentional and even unintentional exertion of power over its terms in personally abusive and destructive ways are

enhanced, while the anxiety over the partner's true commitment to the relationship increases. This is particularly true in a contract setting, where vulnerabilities and emotions rather than dollars and cents are the main consideration and where there is more likelihood of lopsided bargaining positions, as in cases where one partner loves or needs the other more. As palimony cases, along with well known divorce and prenuptial lawsuits attest, quasi-contractual agreements among intimate partners exacerbate power differentials between the parties.⁴¹⁶

By contrast, the creation of a status relationship such as marriage that comes with a presumed 'package' of rights and responsibilities permits society some involvement in equalizing the relative power of the parties and spelling out expectations for a fair and just relationship. Yet, while status relationships, such as spouse-spouse, parent-child, and guardian-ward impose a long list of rights and responsibilities, they still give the parties considerable freedom to negotiate other terms of their relationship that arise out of its unique aspects, either formally or as they go along. Marriage may impose the right to support, but it does not impose duties for earning income or caring for the household or prescribe any level of sexual intimacy, things that are presumed to be better decided by the individual couple.

In other cases, the law makes it impossible for nonmarital partners to create comparable rights and responsibilities.⁴¹⁷ Most federal benefits inure to the nuclear family — spouse/spouse, parent/child. Even grandparents, aunts and uncles, or adult brothers and sisters, to survey one degree of relational separation, cannot take advantage of many federal benefits such as Social Security survivor's benefits restricted to the nuclear family. Once the very constrained way in which these federal programs limited benefits might have been justified by administrative convenience, because the dual spouse nuclear family described how most families were organized, but in an age in which less than a quarter of all households are organized in this manner,⁴¹⁸ the presumption seems ineffective as a means for protecting most social values.

416. Thomas J. Oldham & David S. Caudill, *A Reconnaissance of Public Policy Restrictions upon Enforcement of Contracts between Cohabitants*, 18 FAM. L. Q. 93, 115-17 (1984) (discussion of courts' response to unequal bargaining power among cohabitants).

417. Collett, *supra* note 203, at 379.

418. See POPULATION REPORTS 2001, *supra* note 26, at 3.

However, advocates of the traditional concept of marriage continue to argue for a legally preferential status for the married-couple nuclear family for normative reasons. First, they make the argument that marriage is intrinsically good, so that treating marriage as a qualitatively different from other relationships supports and affirms the continuity of that tradition and choice of those who enter into it.⁴¹⁹ Second, they make consequential arguments: just as good social policy encourages the rewarding of 'green' companies to push them to protect the environment, it represents good social policy to encourage and support nuclear families so that they stay together and accomplish the stabilizing functions that they accomplish, particularly in a society that is otherwise so fragmented and unstable.

Traditional marriage advocates make a point that bears serious consideration: evidence that a social practice has been continued throughout centuries and across cultures is a good indicator that it meets some basic human needs and results in some fundamental social goods, even if this is not a dispositive argument. We should take seriously, as gay marriage advocates do, that the practice of marriage should not be abolished simply because in some of its manifestations, or at times in its history, it has been oppressive or dysfunctional. This argument similarly supports gay advocates' claim that, absent compelling evidence that the values of marriage cannot be extended to their relationship, there is no reason to limit the practice of marriage to those traditionally enabled to participate in it.

While the nuclear family has been a core legal relation from time immemorial, it has not been the only legal relation that confers rights and responsibilities by law. The law can continue to support the marital relationship even while expanding the kinds of relationships that provide benefits meeting similar or additional public policy objectives. Indeed, the government should do so unless American public policy preferences favor increasing individualism and personal freedom; that would seem unusual considering the vast amount of literature and efforts that have gone into redefining communal space and responsibilities in the past thirty years. In fact one might argue that the past two centuries in which virtually all legal rights and responsibilities of private life are vested in the spousal-parent triad is the historical aberration, and the legal

419. See, e.g., *Session Two: Legal, Equitable and Political Issues*, 7 U. CHI. L. SCH. ROUNDTABLE 33, 46-47 (2000) (noting remarks of George Dent).

household concept is the normal practice in human community. Thus, for tradition's sake, we should be predisposed to utilize the household as the legal unit, even if the household is defined differently from age to age and culture to culture.

