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## Registering Relationships

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# Registering Relationships

Erez Aloni\*

*Despite the dramatic changes in family structure in the past decades—including the unprecedented and skyrocketing number of families who live in nonmarital arrangements—marriage and marriage-mimic institutions remain the only legal options for the recognition of relationships. This regulatory regime leaves millions of Americans without the means to establish and protect relationship rights. This Article suggests that the legal issues arising from nonmarital relationships would be best addressed if more options for legal recognition of such relationships were offered. Accordingly, this Article presents the primary principles of a registration-based marriage alternative that is founded on contract: “registered contractual relationships” (RCRs). This legal institution would offer couples the option to sign—and deposit with the state—a contract defining the partners’ obligations and rights vis-à-vis one another and changing their status to that of “registered partners.” Registered partners would receive most of the rights and benefits that the state provides for married couples. Registration would not require a solemnization process nor any ceremonial or religious component and would provide an easy way to dissolve relationships in cases where couples do not have minor children.*

*This model enjoys the flexibility of contracts and the certainty of official registration. It promotes greater autonomy in family formation in two ways: it allows more choice among state-sanctioned mechanisms, and it allows people to design the terms of their relationships, rather than imposing the one-size-fits-all structure of marriage. The introduction of RCRs would have far-reaching legal and societal consequences. RCRs would provide a functional model for registration and termination of partnerships, offer an alternative that is not associated with marriage’s symbolism and that acts to reduce the harm that symbolism creates, and accommodate a wide range of family structures. At the same time, they would efficiently address the state’s need to regulate some aspects of relationships in the interest of avoiding and mediating conflicts and of encouraging couples to think about and negotiate their rights early in their relationships. The Article also looks at the success of the French Pacte Civil de Solidarité (PACS)—a model that resembles RCRs and provides important lessons to the United States.*

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## I. INTRODUCTION

For many American lawmakers—Republicans and Democrats alike—the solution to most of the problems that the American family faces is in encouraging more marriages. Indeed, “Marriage is the foundation of a successful society,” the United States Congress announced in 1996.<sup>1</sup> It is key to the family’s health, wealth, well-being, and stability, as well as the best environment to raise children. To support this policy, marriage is singled out as the only legal institution worthy for recognition of relationships. Hundreds of millions of dollars are invested in programs that aim to advance “healthy marriages and responsible fatherhood,”<sup>2</sup> a few states have enacted covenant marriage in an attempt to reduce divorce rates,<sup>3</sup> and social welfare programs are designed to penalize unmarried mothers.<sup>4</sup> But such a policy not only fails to convince some people to get married (as is evident from the skyrocketing number of nonmarital unions in the United States); it makes the situation of millions of people in nonmarital arrangements worse by leaving them outside the scope of state protection and recognition.

American scholars have come up with numerous proposals to correct these inequities.<sup>5</sup> One approach calls for the abolition of marriage and the adoption of a deregulation regime, in which couples

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1. *What Is HMI*, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://archive.acf.hhs.gov/healthymarriage/about/mission.html> (last visited Jan. 29, 2013).

2. Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 380-85 (2011) (describing federal and states measures to promote marriage).

3. See *infra* Part IV.C (discussing covenant marriage).

4. See Gwendolyn Mink, *Violating Women: Rights Abuses in the Welfare Police State*, 577 ANNALS AM. ACAD. POL. & SOC. SCI. 79, 79-83 (2001) (explaining how the Personal Responsibility and Work Opportunity Reconciliation Act penalizes unmarried women).

5. See generally Edward Stein, *Looking Beyond Full Relationship Recognition for Couples Regardless of Sex: Abolition, Alternatives, and/or Functionalism*, 28 LAW & INEQ. 345 (2010) (surveying three alternative approaches for full relationship recognition: abolition, the menu-of-alternatives approach, and functionalism).

would only use contracts to establish the obligations between themselves.<sup>6</sup> Another approach asks to impose quasim marital status on cohabiting couples upon fulfillment of certain behaviors.<sup>7</sup> Yet another would expand the menu of options for legal recognition of relationships to include various legal institutions that would recognize relationships.<sup>8</sup> But all these approaches, as currently constructed, de facto diminish people's choices among a variety of supportive and well-functioning state-sanctioned institutions for legal recognition of relationship.

This Article suggests that the legal issues arising from the prevalence of cohabitation and other nonmarital living arrangements would be best addressed if more options for legal recognition of various unions were offered. It argues that if policy makers genuinely care about strengthening the American family, the best way to do that is by offering an additional registration scheme—one that is different from marriage. This scheme needs to respond to and be suitable for the diverse family structures that already exist in the United States and their legal needs. Adopting such a model, this Article contends, would bring more people under the scope of state regulation and protection than the current legal regime does.

Accordingly, this Article presents the primary principles of a registration-based marriage alternative. It offers an innovative and sophisticated opt-in model based on contract. I call this model “registered contractual relationships” (RCRs). This legal institution would offer couples the option to sign—and deposit with the state—a contract defining the partners’ obligations and rights vis-à-vis each other and changing their status to that of “registered partners.” Registered partners would receive most of the rights and benefits that the state provides for married couples, such as the ability to sponsor your registered partner (even if it is a nonintimate partner) for admission to the United States. However, these couples would be able to choose which personal rights and obligations *between themselves* (such as visitation rights and end-of-life decisions) they want to designate. Registration would not require a solemnization process nor any ceremonial or religious component and would provide an easy way to dissolve the relationship in cases where the couple does not have minor children.

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6. See *infra* Part IV.B (explaining and critiquing the abolitionist approach).
  7. See *infra* Part IV.D (explaining and critiquing the functionalist approach).
  8. See *infra* Part IV.C (explaining and critiquing the menu-of-options approach).

This model enjoys the advantages of both worlds: the flexibility of contracts and the certainty of official registration. It promotes greater autonomy in family formation in two ways: it allows more choice between two state-sanctioned mechanisms (the RCR and marriage), and at the same time, it allows individuals to design the terms of their relationships, rather than imposing the one-size-fits-all structure of marriage. The plasticity of RCRs and the fact that couples set their degree of commitment mean that RCRs could be used by people in different stages of their relationships and in diverse types of families (including registration of nonromantic partners). For example, RCRs could be used by couples in their premarital stage and would include very few obligations between the partners; at the same time, it could serve as a “marriage without the name” for couples who want the commitment to each other but who reject marriage’s historical, patriarchal, or religious connotations.

The introduction of a competitive alternative to marriage based on a contract recognized by the state would have far-reaching legal and societal consequences. It would provide a functional model for registration and termination of partnerships, and it would offer an alternative that is not associated with marriage’s symbolism and acts to reduce the harm that symbolism creates. At the same time, it would efficiently address the state’s need to regulate some aspects of people’s relationships in the interest of avoiding and mediating potential conflict and of encouraging couples to think about and negotiate their rights early on in their relationships.

A real-life laboratory of RCR-like alternatives already exists in France and Belgium and provides an invaluable lesson for the United States. These marriage alternatives are different from civil unions in other countries in that they are not “marriage by a different name”; they are registered cohabitation.<sup>9</sup> The success of these alternatives is evident from, inter alia, the large number of opposite-sex couples who choose them over marriage. In France, the *Pacte Civil de Solidarité* (PACS) is open to both opposite- and same-sex couples; more than a million PACSs have been registered since the form’s 1999 enactment, with the number of registered couples increasing every year. In 2008,

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9. For the purposes of this Article, I use the terms “civil union,” “domestic partnership,” “civil partnership,” and “registered partnership” interchangeably. See generally Erez Aloni, *Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage*, 18 DUKE J. GENDER L. & POL’Y 105, 110-13 (2010) (surveying the different legal institutions for recognition of same-sex couples in the United States and Europe).

for instance, 146,030 PACSs were registered, as opposed to 265,404 marriages.<sup>10</sup>

The story of the PACS provides insight about the development of such legal change, the population that chooses to use it and their reasons, and the societal and legal implications of the change. While the PACS may have played a slight role in the decline in marriage rates, demographic data show that the total number of registered unions (that is, both marriages and PACSs) has increased. This growth is “explained exclusively by the success of the PACS civil partnership.”<sup>11</sup> Hence, this alternative registration, in fact, encourages unmarried couples, regardless of sexual orientation, to secure a better arrangement for themselves. While the PACS serves as a permanent alternative to marriage for some, it is a prelude to marriage for others, as evidenced by the fact that one of the primary reasons for termination of the PACSs is conversion to marriage.<sup>12</sup> The French experience also teaches that even if civil unions were originally conceived mainly for same-sex couples, societal views of civil unions are capable of changing dramatically.

While I recognize the deep differences between American law, society, and culture and those of the French, I suggest that adopting an RCR scheme is the functionally and politically optimal way to address the limitations of current law in the United States. The United States already has the necessary infrastructure: in the past two decades, sixteen states have created alternative registration forms, and some of them already make these alternatives available to opposite-sex couples.<sup>13</sup> But in order to be true alternatives, they need to be different from marriage; at the same time, they cannot be culturally inferior to marriage.

This Article is organized as follows. In Part II, I provide demographic statistics and a brief description of recent changes to the American family structure, followed by a more detailed survey of the various groups of unmarried couples and their reasons for not getting married. I suggest, in Part III, that the current legal system does not provide adequate protection to nonmarital couples. Part IV contains a survey of the current proposals for legal reforms—traditionalism,

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10. France Prioux & Magali Mazuy, *Recent Demographic Developments in France: Tenth Anniversary of the PACS Civil Partnership, and over a Million Contracting Parties*, 64 *POPULATION* 393, 408 & n.24 (2009).

11. France Prioux, Magali Mazuy & Magali Barbieri, *Recent Demographic Developments in France: Fewer Adults Live with a Partner*, 65 *POPULATION* 363, 379 (2010).

12. *See id.* at 376-77.

13. *See* discussion *infra* Part III.B.

abolition, functionalism, and the menu of alternatives—and in it I examine the shortcomings of each of these approaches. In Part V, I lay out a proposal for the RCR in general terms. Subsequently, I explore how the RCR promotes autonomy and gender equality as well as the weaknesses of the proposal; namely, I ask whether it is a practical proposal, whether the federal government would recognize such unions, and whether this scheme would be of any value in the absence of such federal recognition. Finally, I discuss the fact that Americans tend not to introduce contracts into their relationships and to value marriage for its cultural, religious, and historical significance. In Part VI, I present the main lessons from the French approach, followed by a brief conclusion.

## II. DEMOGRAPHICS AND SOCIAL SCIENCE OF NONMARITAL UNIONS IN THE UNITED STATES

In this Part, I give a brief overview of the statistics concerning nonmarital unions in order to show how prevalent the phenomenon is and how family structures have changed in past decades. I then examine the subgroups of couples in nonmarital unions and their different needs for legal recognition.