Moreover, there are fundamental political considerations that might militate against recognition of the nuclear family concept as the socially preferred or most valued unit of legal responsibility in the United States. In Establishment Clause cases such as *Lynch v. Donnelly*, Justice O'Connor effectively argues that government intervention that symbolically privileges groups with certain religious beliefs automatically splits the political community into 'insiders' and 'outsiders.'⁴²⁰ Not only are outsiders symbolically excluded from the polity, but they are discouraged from participating in its core life. Conversely, insiders come to understand themselves as a superior class entitled to special rights and privileges. Despite the equality that single people and other nonnuclear families enjoy in nonprivate areas such as work and politics, many if not most of them can describe with anguish the ways in which they are socially excluded, treated as invisible, and even looked down upon in the sphere of family life because they do not resemble nuclear families.

It is difficult to imagine what would justify the creation of two classes of citizens, nuclear families and all others, through law, unless nuclear marital families provide distinctive social benefits that other forms of family cannot mimic, even in a shadow form. The overriding need of societies to reproduce and raise children seems in no danger in an era in which over-population poses one of the greatest threats to the well-being of the world's inhabitants, and in which new technologies make reproduction possible in many ways.

Even if one concedes that the marital model may be the most humane form for performing the sexuality function of the family, the American family is called upon to meet many other human needs in which sexual intimacy is not a necessary component and which could be met as well, or even better, in the household concept than in the nuclear family concept. That is not to say that because the gulf between maleness and femaleness persists, there is no value in preserving and encouraging intimate relationships between males and females; for ethical reasons we cannot explore here, it

420. See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

may be a critical aspect of preserving our humanity. Simply put, these are not the only relationships that the law should encourage.

One more social point can be made in favor of the use of household as the key legal organizing principle. Both feminists and conservatives have decried the obsession that American culture has displayed in past decades over sexuality in the narrow sense of the word. Yet, a legal regime that focuses on sexuality, marital and otherwise, to define and lift up relationships as socially important contributes to that atmosphere. Restriction of marriage or civil unions as the legally defining relationship to only those areas of human life where sexual intimacy is truly important, while utilizing the household as the key legal organizing concept for all others, need not reinforce social understandings that sexual relations are largely private matters. It may rather empower individuals to enter any number of close companionate relationships without feeling pushed into creating sexual relationships to support them, or worrying about the perception that any close relationships they do have are sexual. Unburdening companionate relationships from these expectations is a critical social good in a society where human community is often said to be sorely missing.

There does, however, remain one significant advantage to marriage if the household becomes the main organizing concept for legal rights and responsibilities. Perhaps it is true that modern society has inverted the value to be served by the family, raising companionate, self-expressive and nurturing roles above the economic and intergenerational continuity roles it once served. If that is so, then taking much of the economic and social burden off marriage holds out the possibility that society can redefine the institution of marriage to reflect these non-material goods and hold individuals who determine to enter the institution of marriage to a more circumscribed set of expectations with respect to their status as married people, apart from their status as householders.

To the extent that bad marriages are driven by economic and social expectations, the pressure on people to marry for the wrong reasons will subside to some extent, as those expectations are moved into the legal paradigm of the household. Such a movement will permit both religious and secular communities to focus their attention on the ways that sexual, procreative, and intergenerational relationships preserve the human community, and provide appropriate encouragement and support for relationships that serve both individuals' interests in dignity and

growth, and social interests in preserving the marital family as a key unit for social flourishing.

Professor Woodhouse makes perhaps the most significant argument for adopting a legal form such as the household in place of marriage, in stories about people who have formed 'kinship' groupings not based on blood or legal ties. Reminding us of what Robert Frost so poignantly taught, she urges:

"home" is the place where there are people whose lives are "somehow" bound up with yours, where they "have to take you in" not because of what you can give or deserve, but because of who you "are" — your unique place in an interlocking network of individuals, families and communities linked by bonds of socially constructed kinship.⁴²¹

So, the bonds of the household concept are the interwoven threads of freedom and responsibility, where people can be chosen by the need of the others in the household to do the work of family as well as choosing their families, where each relationship of care is valued and none demeaned. This is a tradition that can birth a future from the past.

421. Woodhouse, *supra* note 21, at 576.