### A. *Changing Family Structure*

The United States, like other Western, first world countries, has experienced dramatic changes in family structure since the 1970s. Among these changes is the extraordinary rise in the number of unmarried couples, which has been accompanied by a decline in the number of marriages.<sup>14</sup>

Before the 1970s, cohabitation was not just rare and regarded as deviant, but was unlawful as a result of criminal sanctions against cohabitation as well as widespread laws criminalizing fornication.<sup>15</sup> Since the 1970s, however, these laws have been challenged as unconstitutional; some were struck down by state courts, some were repealed by state legislatures, and some are simply no longer enforced.<sup>16</sup> The United States Supreme Court decision in *Lawrence v. Texas* may mean that antiohabitation laws are no longer

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14. D'Vera Cohn et al., *Barely Half of U.S. Adults Are Married—A Record Low*, PEW RESEARCH CTR. (Dec. 14, 2011), <http://www.pewsocialtrends.org/2011/12/14/barely-half-of-u-s-adults-are-married-a-record-low/?src=prc-headline>.

15. See, e.g., CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 13-20 (2010).

16. *Id.* at 15-18.



constitutional,<sup>17</sup> but sixteen states still have laws against cohabitation or fornication, even if they are no longer enforced.<sup>18</sup>

In 2009 and 2010, for the first time since the United States Census Bureau started to collect census information a hundred years ago, the number of adults between the ages of twenty-five and thirty-four who were never married surpassed the number of married individuals.<sup>19</sup> The 2010 Census reported that, for the first time in history, married couples constituted fewer than one-half of all American households.<sup>20</sup> The 2011 Current Population Survey found that 7.6 million opposite-sex couples live in nonmarital arrangements.<sup>21</sup> As this option has become more popular, attitudes toward cohabitation, once negative, have changed tremendously, especially among youths.<sup>22</sup> Indeed, a 2010 survey found that nearly four in ten Americans say marriage is becoming obsolete.<sup>23</sup> While cohabitation was originally mostly popular among the less educated and less economically privileged, the practice has expanded to other segments of the population;<sup>24</sup> today, approximately 19% of cohabitating males in

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17. 539 U.S. 558 (2003) (striking down Texas's antisodomy provision as unconstitutional).

18. See, e.g., MISS. CODE § 97-29-1 (2012). Of course, the fact that the laws are not enforced does not make their existence insignificant, as they may still be used as weapons in custody battles and may make it more difficult to fight against discriminatory policies. See BOWMAN, *supra* note 15, at 20.

19. Mark Mather & Diana Lavery, *In U.S., Proportion Married at Lowest Recorded Levels*, POPULATION REFERENCE BUREAU (Sept. 2010), <http://www.prb.org/Articles/2010/usmarriagedecline.aspx>.

20. Sabrina Tavernise, *Married Couples Are No Longer a Majority, Census Finds*, N.Y. TIMES (May 26, 2011), <http://www.nytimes.com/2011/05/26/us/26marry.html>.

21. *More Young Adults Are Living in Their Parents' Home, Census Bureau Reports*, U.S. CENSUS BUREAU (Nov. 3, 2011), [http://www.census.gov/newsroom/releases/archives/families\\_households/cb11-183.html](http://www.census.gov/newsroom/releases/archives/families_households/cb11-183.html).

22. Barbara Dafoe Whitehead & David Popenoe, *Who Wants To Marry a Soul Mate? New Survey Findings on Young Adults' Attitudes About Love and Marriage*, in THE STATE OF OUR UNIONS 2001: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA 6, 10 (2001), <http://www.stateofourunions.org/pdfs/SOOU2001.pdf> (indicating that 43% of respondents to a national survey of 1003 young adults aged 20 to 29 answered that they believe cohabitating couples should receive government benefits); David Popenoe, *Cohabitation, Marriage, and Child Wellbeing: A Cross-National Perspective*, 46 SOC'Y 429, 429-30 (2009) ("In the past 25 years, the percentage of high school seniors who 'agreed' or 'mostly agreed' with the statement 'It is usually a good idea for a couple to live together before getting married in order to find out whether they really get along' has climbed from 45% to 64% for boys and 32% to 57% for girls.").

23. *The Decline of Marriage and Rise of New Families*, PEW RESEARCH SOC. & DEMOGRAPHIC TRENDS (Nov. 18, 2010), <http://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/6/>.

24. Steffen Reinhold, *Reassessing the Link Between Premarital Cohabitation and Marital Instability*, 47 DEMOGRAPHY 719, 719 (2010).

opposite-sex relationships earn more than \$50,000 a year.<sup>25</sup> More than 10% of female cohabitants in opposite-sex relationships earn more than \$50,000 a year, and more than 20% of them hold a bachelor's degree or have achieved a higher level of education.<sup>26</sup>

*B. Who Are They and Why Don't They Get Married?*

In order to craft a law that responds to the reality of current family structures and to assess the suitability of the current legal regime, we must know the population whose interests are at stake and what its legal needs are. Who, then, are the people who live in nonmarital unions in the United States? It is important, first, to emphasize that cohabitation is a heterogeneous practice, existing among different ethnic groups, cultures, age groups, and socioeconomic classes (and different from one individual to another), and that the reasons for it vary. Obviously, there are intersections among these characteristics—that is, some people belong to more than one group.<sup>27</sup> An overview of the body of knowledge on this subject, which has been collected by social scientists and demographers, exceeds the scope of this Article. For the purposes of this Article, it is sufficient to briefly introduce the main groups of people in nonmarital unions.<sup>28</sup>

Generally, people who cohabit in the United States do so for a relatively short period of time; more than 50% of such unions last only two years on average, after which the couples marry or separate.<sup>29</sup> Although one-half of first-time cohabitants expect to marry within three years,<sup>30</sup> 40% end their relationships within five years of moving

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25. *America's Families and Living Arrangements: 2011*, U.S. CENSUS BUREAU tbl.UC3 (Nov. 2011), <http://www.census.gov/population/www/socdemo/hh-fam/cps2011.html>.

26. *Id.*

27. Julie A. Phillips & Megan M. Sweeney, *Premarital Cohabitation and Marital Disruption Among White, Black, and Mexican American Women*, 67 J. MARRIAGE & FAM. 296, 297 (2005).

28. For an excellent and extensive review and analysis of cohabitation in the United States, see BOWMAN, *supra* note 15, at 125-69.

29. Sheela Kennedy & Larry Bumpass, *Cohabitation and Children's Living Arrangements: New Estimates from the United States*, 19 DEMOGRAPHIC RES. 1663, 1673 (2008).

30. PAULA Y. GOODWIN, WILLIAM D. MOSHER & ANJANI CHANDRA, U.S. DEP'T OF HEALTH & HUMAN SERVS., PUB. NO. 2010-1980, MARRIAGE AND COHABITATION IN THE UNITED STATES: A STATISTICAL PORTRAIT BASED ON CYCLE 6 (2002) OF THE NATIONAL SURVEY OF FAMILY GROWTH 1, 3 (2010), *available at* [http://www.cdc.gov/nchs/data/series/sr\\_23/sr23\\_028.pdf](http://www.cdc.gov/nchs/data/series/sr_23/sr23_028.pdf).

in together and without getting married.<sup>31</sup> Roughly 10% stay together as unmarried couples for more than five years.<sup>32</sup> Despite the short duration of these relationships, around 50% of cohabiting couples pool their incomes to some extent.<sup>33</sup> Many cohabitants raise children together, and in 2008, almost 4.2 million children lived in households headed by unmarried, opposite-sex couples.<sup>34</sup>

The largest group of unmarried couples is comprised of those in premarital cohabitation arrangements: couples who live together with the intention of getting married and want to examine their relationship before doing so.<sup>35</sup> Today in the United States, cohabitation precedes over two-thirds of all first marriages,<sup>36</sup> and one-half of women between the ages of fifteen and forty-four who have ever been married cohabitated at some point before marrying.<sup>37</sup>

The second largest group of cohabiting couples in the United States is divorced people.<sup>38</sup> In 2007, more than one-fourth of cohabiting couples were both previously married, and in about one-half of cohabiting couples one partner was divorced.<sup>39</sup> Within this group, the reasons for cohabitation are clear: many are wary of marriage after experiencing an acrimonious divorce and would like to do a better job of screening their new partners.<sup>40</sup>

Another prominent group of cohabiting couples in the United States is older adults. Based on the 2000 Census, it has been estimated

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31. Pamela J. Smock, *Cohabitation in the United States: An Appraisal of Research Themes, Findings, and Implications*, 26 ANN. REV. SOC. 1, 3 (2000).

32. *Id.*

33. BOWMAN, *supra* note 15, at 138-39.

34. *Id.* at 159. This Article does not offer a sustained examination of child-rearing, nor its correlation to adults' reasons to get married or to organize their lives in other ways (contract or alternative registration). This is not because children's or their caretakers' needs are less important. Rather, when it comes to legal issues related to children that stem from their parents' status—like parental presumptions, I am in favor of functional family law that provides these rights and protections equally, regardless of the parents' status. In addition, a large part of the population that would be presumed to use RCRs are people in premarital relationships, elderly, and friends without mutual children. Issues relating to children are of less interest to some people in this population.

35. *E.g.*, GOODWIN, MOSHER & CHANDRA, *supra* note 30, at 2.

36. Daniel T. Lichter, Richard N. Turner & Sharon Sassler, *National Estimates of the Rise in Serial Cohabitation*, 39 SOC. SCI. RES. 754, 755 (2010).

37. Anita Jose, K. Daniel O'Leary & Anne Moyer, *Does Premarital Cohabitation Predict Subsequent Marital Stability and Marital Quality? A Meta-Analysis*, 72 J. MARRIAGE & FAM. 105, 106 (2010).

38. *See* Xiaohe Xu, Clark D. Hudspeth & John P. Bartkowski, *The Role of Cohabitation in Remarriage*, 68 J. MARRIAGE & FAM. 261, 261 (2006) (“[P]ostdivorce cohabitation is even more common than premarital cohabitation.”).

39. BOWMAN, *supra* note 15, at 117.

40. *Id.* at 117-18.

that more than one million cohabitants are over fifty years old.<sup>41</sup> Many of the people who belong to this group are divorced or have been widowed. The motivations for cohabitation among older adults and the nature of these relationships are different from those of younger cohabitants.<sup>42</sup> For example, some older cohabitants may have economic incentives not to marry, such as a loss of spousal support or a reduction of Social Security benefits.<sup>43</sup> Others may feel pressure not to marry from their children, who wish to protect their inheritance.<sup>44</sup> Some female cohabitants desire companionship, but prefer to avoid the gender roles attendant to many marriages.<sup>45</sup> Research shows that while older cohabitants generally do not plan to marry, the quality of their relationships is better than those of younger cohabitants.<sup>46</sup> The prevalence of older cohabitants and their special needs have led a few states to offer domestic partnership schemes for opposite-sex, older couples (but not for younger opposite-sex couples).<sup>47</sup>

One more way to characterize cohabitation patterns is by racial or ethnic group. While African-Americans, Hispanics, and non-Hispanic whites are equally likely to enter into cohabitation, African-Americans are far less likely than non-Hispanic whites to eventually marry, and Hispanics fall somewhere in the middle.<sup>48</sup> The reasons proffered as to why African-Americans do not move on to marriage vary. Some scholars think that African-Americans use cohabitation as an alternative to marriage, rather than as a bridge—an argument that is supported by the higher number of nonmarried African-Americans who have children.<sup>49</sup> Other accounts indicate that African-Americans are less likely to marry because African-American females worry

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41. Susan L. Brown, Gary R. Lee & Jennifer Roebuck Bulanda, *Cohabitation Among Older Adults: A National Portrait*, 61B J. GERONTOLOGY S71, S71 (2006).

42. *Id.* at S72.

43. BOWMAN, *supra* note 15, at 119. While some older cohabitants do not marry because they are afraid that their alimony will be terminated, the fact is that in many states cohabitation is also a cause for terminating the alimony. The termination-cohabitation policy has different structures in different states. Some states adopted a rebuttable presumption that cohabitation causes a financial change that justifies termination or modification of alimony. Other states have taken another approach: they demand proof of change in a woman's needs and financial situation due to cohabitation. *See, e.g.*, J. Thomas Oldham, *Cohabitation by an Alimony Recipient Revisited*, 20 J. FAM. L. 615, 621-23 (1981-82).

44. Brown, Lee & Bulanda, *supra* note 41, at S72.

45. *Id.*

46. BOWMAN, *supra* note 15, at 120.

47. *See* discussion *infra* Part III.B.

48. GOODWIN, MOSHER & CHANDRA, *supra* note 30, at 2.

49. Phillips & Sweeney, *supra* note 27, at 298.

about their partners' inability to support them financially.<sup>50</sup> Ralph Richard Banks recently published a controversial book in which he argues that the shortage of eligible African-American men (due to high incarceration rates) and the educational gap between male and female African-Americans, along with African-American women's reluctance to marry outside their race (which African-American men do more often), are the main causes for the decline in marriage among African-Americans.<sup>51</sup>

An additional factor bearing on the decision to cohabit is the couple's financial situation. It is well established by quantitative and qualitative research that many poor and working-class Americans believe they need to attain financial security before getting married, thus they tend to delay marriage.<sup>52</sup> Indeed, the poor are far less likely to ever get married than are people in the middle class.<sup>53</sup> The decision to wait until they have achieved financial security often stems from their desire to purchase a home prior to marriage. Some of these couples do not get married because they do not have the money for a "real" wedding ceremony, as opposed to a ceremony at a city hall.<sup>54</sup> Indeed, historically during periods of economic instability the number of weddings performed significantly decreases; this was also true during the recent financial crisis.<sup>55</sup>

Finally, an unknown number of unmarried couples are "ideological cohabitants." This group consists of people who view cohabitation as a permanent way of life, a legitimate alternative to marriage, and not just a temporary condition or a prelude to marriage.<sup>56</sup> Their reasons vary: some do it out of opposition to marriage as a

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50. BOWMAN, *supra* note 15, at 111-13.

51. See RALPH RICHARD BANKS, *IS MARRIAGE FOR WHITE PEOPLE? HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE* (2011) (illustrating the influence of race on cohabitation and marriage practices among the African-American population).

52. Kathryn Edin, Maria J. Kefalas & Joanna M. Reed, *A Peek Inside the Black Box: What Marriage Means for Poor Unmarried Parents*, 66 J. MARRIAGE & FAM. 1007, 1012 (2004); Pamela J. Smock, Wendy D. Manning & Meredith Porter, "Everything's There Except Money": *How Money Shapes Decisions To Marry Among Cohabitators*, 67 J. MARRIAGE & FAM. 680, 684 (2005).

53. NAOMI CHAN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* 3 (2010).

54. Smock, Manning & Porter, *supra* note 52, at 688-93.

55. Erik Eckholm, *Saying No to "I Do," with the Economy in Mind*, N.Y. TIMES (Sept. 28, 2010), <http://www.nytimes.com/2010/09/29/us/29marriage.html>; see BOWMAN, *supra* note 15, at 100.

56. KATHLEEN E. HULL, *SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW* 104-07 (2006).

patriarchal institution,<sup>57</sup> while others “desire . . . freedom and choice in their intimate lives, as opposed to the compulsion and constraint they believe typify marriage relationships.”<sup>58</sup>

Other types of families exist in which marriage does not play a role. Same-sex couples cannot get married in most states in the United States; thus, some cohabit because they are denied the option of marriage. Some people just fall into cohabitation; that is, they move in together and then continue living as partners, feeling that it would be too much trouble to get married or that they essentially are married already. Relatives and friends may live together in a family setting and function as a family or as caregivers for various reasons. I discuss the way that friends and relatives function as caregivers further in Part V.B.2.a, below.

The legal needs of these groups vary. In some cases, people in premarital cohabitations are less economically dependent on one another and may still prefer that some of the rights traditionally reserved for their spouse (like end-of-life decisions) will be claimed by their parents. At the same time, the period of cohabitation outside of marriage is becoming longer and, with it, the needs of partners are greater during this period. These needs could include health insurance, hospital visitations, medical leave, and citizenship status. Thus, the couples in this group need a legal institution that recognizes their relationships but does not confer full marital benefits and obligations because they may not be ready for, or may not want, marital commitment. The divorced and older cohabitants need legal recognition of their relationships by the state and other third parties (for example, so they can make medical decisions for one another) but should be able to mediate their obligations to each other with minimum state intervention (for example, so they can avoid financial conflicts between their children and their surviving partner or avoid ex post lawsuits for distribution of property and alimony).<sup>59</sup> The question of African-American marital choice exceeds the scope of this Article, but for now it suffices to say that at least one scholar, Robin Lenhardt, suggests that “any effort to determine the proper place of marriage in the black community should not only consider marriage and the whys of black America’s current relationship to it, but also the increasing

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57. *Id.* at 107.

58. *Id.* at 106.

59. For the older cohabitants, legal recognition of relationships is a double-edged sword because some of them prefer not to be recognized so that they will not lose Social Security. For them, legal recognition may not be useful.

array of alternatives to marriage available.’<sup>60</sup> Thus implying that an improved version of civil union or domestic partnership could become more attractive to African-Americans.

People who are poor need an institution that helps them negotiate their rights and obligations as they wait for the day they will have the financial security to wed. They could also use an institution that involves less symbolism in its solemnization and that is easy and inexpensive to participate in before they can afford to marry. Ideological cohabitants need an alternative to marriage that is secular, flexible, and lacks the historical and cultural connotations of marriage. Friends and relatives who wish to receive some rights that stem from their relationships may need a way to establish and secure these rights, but in the most flexible way. They may not need alimony and property-division rights but would benefit from the extension of one partner’s health care benefits (rather than separate health care plans), the right to make medical decisions without power of attorney, and possibly exemption from estate taxes.

Many individuals from these groups—and others—do not have access to these rights today in the United States. In the following discussion, I briefly survey the current state of legal recognition of nonmarital unions in the United States. I will demonstrate that unmarried couples—regardless of their reasons for not getting married—lack the flexibility, security, and certainty in organizing the legal consequences that stem from their relationships.

### III. LACK OF LEGAL RIGHTS FOR UNMARRIED COUPLES

Legal recognition of partnerships can be critical at several occasions in a couple’s life together. For example, upon dissolution of the relationship or the death of one of the partners, the rights of each partner concerning property division and the financial obligations of the partners to each other are of great importance. While marital property rules are founded on the principles of equal or just division of property upon dissolution and the obligation for spousal maintenance<sup>61</sup> (unless they contract otherwise), unmarried partners are not

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60. Robin A. Lenhardt, *Race and the Place of Marriage* (Sept. 1, 2012) (unpublished manuscript) (on file with author).

61. The rules of both division of property and support differ from state to state. See Shahar Lifshitz, *Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationships*, 66 WASH. & LEE L. REV. 1565, 1608-09 (2009).

automatically entitled to the protection of these rules.<sup>62</sup> Lack of legal recognition also means denial of many benefits and rights that are bestowed by the state and granted by other third parties to a married couple during their relationship, ranging from tax exemptions to hospital visitation rights, immigration rights, parental presumption, and extension of health benefits.<sup>63</sup> In this Part, I first describe the absence of defined obligations of unmarried partners vis-à-vis each other, and the shortcomings of ex post judicial determinations of the nature of partners' obligations. Subsequently, I examine the state's failure to extend rights and benefits to unmarried couples and why domestic partnerships and civil unions as currently designed do not solve this problem.

#### A. *Inadequacy of Nonregistered Mechanisms*

This Subpart introduces three types of mechanisms to establish or enforce rights between unmarried couples without registration: contract-based rights, equitable remedies, and status-based rights.

##### 1. Contract-Based Rights

Unmarried couples can sometimes establish their obligations to each other by contract. This involves a variety of difficulties, however. Before 1976, contracts concerning financial arrangements between unmarried couples were unenforceable.<sup>64</sup> Today, most states follow the California model, as defined by the famous case of *Marvin v. Marvin*, in which the Supreme Court of California ruled that the fact that a cohabiting man and woman were not married did not in itself invalidate agreements between them related to their earnings, property, and expenses.<sup>65</sup> Only Illinois, Mississippi, Georgia, and Louisiana do not recognize cohabitants' right to contract regarding their rights and responsibilities toward each other.<sup>66</sup> However, states differ with regard

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62. See, e.g., *Marvin v. Marvin*, 176 Cal. Rptr. 555 (Ct. App. 1981) (affirming the denial of palimony or alimony to a woman who lived with her partner for five years); *Arwood v. Sloan*, 560 So. 2d 1251 (Fla. Dist. Ct. App. 1990) (denying the claim of a male cohabitant to rights in his deceased partner's estate).

63. See, e.g., Elizabeth F. Emens, *Regulatory Fictions: On Marriage and Counter-marriage*, 99 CALIF. L. REV. 235, 258-59 (2011).

64. See Cynthia Grant Bowman, *Legal Treatment of Cohabitation in the United States*, 26 L. & POL'Y 119, 126 (2004).

65. 557 P.2d 106 (Cal. 1976).

66. *Long v. Marino*, 441 S.E.2d 475, 475 (Ga. Ct. App. 1994) (holding that the trial court did not err in dismissing appellant's claim of implied contract based on her agreement with her partner to provide sexual relations in exchange for monetary support because the



to what makes such a contract valid. While the *Marvin* court explicitly approved the recognition of an implied contract between the couple, based on their behavior,<sup>67</sup> other states recognize only express contracts.<sup>68</sup> Similarly, some states enforce oral contracts between cohabitants, while others demand the existence of a written contract.<sup>69</sup>

Even in the states that have adopted the rule associated with *Marvin*, in most, contract theory does not provide a just and adequate outcome for the party in need. The problem stems from the fact that most unmarried couples simply do not draw up contracts,<sup>70</sup> and even in states that recognize implied or oral contracts, it is very difficult to prove such a contract exists.<sup>71</sup> Moreover, even if one party succeeds in proving that there was a contract, the terms of the contract can still be disputed and are ultimately decided by a court or jury, which may be biased against cohabitants and is often limited in its ability to discern the partners' expectations.<sup>72</sup> Litigation can be extremely unpleasant and intrusive to both parties because, as with all contracts, the parties must prove formation and valid consideration; to do so, it is often necessary to reveal intimate details pertaining to the couple's private

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state does not enforce contracts based on immoral consideration and "unmarried cohabitation would constitute immoral consideration" (citation omitted)); *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1207, 1211 (Ill. 1979) (holding that "unmarried cohabitants' mutual property rights . . . cannot appropriately be characterized solely in terms of contract law" and that to hold otherwise would violate public policy); *Schwegmann v. Schwegmann*, 441 So. 2d 316, 322 (La. App. 5 Cir. 1983) ("Even if the alleged agreement was not required to be in writing, it would be unenforceable because it is a meretricious one."); *Davis v. Davis*, 643 So. 2d 931, 932, 936 (Miss. 1994) (holding that a woman who had cohabited with a man for several years was not entitled to "equitable division of partnership assets" from her husband because the Mississippi legislature "has not extended the rights enjoyed by married people to those who choose merely to cohabit").

67. *Marvin*, 557 P.2d at 121-22.

68. See *Bowman*, *supra* note 64, at 126 ("[O]ther states moved to accept *Marvin* but to limit its application. New York, for example, restricted *Marvin* rights to those based on express contracts . . . . Minnesota and Texas went further, passing Statutes of Frauds that require cohabitants' contracts to be in writing." (citations omitted)); Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1396-97 (2001).

69. See, e.g., *BOWMAN*, *supra* note 15, at 47-48; MINN. STAT. § 513.075 (2012); *Morone v. Morone*, 413 N.E.2d 1154 (N.Y. 1980) (holding that a contract to share earnings and assets cannot be inferred simply from a cohabiting couple's relationship).

70. See, e.g., Jennifer K. Robbenolt & Monica Kirkpatrick Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Preventive and Therapeutic Approach*, 41 ARIZ. L. REV. 417 (1999) (presenting a study of Minnesota residents that found that only 29% of unmarried couples had a written contract regarding property).

71. *BOWMAN*, *supra* note 15, at 51.

72. Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 256-57.

life.<sup>73</sup> Such contracts can be undesirable for other reasons as well—among them, the prohibitive cost of this kind of litigation and the fact that any system that rests on the premises of ex post determination of obligations between partners inevitably promotes uncertainty.<sup>74</sup>

## 2. Equitable Remedies

Likewise, equitable remedies do not provide an adequate solution. Many courts in the United States recognize claims between cohabitants for restitution under the legal theories of unjust enrichment, resulting trust, constructive trust, *quantum meruit*, and contract implied by law.<sup>75</sup> The most common use of equitable relief is when both cohabitants contribute to the purchase of a common residence in a separate property jurisdiction (for example, each paying a portion of the mortgage or everyday expenses), but the property is listed under the name of only one of the parties; upon death or separation, the other party finds themselves without any rights in the property.<sup>76</sup> In another common scenario, the woman in an opposite-sex relationship has contributed to the home by providing domestic services and taking care of the children but, upon separation or the death of her partner, is left without any share in the property.

Equitable relief, however, is also an insufficient legal remedy. Courts tend to award very small amounts for housekeeping<sup>77</sup> and frequently provide equitable relief only in cases in which the plaintiff contributed financially to the purchase of a particular asset (as opposed to contributing work “that can be characterized as part of the ordinary give-and-take of a shared life”).<sup>78</sup> Because people do not normally enter into cohabitation arrangements as a result of fraud, duress, or a mistake and theoretically have an opportunity to negotiate what services or support they will bring to the union, it is hard to satisfy the

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73. *Cf., e.g.,* *Stevens v. Muse*, 562 So. 2d 852 (Fla. Dist. Ct. App. 1990) (“Thus it appears to us that a cause of action based on an express contract . . . is enforceable . . . as long as it is clear there was valid, lawful consideration separate and apart from any express or implied agreement, regarding sexual relations.” (omission in original)).

74. *See* Scott, *supra* note 72, at 256-57.

75. HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* 167-68 (2004); *see also* *Sullivan v. Rooney*, 533 N.E.2d 1372 (Mass. 1989) (imposing a constructive trust in the female cohabitant’s favor on one half of the property); *Mitchell v. Oksienik*, 880 A.2d 1194, 1199 (N.J. Super. Ct. App. Div. 2005) (finding that as “joint venturers,” unmarried cohabitants are “entitled to seek a partition of their property when their joint enterprise comes to an end, irrespective of how the title was formally held”).

76. BOWMAN, *supra* note 15, at 40.

77. *Id.* at 44.

78. *See* Estin, *supra* note 68, at 1400.

legal requirements of the cause of action for unjust enrichment.<sup>79</sup> Legal commentators have therefore suggested that equitable claims are not a suitable legal theory to govern the legal treatment of unmarried couples.<sup>80</sup>

### 3. Status-Based Rights

Washington State has developed a unique status-based approach for resolving disputes between cohabiting couples upon separation. The courts there have advanced the doctrine of “committed intimate relationships” (previously known as “meretricious relationships”) in which the court looks at the couple’s conduct during their relationship to see if the relationship demonstrates a marriage-like pattern.<sup>81</sup> If the court finds that it does, the couple is treated similarly to married couples with regard to property distribution, that is, their community property is distributed between them in a just fashion. While in other states couples are required to “opt in” (that is, to prove the existence of a contract), in Washington cohabiting couples may need to “contract out” (that is, to sign a contract if they want to avoid the presumption of shared property upon separation).<sup>82</sup>

While Washington’s legal theory provides more certainty for unmarried couples, it still has serious disadvantages. First, ex-partners are not eligible for spousal support.<sup>83</sup> Second, in order for the committed intimate relationships doctrine to apply, the relationship must be marital-like: stable, continuous, and involving the sharing of resources.<sup>84</sup> Relationships that do not fit this pattern—for example, because the couple has lived together on and off—will fall short of recognition.<sup>85</sup> Moreover, as is often the case in establishing the rights of unmarried couples, the judicial inquiry inevitably involves an

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79. See Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711, 736 (2006).

80. See Robert C. Casad, *Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?*, 77 MICH. L. REV. 47 (1978); Sherwin, *supra* note 79, at 736. *But see* DAGAN, *supra* note 75, at 167 (“While restitution is downplayed by the literature on cohabitation, it is, in fact, an important source of recovery between cohabitants absent an explicit contractual arrangement.” (footnote omitted)).

81. *In re Marriage of Lindsey*, 678 P.2d 328, 331 (Wash. 1984) (ruling that in dividing property acquired by the unmarried couple, the court must examine the meretricious relationship and the property accumulations, and it make a just and equitable disposition of the property); see *Olver v. Fowler*, 168 P.3d 348, 350 (Wash. 2007) (establishing the term “law of committed intimate relationships”).

82. BOWMAN, *supra* note 15, at 56.

83. *Id.* at 58.

84. *Id.* at 57.

85. *Id.*

“intrusive examination into factors that qualify a relationship as ‘marital-like’”<sup>86</sup> and can also be a financial burden.

The remedies discussed in Part III.A can be used to define and enforce obligations between the partners themselves, but do not make unmarried couples eligible for the rights and benefits that the state bestows on married couples or for those granted by third parties. In Part III.B, I examine the legal recognition of unmarried couples in the few states that provide registration schemes.

### *B. Inadequacy of Domestic Partnerships and Civil Unions*

A few states allow opposite-sex couples to register as domestic or civil partners.<sup>87</sup> These registrations vary widely in their requirements for eligibility and in the scope of rights and benefits that they offer. Illinois,<sup>88</sup> Nevada,<sup>89</sup> Hawaii,<sup>90</sup> and the District of Columbia<sup>91</sup> allow opposite-sex couples to register in civil unions or in domestic partnerships and receive more or less of the rights and benefits that the state bestows upon married couples. The problem, however, is that in most cases these statutes differ only in name from marriage, so there is very little incentive for couples to use them rather than simply marry (aside from the desire to avoid the term “marriage” and its negative historical heritage<sup>92</sup>). In addition, it is unclear whether opposite-sex couples who register as civil or domestic partners receive the rights granted to married couples by the federal government.<sup>93</sup>

Washington and California also have domestic partnership laws, and these are not just “marriage mimic status,” all-or-nothing laws.<sup>94</sup> This type of registration is only open to opposite-sex couples when at

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86. *Id.*

87. A few other states (for example, Delaware and New Jersey) have civil union or domestic partnership arrangements that are restricted to same-sex couples. DEL. CODE tit. 13, § 202 (2012); N.J. STAT. § 37:1-30 (2012).

88. 750 ILL. COMP. STAT. 75/5 (2012).

89. NEV. REV. STAT. §§ 122A.010-.200 (2012).

90. S. 232, 2011 Leg., 26th Sess. (Haw. 2001) (listing the requirements for entering into a civil union).

91. D.C. CODE § 32-701 (2012).

92. *Cf.* Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537, 551-54 (2007) (envisioning a world in which civil unions replace marriage and contemplating the advantages of civil unions over marriage).

93. *See supra* Part V.C.2.

94. The term “marriage mimic status” is taken from Nan Hunter, *D.C. Should Not Eliminate Domestic Partnerships When It Authorizes Gay Marriage*, HUNTER JUSTICE (Oct. 26, 2009), <http://hunterofjustice.com/2009/10/dc-should-not-eliminate-domestic-partnership-option.html>.

least one of the partners is over the age of sixty-two.<sup>95</sup> The terms of New Jersey's domestic partnership are even more limiting. To qualify, *both* partners must be sixty-two or older.<sup>96</sup> The couple must also share a common residence, and they need to show that they are jointly responsible for their common welfare, as evidenced by joint financial arrangements or joint ownership of real or personal property.<sup>97</sup> Furthermore, domestic partners who wish to terminate their relationship must go through a judicial dissolution process similar to divorce.<sup>98</sup> In light of these limitations, it is not surprising that registration for domestic partnership in New Jersey has not been a great success: in 2008, for example, only thirty-two couples registered.<sup>99</sup>

Other states provide more sophisticated alternatives, but they also have their share of problems. Maine has a domestic partnership law that both opposite- and same-sex couples can take advantage of, but couples are required to live together for a year before they are able to register.<sup>100</sup> The advantage of this law is that it offers an easy exit: the partnership is automatically terminated if one party gets married, if both parties file a declaration of mutual consent, or if one party serves notice to the other according to the state's guidelines.<sup>101</sup>

Vermont and Hawaii have a "reciprocal beneficiaries" registration—a type of registered partnership that is available to a limited group of people.<sup>102</sup> In Hawaii, the registration is open only to people who are "prohibited from marrying one another,"<sup>103</sup> and in Vermont, individuals who wish to take advantage of the registration must "be related by blood or adoption to the other party."<sup>104</sup> These statutes are thus very limited in their scope and do not provide alternatives for opposite-sex couples in conjugal relationships, nor, in

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95. CAL. FAM. CODE § 297.5(a) (2011) ("[P]ersons of opposite sexes may not constitute a domestic partnership unless one or both of the persons are over the age of 62."); WASH. REV. CODE § 26.60.030 (2012).

96. N.J. STAT. § 26:8A-4 (2012).

97. *Id.* § 26:8A-4(b)(1)-(2).

98. *Id.* § 26:8A-10.

99. BOWMAN, *supra* note 15, at 67-68 n.82 (citing statistics provided by the New Jersey Department of Health and Senior Services, which Bowman has on file).

100. ME. REV. STAT. tit. 22, § 2710(2B) (2012) ("The domestic partners have been legally domiciled together in this State for at least 12 months preceding the filing.").

101. *Id.*

102. *See* HAW. REV. STAT. § 572C-3 (2012).

103. *Id.* § 572C-4(3).

104. *Reciprocal Beneficiaries Relationship in Vermont*, VT. DEP'T HEALTH (June 2000), [http://healthvermont.gov/research/records/documents/recipbenefit\\_updated071107.pdf](http://healthvermont.gov/research/records/documents/recipbenefit_updated071107.pdf).

Vermont, do they provide such alternatives for nonintimate partners. It is no wonder, then, that the number of registrations is extremely small.<sup>105</sup>

The most unique and flexible model for legal recognition of couples in nonmarital relationships is Colorado's "designated beneficiary" law.<sup>106</sup> This statute allows couples to register as designated beneficiaries, which involves an agreement ensuring certain rights and financial responsibilities. To this effect, couples file a state-provided form with the county clerk and recorder's office. The status is open to both opposite- and same-sex couples. It offers the options of a joint ownership regime, hospital visitation rights, medical decision-making rights, health and life insurance benefits, and the ability to sue for wrongful death. By checking specific boxes on a simple form, the couple decides which of the listed rights and obligations it will commit to.<sup>107</sup> However, despite its innovative nature and flexibility, the Colorado law is not without problems. The designated beneficiaries cannot file a joint tax return, and insurance companies are not obligated to recognize named beneficiaries. In addition, the law does not deal with issues of spousal support. Moreover, while it is for the good of the partners that they may easily change some parts of the agreement, because legal documents that are valid and enforceable trump the designated beneficiary agreement,<sup>108</sup> there is a risk that such a regime does not provide protection against intentional or unintentional disinheritance (because one partner can simply amend their will without notifying their registered partner).

In summary, despite their potential as alternatives to marriage, current, status-based registrations in the United States are very limited and often serve as fig leaves for the denial of marriage for same-sex couples. That is, they are often either marriage-by-a-different-name or have prerequisites not required by marriage, like common residency. Additionally, the fact that they are inherently a compromise intended to block the legalization of same-sex marriage, rather than an alternative

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105. M.V. LEE BADGETT, WHEN GAY PEOPLE GET MARRIED: WHAT HAPPENS WHEN SOCIETIES LEGALIZE SAME-SEX MARRIAGE 172 (2009) (stating that in Vermont, no one had registered as reciprocal beneficiaries seven years after the law was passed and that probably only same-sex couples registered in Hawaii).

106. COLO. REV. STAT. §§ 15-22-101 to -112 (2012); see Nancy Polikoff, *The Extraordinary New Colorado Law*, BEYOND (STRAIGHT AND GAY) MARRIAGE BLOG (Apr. 15, 2009), <http://beyondstraightandgaymarriage.blogspot.com/2009/04/extraordinary-new-colorado-law.html> (praising Colorado's designated beneficiary law).

107. COLO. REV. STAT. § 15-22-106.

108. *Id.* § 15-22-103(3).

to marriage for people regardless of their sexual orientation, makes them socially and culturally inferior.<sup>109</sup>

The changes in family structure and the debate about how family law should respond to these changes have prompted scholars to seek the best ways to resolve the associated issues. In the next Part, I survey proposals for policies and regulations and point out their pros and cons.

#### IV. SUGGESTIONS FOR LEGAL REFORM AND THEIR SHORTCOMINGS

The sweeping changes to family structures in the United States have stimulated debate about how to craft desirable public policy and have led to an upsurge of scholarly writing on the best options for the legal recognition of families. Many scholars have explored the limitations of current marriage law and suggested reforms; in my view, each of their approaches has some shortcomings. Building on Edward Stein's categories, I divide the legal literature on public policy regarding partnership regulation into four groups of approaches: traditionalist, abolitionist, menu-of-options, and functionalist.<sup>110</sup>

##### A. *Traditionalism*

Traditionalists contend that the state should encourage people to procreate "responsibly"—meaning that they procreate in a way that leads to a stable family structure, which traditionalists believe can only be done by married, opposite-sex couples. Because of its clear recognition of the father and mother as responsible for the child and as providing the best environment for the child, marriage is seen as the best framework in which couples can reproduce and care for their children.<sup>111</sup> Thus, traditionalists advocate preserving the special status of marriage.<sup>112</sup>

Traditionalists base much of their arguments on social science research. They insist that children who live in households headed by

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109. Cf. Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1775 (2005).

110. Stein, *supra* note 5.

111. See, e.g., Maggie Gallagher, *Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage?*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 225, 233 (2004); Christina Davis, Comment, *Domestic Partnerships: What the United States Should Learn from France's Experience*, 24 PENN ST. INT'L L. REV. 683, 699-700 (2006).

112. E.g., Lynn D. Wardle, "Multiply and Replenish": *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771 (2001) (arguing that the special status of marriage needs to be preserved because it promotes social interests and that allowing same-sex marriages would weaken the institution of traditional marriage).

married couples enjoy a higher standard of living and better economic conditions than children in alternative families who, some studies find, are more likely to suffer from health and emotional problems, abuse, and the like.<sup>113</sup> They aver that the high rate of poverty among nontraditional families, the negative financial consequences of divorce, and the birth of children to unmarried parents all pose a threat to the social fabric. Traditionalists therefore advocate against the expansion of rights to cohabiting couples; the denial of rights is believed to incentivize at least some people to marry.<sup>114</sup> They also claim that marriage, with its default rules and social understanding, is the best framework for understanding couples' roles and obligations, whereas other family forms are confusing.<sup>115</sup> In contrast: "The alternatives to marriage create a plethora of choices and uncertainties. The understandings, roles, and duties that attend the myriad liaisons short of marriage are murky, confused, conflicting, and poorly defined."<sup>116</sup>

However, the traditionalist approach is full of weaknesses. First, there is no evidence that current social policy, which encourages marriage over other forms of relationships, sufficiently decreases the number of nonmarital unions. In fact, the opposite is the reality: despite the limited rights offered to unmarried couples in the United States, the number of nonmarital families is increasing.<sup>117</sup> The argument that marriage offers a clear framework for couples is also problematic; many people are not fully aware of what rights and obligations are attached to marriage until they divorce.<sup>118</sup> Indeed, the marriage default rules are different from state to state. (Not many people know, for example, that in Georgia infidelity does not

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113. *E.g.*, Amy L. Wax, *Traditionalism, Pluralism, and Same-Sex Marriage*, 59 RUTGERS L. REV. 377, 386 (2007).

114. *Cf.* Marsha Garrison, *The Decline of Formal Marriage: Inevitable or Reversible?*, 41 FAM. L.Q. 491, 515-16, 520 (2007) (arguing that while initiatives designed to promote formal marriage may have only limited results, they "may have the capacity to make a difference at the margins").

115. Amy L. Wax, *The Family Law Doctrine of Equivalence*, 107 MICH. L. REV. 999, 1010-12 (2009).

116. *Id.* at 1012.

117. BOWMAN, *supra* note 15, at 232.

118. I do not argue that marriage has no channeling effect. It is clear that many people get married precisely because of the benefits that are attached to it and the lack of other options. I do argue that the current policy that singles out marriage has failed to provide the results that are expected, and while marriage is still affecting people's behavior, some of that effect is to marginalize and deny rights to unmarried couples rather than incentivize them to get married. Indeed, a number of studies have shown that welfare programs intended to encourage people to get married do not affect people's behavior. *Id.* at 233.



necessitate the payment of maintenance.)<sup>119</sup> People are, moreover, unclear in general about what rights are conferred specifically by marriage: some think that cohabitation in and of itself offers partnership rights, despite the fact that common law marriage exists only in a few jurisdictions,<sup>120</sup> while others regard their informal unions as marriage.<sup>121</sup> Thus, the rights and benefits offered by marriage may have a limited impact on some people's decisions concerning whether or not to marry. Even if they did have such an impact, encouraging people to marry who are not ready to do so would not yield the results that traditionalists are expecting—and may even have adverse effects on the couple.<sup>122</sup>

Second, the data cited by traditionalists, as well as their interpretation, are often disputable, simplistic, and generalized. While social science research has demonstrated a variety of problems in the lives of people in nonmarital unions, informal unions do not have negative effects on all groups of unmarried couples. For example, while the relationships of certain cohabitants are short lived, this is not the case with all cohabitants, such as older cohabitants and Puerto Ricans.<sup>123</sup> Similarly, an “informal relationship” does not mean that the relationship is of a lesser quality for some subgroups; the quality of relationships between older cohabitants, for instance, is better than that of other subgroups. In fact, recent research—based on a study sample from the National Survey of Families and Households of 2737 single men and women, 896 of whom married or moved in with a partner

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119. See Jennifer Levitz, *The New Art of Alimony*, WALL ST. J., Oct. 31, 2009, at W1 (discussing the different attitudes evinced by various states' alimony laws); cf. NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 179-80 (2008) (“Couples who marry have no idea what economic obligations accompany their marriage . . . . The law is so different from state to state . . .”).

120. GÖRAN LIND, *COMMON LAW MARRIAGE: A LEGAL INSTITUTION FOR COHABITATION* 8-12 (2008) (listing which jurisdictions recognize common law marriage).

121. BOWMAN, *supra* note 15, at 231-32. This is the case among some Puerto Ricans who report their nonmarital unions as marriages. Interestingly, the *Washington Post* recently reported that in the 2010 Census—the first one in which respondents in same-sex relationships could identify themselves as “wife” or “husband”—the number of individuals in same-sex relationships who checked “husband” or “wife” was larger than the actual number of same-sex couples in marriages, civil unions, and domestic partnerships. See Hope Yen, *Gay Couples Living Together Nearly Doubled in 10 Years, Census Shows*, ARIZ. REPUBLIC (Sept. 27, 2011, 4:36 PM), <http://www.azcentral.com/arizonarepublic/news/articles/20110927-gay-marriages-census-numbers27-ON.html>. The chief of the Fertility and Family Statistics Branch of the Census Bureau explained that these couples “basically responded that way because that is truly how they felt they were living.” *Id.* (internal quotation marks omitted).

122. See Garrison, *supra* note 114, at 516-17.

123. See Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & FAM. STUD. 1, 13-14 (2007).

over the course of six years—found that the benefits of marriage over long-term cohabitation are minor; regarding some factors—such as happiness and self-esteem—cohabitants were doing better than married couples.<sup>124</sup> While the research found that married couples enjoy better health than cohabitants, the researchers hypothesize that this is a result of the benefits attached to marriage, including health insurance.<sup>125</sup> Likewise, it is unclear how much marriage itself—as opposed to other factors related to the parents’ education, environment, financial conditions, and the like—actually affects children’s well-being. Indeed, “[r]esearchers have found it difficult to isolate marriage from other factors that might explain differences in child welfare within families.”<sup>126</sup> In other words, it is not marital status that makes one a good parent and produces happy children; rather, it is the quality of parenting and other factors that determine whether or not a child will fare well.<sup>127</sup>

Third, even assuming that the traditionalists’ claims and the research that they cite are accurate, this does not mean that the right policy would be one that denies rights to unmarried couples. The opposite is true: if unmarried couples suffer from instability and poverty, then the right policy would be one that provides support, benefits, and property rights to couples both during and at the end of the relationship, thus strengthening the emotional and economic well-being of those involved. The denial of rights to unmarried couples may, in fact, cause some of the adverse conditions from which they suffer. For example, the result of not imposing obligations upon a couple vis-à-vis each other is that the weaker partner is left without property or financial support, which perpetuates poverty (in addition, it is an incentive for the stronger party not to get married).<sup>128</sup> Thus, legal recognition and alleviation of the stigma that often accompanies cohabitation may improve unmarried couples’ socioeconomic conditions and well-being.

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124. Kelly Musick & Larry Bumpass, *Reexamining the Case for Marriage: Union Formation and Changes in Well-Being*, 74 J. MARRIAGE & FAM. 1, 12-13 (2012).

125. *Id.* at 13.

126. Vivian E. Hamilton, *Family Structure, Children, and Law*, 24 WASH. U. J.L. & POL’Y 9, 14 (2007).

127. Furthermore, research has consistently shown that the children of unmarried same-sex couples fare as well as the children of married opposite-sex couples. See Erez Aloni, *Cloning and the LGBTI Family: Cautious Optimism*, 35 N.Y.U. REV. L. & SOC. CHANGE 1, 46-47 (2011).

128. BOWMAN, *supra* note 15, at 233-34.

### B. Abolitionism

Some scholars support the abolition of marriage. A number of people in this camp endorse a deregulation regime in which people would organize their relationships through contracts.<sup>129</sup> Others suggest that the state should cease granting marriage licenses; rather, it should offer only civil unions, and marriage should be solely a religious institution.<sup>130</sup>

The proposals to abolish marriage also have many problems and have been criticized from a variety of perspectives. Most importantly, the abolition of marriage is not a practical option.<sup>131</sup> In addition, because civil unions are similar to marriage in terms of their one-size-fits-all approach to relationships, the adoption of civil unions in place of marriage will not be enough to solve the problem of lack of flexibility and choice for intimate partners and families living in nontraditional arrangements.<sup>132</sup>

The idea of abolishing marriage raises other concerns as well. In terms of efficiency, marriage has some advantages over solely contractual regimes, including its recognition by third parties—advantages that are hard to achieve through private contracts.<sup>133</sup> There is also apprehension that couples would not enter into contracts regarding the terms of nonmarital relationships; thus, in cases of conflict within relationships, the default rules would apply in much the same way they do under the current marriage-centered system.<sup>134</sup>

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129. See, e.g., Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161 (2006) (arguing that civil marriage should be abolished in favor of marriage being solely a religious and cultural institution with no legal definition or status); Clare Chambers, *Feminism, Liberalism and Marriage*, <http://www.brown.edu/Research/ppw/files/Feminism,%20Liberalism%20and%20Marriage.doc> (last visited Jan. 29, 2013).

130. Martha C. Nussbaum, *A Right To Marry?*, 98 CALIF. L. REV. 667, 695 (2010); Alan M. Dershowitz, *To Fix Gay Dilemma, Government Should Quit the Marriage Business*, L.A. TIMES (Dec. 3, 2003), <http://articles.latimes.com/2003/dec/03/opinion/oe-dersh3>.

131. Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 34 (2003) ("Despite such arguments in favor of the abolition of marriage, such a step is, quite frankly, unlikely to occur, at least in the foreseeable future."); Scott, *supra* note 92, at 547; Stein, *supra* note 5, at 371 ("I would reject abolition, at least in the form of deregulation, as both impractical and theoretically problematic. I simply do not think that the United States is ready now, or would likely be ready anytime soon, to get rid of marriage.").

132. See Stein, *supra* note 5.

133. See, e.g., Case, *supra* note 109, at 1781.

134. Carol Sanger, *A Case for Civil Marriage*, 27 CARDOZO L. REV. 1311, 1315 (2006). In addition, if some couples were to enter into the equivalent of prenuptial contracts, at least one legal scholar is concerned about the practical enforceability of some provisions in such contracts. *Id.*

### C. *The Menu of Options*

The menu-of-options approach promotes, in the words of Mary Anne Case, “recognition of a variety of supportive family forms offering persons of all sexes and orientations the opportunity to structure their families and live their lives as best suits them.”<sup>135</sup> William Eskridge predicts that the menu will look different from state to state, and he cannot foresee what it will be comprised of in the future.<sup>136</sup> Thus he envisions a “stylized list,” organized from the lowest level of commitment to the highest as follows:<sup>137</sup>

- (1) domestic partnership: a partnership that will be recognized by employers, and domestic partners will receive health insurance and other benefits that are given by that employer;
- (2) cohabitation: a relationship that demonstrates a greater level of commitment and dependency between the partners, and thus the state imposes duties of support on the couple;
- (3) “cohabitation plus”: an institution (like the PACS or Hawaii’s reciprocal beneficiary agreement) that allows for quick dissolution, mutual support, and some “unitive rights,” meaning financial rights and other benefits (such as healthcare decision making);<sup>138</sup>
- (4) civil unions: marriage-with-a-different-name;
- (5) civil marriage;
- (6) covenant marriage: traditional marriage, in which marrying couples accept a different divorce process, including the need to prove grounds for divorce and imposed waiting periods.<sup>139</sup>

This list, however, provides only a very broad and vague idea about what each alternative includes and what function each serves. For example, we do not know what kinds of rights would be given to

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135. Case, *supra* note 109, at 1772.

136. See, e.g., William N. Eskridge, Jr., *A Liberal Vision of U.S. Family Law in 2020*, in *THE CONSTITUTION IN 2020*, at 245, 249-50 (Jack M. Balkin & Reva B. Siegel eds., 2009).

137. *Id.*

138. Hawaii’s reciprocal beneficiary relationship and the French PACS are very different legal institutions. The reciprocal beneficiary relationship is limited only to couples who cannot get married, such as same-sex couples and relatives, while the PACS is open to opposite-sex couples but prohibited to relatives. The PACS offers many rights that the reciprocal beneficiary relationship does not. For example, reciprocal beneficiaries cannot file a joint state income tax return or obtain health insurance benefits. Importantly, the reciprocal beneficiary relationship is not a contract like the PACS, so it is unclear what cohabitation plus actually includes and why these two institutions represent this category.

139. E.g., ARIZ. REV. STAT. §§ 25-901 to -906 (2012); LA. REV. STAT. §§ 9:272, 275.1 (2012).

informal cohabitants or how they would affect the function of the other alternatives. Would cohabitation grant full marital rights and obligations, as in New Zealand, or a more limited bundle, as in France? We do not know what kind of rights and obligations are included in cohabitation plus or what population it is supposed to serve.

In addition, the list is long and complicated. Such a list inevitably leads to confusion and in the end may be harmful to couples who do not understand the differences between the various institutions and would thus stick to the old and known option (marriage). Indeed, as articulated by psychology professor Barry Schwartz: “[T]he fact that *some* choice is good doesn’t necessarily mean that *more* choice is better. . . . [T]here is a cost to having an overload of choice.”<sup>140</sup> What is more, it is unclear why states need both cohabitation plus *and* civil unions, or how civil unions are different from marriage. In the words of Ian Curry-Sumner, a Dutch scholar, concerning the debate on the necessity of civil unions in the Netherlands, “[C]hoice is all well and good, so long as that choice is a real choice, rather than simply a hollow shell.”<sup>141</sup>

In fact, the experience of other countries clearly teaches that civil unions are only a burden on family law, and couples rarely choose them as an alternative to other forms of regulation. With the exception of France and Belgium, which I discuss in Part VI, registered partnerships generally are not a popular option among opposite-sex couples. Nor are they very popular among same-sex couples. For example, in New Zealand, where same-sex marriage is not legal and the institution of civil unions was brought into effect in 2005; by December 2008, only 284 registrations out of 1506 were signed by opposite-sex couples.<sup>142</sup> Notably, the number of registrations among opposite-sex couples is very low compared with the more than 20,000 marriages celebrated annually.<sup>143</sup> In the Netherlands, the statistical data

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140. BARRY SCHWARTZ, *THE PARADOX OF CHOICE: WHY MORE IS LESS* 3 (2004).

141. Ian Curry-Sumner, *The Netherlands: Party Autonomy and Responsibility*, in *THE INTERNATIONAL SURVEY OF FAMILY LAW* 255, 274 (Bill Atkin ed., 2008).

142. *Marriages, Civil Unions and Divorces: Year Ended December 2008*, STAT. N.Z. (May 5, 2009, 10:45 AM), [http://www.stats.govt.nz/browse\\_for\\_stats/people\\_and\\_communities/marriages-civil-unions-and-divorces/MarriagesCivilUnionsandDivorces\\_HOTPYeDec08.aspx](http://www.stats.govt.nz/browse_for_stats/people_and_communities/marriages-civil-unions-and-divorces/MarriagesCivilUnionsandDivorces_HOTPYeDec08.aspx) (data accessible by following “Marriages, Civil Unions and Divorces: Year ended December 2008—Tables” hyperlink).

143. In 2008, 21,948 marriages were registered by New Zealand residents. *See id.* at tbl.1.1. In 2009, 21,600 marriages were registered to New Zealand residents. *Marriages, Civil Unions, and Divorces: Year Ended December 2009*, STAT. N.Z. (May 5, 2010, 10:45 AM), [http://www.stats.govt.nz/browse\\_for\\_stats/people\\_and\\_communities/marriages-civil-unions-and-divorces/MarriagesCivilUnionsandDivorces\\_HOTPYeDec09.aspx](http://www.stats.govt.nz/browse_for_stats/people_and_communities/marriages-civil-unions-and-divorces/MarriagesCivilUnionsandDivorces_HOTPYeDec09.aspx).

is more complex but consistent: generally, only a small number of opposite-sex couples choose registration over marriage or informal cohabitation.<sup>144</sup> In fact, in the Netherlands and in South Africa, arguments are made for the repeal of registered partnerships because they only make family law more complicated.<sup>145</sup> Most important, as I suggest in the next Subpart, if a cohabitation plus scheme is flexible enough, it can serve simultaneously as a civil union scheme.

#### D. *Functionalism*

Still other academics suggest more complex partnership-regulation regimes, including a functional family law that would accommodate a wide range of families. In essence, the idea is that how the relationship functions, rather than whether it is technically a marriage, should determine the legal consequences of the union. Generally, functional family law does not necessarily stand in contradiction to the menu-of-options approach. In my view, some of the proposals for functional family law could be characterized *as part of* the menu of options: the part that governs couples in informal relationships. Yet functional family law could stand in contradiction to the menu of options if, *de facto*, it decreases the choices among well-functioning options for legal recognition. A number of scholars have

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144. BADGETT, *supra* note 105, at 61 (arguing that a small number of opposite-sex couples choose registered partnership and that it is the fourth most popular option for them after marriage, cohabitation with an agreement, and cohabitation without an agreement); accord Katharina Boele-Woelki, Ian Curry-Sumner, Miranda Jansen & Wendy Schrama, *The Evaluation of Same-Sex Marriages and Registered Partnerships in the Netherlands*, 8 Y.B. PRIVATE INT'L L. 27, 33 (2006) ("Even though the absolute number of partnerships registered each year is relatively small compared to the absolute number of marriages, it can still be concluded that, of the couples who since 2001 have decided to formalize their relationship, a small, but not insignificant group of people have chosen to register their partnership instead of getting married. In this sense, registered partnership would seem to fulfill an apparent demand from a small group of couples."). One could argue that I discount the situation in the Netherlands because, despite the critique of civil unions and the relatively small number of registrants, repeal has been repeatedly rejected. Ian Curry-Sumner, a Dutch legal scholar, answers with a question: "Is Dutch law now better off having two formal relationship institutions with more-or-less identical legal consequences? The answer is: it depends on whom you ask!" Curry-Sumner, *supra* note 141, at 274.

145. See A.J.M. Nuytinck, *Het geregistreerd partnerschap wordt niet afgeschaft. Jammer, een gemiste kans!*, REPUB 2, <http://publishing.eur.nl/ir/repub/asset/12197/Nuytinck,%20Het%20geregistreerd%20partnerschap%20wordt%20niet%20afgeschaft.pdf> (last visited Jan. 29, 2013) (arguing that registered partnerships should be abolished to simplify the legislation in the field of family law); B.S. Smith & J.A. Robinson, *An Embarrassment of Riches or a Profusion of Confusion? An Evaluation of the Continued Existence of the Civil Union Act 17 of 2006 in the Light of Prospective Domestic Partnerships Legislation in South Africa*, 13 POTCHEFSTROOM ELECTRONIC L.J. 30 (2010) ("[T]he Civil Union Act is an unnecessary piece of legislation.").

proposed such functionalist approaches,<sup>146</sup> and I will present two that encompass much of the work on this subject.

Cynthia Grant Bowman suggests that couples who have cohabited for more than two years or who have had a child (regardless of how long they have been together) should be treated as married in all respects of the law—*vis-à-vis* each other and by third parties, including the state.<sup>147</sup> This quasimarital status would be imposed upon them without their consent and would not require them to prove the nature of their relationship.<sup>148</sup> Couples who do not want to be treated as married would have an easy mechanism for opting out and could contract about the terms of their relationships, if they wish to do so. In cases where only one partner wants the obligations and commitment offered by marriage, the process would provide the vulnerable side (often the woman, in opposite-sex couples) with bargaining power.<sup>149</sup> Finally, Bowman suggests a parallel system of domestic partnership in which couples could register. The registration would allow the parties to decide upon and outline their own obligations via contract, but the default rules would be similar to marriage. The idea behind this option is to allow couples, if they wish, to escape the religious connotations or the gender-based assumptions associated with marriage.<sup>150</sup>

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146. See, e.g., MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004) (arguing that the law should support dependent individuals and their caretakers); Lifshitz, *supra* note 61 (arguing for a pluralist approach that divides unmarried couples according to their presumed intentions and assigns them a bundle of rights upon dissolution based on the categorization of their relationship); Scott, *supra* note 72 (arguing that a contractual framework that presumes that cohabitants who live together for more than five years intend to share property and to support each other financially upon dissolution). For discussion of literature on legal recognition of friends and family members who are entitled to some of the rights conferred by the state upon married couples, see *infra* Part V.B.2.a.

147. BOWMAN, *supra* note 15, at 224-28. Bowman did not choose this period of time randomly, but rather because most cohabitants do not live together for this long, so short-term cohabitation would not be covered by the reform. In 2008, about 4.5 million individuals had lived together longer than two years. Conversely, other countries use the three-year mark for imposing marital status (for example, New Zealand), and other scholars, including the American Law Institute (ALI), advocate for the three-year line for cohabitants without children.

148. In this regard, Bowman's suggestion is different from that of the ALI, which has proposed a similar system but one which would require proof by factors, such as management of the household together. In addition, ALI's proposal only treats remedies within dissolution and does not concern similar treatment by the state during the relationship, as Bowman's proposal does. See ALI, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* §§ 4.09-.10, 5.04, 6.04-.06 (2002).

149. BOWMAN, *supra* note 15, at 228-29.

150. *Id.* at 229-30.

A more complex regulatory regime is proposed by Nancy Polikoff, who advocates a major reform in the law's treatment of family issues, a reform she characterizes as a "valuing-all-families" approach.<sup>151</sup> This is a functional approach par excellence, according to which there would be no bright-line rule (that is, not marriage nor any other status) for the division of benefits and protections by the state.<sup>152</sup> Instead, the law's protection of the familial unit would be motivated by the purpose of the law at stake and the role the family members fulfill in the family. For example, a partnership that involved children would have rules of dissolution different from one that did not.<sup>153</sup> Polikoff's approach goes beyond recognition of intimate unions. In her view, the law should recognize adult relationships; thus friendship and other interdependent relationships are worthy of protection in the same way that conjugal relationships are, according to the functions they fulfill.<sup>154</sup>

Accordingly, her proposed legal system would look as follows: marriage would be open to both opposite- and same-sex couples but would be renamed "civil partnership." Regarding the regulation of economic relationships between unmarried couples upon dissolution, Polikoff's main point is that couples should not marry, register, or contract in order to receive rights upon separation. She generally supports the recommendations of the American Law Institute (ALI). According to the ALI, couples who do not have children and who cohabit for three years (or two years if they have children) are presumed to be domestic partners and treated, for purposes of dissolution of the relationship (but not for state rights during the relationship), similarly to married couples in terms of property and spousal support.<sup>155</sup> The ALI proposes thirteen factors for establishing

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151 POLIKOFF, *supra* note 119, at 126.

152. *Id.*

153. Nancy Polikoff uses California's domestic partnership law as an example of legislation that distinguishes between types of marriage for different purposes. For example, the law allows some couples to divorce by filing a notice, with no need to go to court, when they meet certain criteria (for instance, if the couple has been registered for less than five years and has no children). *Id.* at 133.

154. Polikoff suggests that instead of relying upon marital status, the law should be based on three principles: (1) "the needs of children and their caretakers" should be placed "above the claims of able-bodied adult spouses/partners," (2) "the needs of children in all family constellations" should be supported, and (3) adult interdependency must be recognized. *Id.* at 137-38.

155. ALI, *supra* note 148. While the ALI principles allow the legislature to decide the length of the cohabitation period required to establish a "domestic partnership," the principles seem to recommend, based on other countries' experience, that the cohabitation period should be two years for couple with a common child and three years for a couple without a common child. *Id.* § 6.03 cmt. D. The principles also add factors that would rebut the presumption



whether a couple should be treated as domestic partners. Among these are whether the couple commingles finances, whether they name one another as beneficiaries in documents (like wills), and whether they present themselves to the community as a committed couple.

While these approaches are more promising than abolitionism and traditionalism, and their rationales are compelling, they also have some shortcomings. Polikoff's model seems entirely right, as there is no good reason to single out marriage as the only worthy mechanism to determine what constitutes a family. My only critique of Polikoff's approach is that her model provides only one registration scheme for couples.<sup>156</sup> In Polikoff's regulatory regime, intimate couples could only enter into civil partnerships (equivalent to getting married) and would not have any alternative registration options.<sup>157</sup> In Bowman's model, cohabiting couples would be afforded all the rights and obligations of marriage only after two years—so there is very little incentive for them to use the domestic partnership scheme she suggests, as it would not add much more than the quasimarital status offers. Bowman's model thus gives very little incentive for couples to register for any particular marriage alternative and to design their relationship with maximum flexibility; such a lack of incentive may, de facto, decrease choice.

What these proposals disregard is that registration, opt-in schemes, and an ex ante establishment of a couple's rights, benefits, and obligations have significant value.<sup>158</sup> They provide couples with a

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created by the length of cohabitation. The same factors would be used to establish the presumption when the cohabitation time was shorter than required by the statute.

156. Polikoff is also in favor of registration—not one intended to be used by conjugal couples, but rather one that is for “those who lack a spouse/partner but wish to identify someone considered a family member.” This registration would affect only two areas of the law: medical decision-making privileges and inheritance rights. The designated person would have a right to make medical and disposition-of-remains decisions, and if the designating person were to die without a will, the designated person would get the same share of the estate that a spouse would receive. POLIKOFF, *supra* note 119, at 134.

157. One may wonder what the difference is between Polikoff's civil partnership and the RCR. After all, if marriage becomes civil partnerships and the rules of exit change in accordance with the couple's status (as in Polikoff's model), why then do we need both RCRs and civil partnerships? First, because the idea of marriages becoming civil partnerships is not realistic in the near future and an RCR-like regime already exists in Colorado, it seems that the RCR is a more realistic option. Second, even assuming that marriages can transform into civil partnerships, there will still be a place for marriage alternatives based on contract that are less formal and more flexible than marriage or marriage with a different name.

158. My previous argument that couples rarely know the legal rules that are attached to marriage does not stand in contradiction because there is a cultural understanding of what marriage means, even if the legal institution's rules are not entirely clear. Unlike marriage, in the case of the RCR, the couple will have to contemplate the specific consequences of registering the relationship.

means of getting—with only one act of registration—the entire bundle of rights, benefits, and obligations that stem from the relationship. They exempt couples from the hassle of providing documentation and other proof of the relationship to employers, judges, and administrators.

Bowman's model is, in essence, a different path to marriage, rather than an alternative. More important, the lack of registration in her scheme creates significant difficulties in the relationships between third parties (including the state) and the couple. If a couple wants, for example, to enjoy tax benefits under Bowman's proposal, they would not be eligible until they were able to show that they had lived together for two years or had a child together. Would the couple have to prove this at any time—or again and again—to the state and employers for every different benefit they apply for? Of course, this issue could easily be resolved if the couple were able to produce a certificate of cohabitation (already a type of registration). Even then, what if a couple raises a child together, who is the legal child of only one of the partners? What happens if one relationship ends and a new one begins; that is, how does the state know about the separation for purposes of, say, taxation and Social Security? How would the duration of the relationship be measured? What if only one partner is named in the residency contract? What about couples who do not live together (a growing trend in the United States and Europe)?<sup>159</sup>

In a regime where informal unions receive so many rights, cohabitants have very little incentive to register. Therefore, under these two proposals the range of choices concerning how to organize the family in fact diminishes. In other words, these proposals are in contradiction to a full and well-functioning menu of regulatory options for relationship recognition.

Functional family law is a valuable idea: families should not be denied any rights or benefits based on strict definitions of what

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159. In addition, these proposals also put a heavy burden on, or even disregard, many nontraditional couples. In New Zealand, the requirement that cohabiting couples must live together in order to receive recognition is only one factor among others. This structure of the law “means that there will be some cases where the parties do not actually live under the same roof or where they spend only part of their time together.” Bill Atkin, *The Challenge of Unmarried Cohabitation—The New Zealand Response*, 37 FAM. L.Q. 303, 315 (2003). In another place, Bowman argues that couples who live apart do not need to be recognized under her model because the very fact that they maintain separate residences means that they are not economically interdependent. Cynthia Grant Bowman, *The New Family: Challenges to American Family Law*, 22 CHILD FAM. L.Q. 387, 392-93 (2010). It seems likely that these couples could use an alternative registration that would allow them to keep their economic independence and still enjoy other rights that stem from their relationships.

“family” is. At the same time, family law should be as clear and efficient as possible. Functional family law is perhaps close to the ideal. But the extra bureaucracy it entails could harm those who do not have the means to consult lawyers or are unable to understand complex rules.<sup>160</sup> In this regard, it may be possible to formulate a more flexible and simple family law that better serves people.

*E. Intermediate Summary: The Principles of a Menu of Options*

While this Article sides with the menu-of-alternatives approach, it also argues that this is the least developed and most under-investigated plan. This Article aims to set some initial principles for a well-functioning menu-of-options system.

First, the list should offer relatively few choices in order to avoid both confusion in family law and the promulgation of legally unnecessary alternatives (such as marriage-mimic institutions). Second, the list should not offer options that neutralize other options in a way that, de facto, decreases choice. In other words, for a menu to be successful, it is important to examine how the options interact with each other. The options need to be tangential: they can touch the boundaries of each other but cannot take over one another. Third, to remedy problems that may arise from having a limited number of alternatives, each institution should be as flexible as possible (consistent with its unique purpose) in order to accommodate various degrees of commitment and various types of relationships.

Still other questions remain open. What level of rights and obligations would provide enough protection to informal couples while leaving room for other alternatives? Does covenant marriage promote the plurality of options, or does constraining the ability to seek divorce infringe upon people’s autonomy and private decision making?<sup>161</sup>

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160. One could argue that my proposal for the RCR is at least as complicated as functional family law. While I am aware of, and discuss, the problems and complexities of signing a contract, my regime is still less complicated and more accessible than other functionalist models. As I discuss in the next Part, there will be some off-the-rack contracts that are advertised or publicized in some way as well (like at a florist, where you can choose each flower individually or you can choose a prepackaged bouquet). Moreover, as I explain below, states can adopt the Colorado model that provides a standard form that contains a list of numerous legal consequences from which to choose from. Second, the RCR is *one* additional institution, even if it is a somewhat complicated one, and one that relies on the advantages of status while the other proposals discussed here offer a set of different rules that are established ad hoc or offer a complex of different rules about various aspects of couples’ lives.

161. See Lifshitz, *supra* note 61, at 1632-34 (arguing that covenant marriage is consistent with a pluralistic approach). Even if one thinks that the option for covenant

Should the menu of options include the recognition of polygamous relationships?<sup>162</sup> This Article leaves these questions for a future discussion and focuses on the gap in the spectrum of legal recognition—that space between informal relationships and marriage.

## V. RCRs

In this Part, I propose that for a menu of options to be consistent with the ideals of autonomy and gender equality it should include an alternative to marriage in the form of the RCR. I start by outlining what such a mechanism would look like. I then explore how this model is consistent with the purposes of American family law. This is followed by an assessment of its possible weaknesses.

### A. Mechanism

The RCR's main purpose is to add an additional institution to the menu of legally sanctioned relationship options—creating a menu that recognizes the fact that families are no longer structured by the dichotomist distinction of “married versus unmarried.” RCRs would serve those relationships that fall in the large space between marriage and informal relationships. In practice, this means that RCRs should accommodate diverse groups of couples with different levels of commitment and varied legal needs. As such, it is not enough that the RCR adds an additional option to the list of choices; it has to be highly flexible within its own framework. The RCR should be an institution that is different from marriage because marriage, with its one-size-fits-all nature and its historical and cultural values, is not a relevant option for various individuals; it should also be different from informal relationships in that it should offer the benefits of registration and recognition by the state and third parties.

Based on these principles, the most important aspects of the RCR scheme are that it is a form of registration lacking a solemnization process and that it is based on a contract or other agreement between

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marriage should exist within a menu of alternatives because it increases families' options, other ways exist to expand options without infringing on people's rights to end their relationships with minimal government interference. For example, Elizabeth Scott suggests that people could choose between regular no-fault divorce and divorce with an imposed waiting period but without the requirement of grounds for divorce. See Elizabeth S. Scott, *Divorce, Children's Welfare, and the Culture Wars*, 9 VA. J. SOC. POL'Y & L. 95, 105 (2001).

162. See Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955 (2010) (proposing a regulatory model for contemplating polygamy).

the parties. It should allow an easy means of termination as well as easy means of conversion to marriage. Ideally, it would be open not only to conjugal couples but also to relationships among relatives and friends. Of course, designing the many details of such a system requires amending numerous statutes, rights, and protections that are tied to relationships—a mission that this Article does not purport to achieve. Instead, this Article puts forth the general design of this system, which is discussed below.

*Registration.* Registration would take place in court or city hall before a clerk, and should not involve vows, witnesses, or any other symbols of solemnization, in order to reflect the secular and contractual nature of the union.<sup>163</sup> The couple would deposit a contract or fill in a form that lays out their rights and their obligations to each other (more on this below). The registration would prompt a change of status (to registered partners) that would require third parties, including the state, to grant such couples the rights that I describe below.

*Contract.* Registration should encourage the couple to contemplate the legal consequences of their relationship so that they can decide for themselves what obligations and rights their union carries. Upon deciding these terms, the couple would draft and sign a contract (or fill out a form) reflecting their decided-upon obligations. To serve the flexibility of the RCR and allow the couple to change their level of commitment to each other, the couple would have the ability to modify the contract at any time. For the sake of privacy, some parts of the contract could be kept confidential (such as matters relevant to property, but not those that are relevant to third parties like hospitals).<sup>164</sup>

Because contracts can be complicated, intimidating, and expensive, and because couples are often uncomfortable discussing financial issues that are related to death or separation and questions concerning the end of life, states should make the contract process as

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163. There is an argument to make that, because the RCR is built on maximum flexibility and choice, it should include an option allowing a couple to choose a solemnization process. In other words, when the couple arrives to register they could choose between simple registration and a short exchange of vows. While this argument has some merit, it seems that in order to keep the process as simple and accessible as possible (with a minimum burden on the state), as well as to perpetuate the RCR's unique character as an institution that is different than marriage and that lacks the symbolic values of marriage, it should not include any rituals.

164. The fact that some terms of the contract are confidential does not mean that third parties would be unaware of the obligations that a couple have to each other, because the couple's status as registered partners would indicate that such a contract might exist and therefore third parties could ask the couple to present the contract.

accessible and easy as possible, ideally without the need for lawyers. There are several ways they might do this. In one system (similar to the French model), the couple would deposit a contract with an official registrar. (It is expected that, upon the creation of the RCR, there would be many standard forms of contracts available.)<sup>165</sup> Alternatively and preferably, to advance simplicity and efficiency, the state could choose to offer a form in the style of Colorado's designated beneficiary scheme that would be available via the Internet and easy to understand and fill out. In such cases, couples would check boxes indicating which obligations they accept, which they reject, and specify for which functions—for example, making end-of-life decisions—they designate their partner.<sup>166</sup> In a Colorado-style system, there is no need for default rules because the parties must address all the legal activities concerning their relationships.<sup>167</sup>

*Rights, benefits, and obligations:* In order to contemplate which rights, benefits, and obligations should accompany the RCR, we can roughly divide the relevant rights, benefits, and obligations into two sets. One set consists of those in which the state enforces the partner's wish to designate the other partner for a legal purpose. In this role, the state helps enforce the choice that the state assumes that the partners would make or the expressed choice about the role of the other partner. For example, by designating the surviving partner as the heir of a decedent dying intestate, or by allowing a partner to make end-of-life decisions, the state assumes that such a designation is the wish of the other partner and enforces their wishes.

The second set of rights and benefits contains the cases in which the state recognizes the partnership between the couple and confers rights and benefits upon their status. In this case the couple often *seeks* the rights and benefits that are granted by the state. Either these rights are given only upon the couple's request, or the couple is able to waive these rights. For example, immigration rights are granted upon

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165. Sanger, *supra* note 134, at 1315-16; *cf.* Zelinsky, *supra* note 129, at 1182.

166. Another possible model could allow people to register without a contract; the couple would sign a declaration stating that they are registered partners according to the terms of the law. In such system, the default rules would define the partners' obligations and rights. This is the case in France, where most couples simply sign a statement agreeing to the terms of the PACS. See BOWMAN, *supra* note 15, at 210. While such a system has the advantage of simplicity, it neuters essential components of the RCR by making it more like a civil union than a flexible institution different from marriage.

167. In a contract-style system, there is a possibility that the parties will not address some issues. This possibility could be dealt with by requiring that the parties address certain issues or by creating default rules that are different from those for marriage and that reflect the nature of the nonmarital arrangement as an intermediate level of commitment.

request and testimonial spousal privileges may be waived by the partners.

The RCR's main principle is that the rights, benefits, and obligations in the first set are for the couple to choose and may be waived by the couple. Simply put, the list of these rights, benefits, and obligations will appear on the form (or contract), and the couples will choose which they want. Thus couples can decide, for example, that they do not owe spousal support and/or do not designate each other to make medical decisions, but they can still designate each other as a beneficiary of their life insurance policies.

Regarding the second set of rights, benefits, and obligations, the couples are eligible for most rights and benefits that the state offers. However, the eligibility for a minority of those rights could be conditioned upon the existence of certain terms, according to the purpose of the law. The basic principle is that since marriage is still a primary way to distribute benefits and protections, there is no reason to prefer married couples over others. However, sometimes the logic of why legal protection is granted to couples clearly does not apply to the RCRs. For instance, there is no reason to grant Social Security survivor benefits to couples who were *not* economically interdependent.

The kinds of rights that are included in the RCR could possibly raise many questions and concerns: which rights are included and which are excluded? How would the state decide RCR eligibility, and in what way would the state handle the bureaucracy that such a change obliges? Some readers will be alarmed by the opportunities for fraud in such a regime; others will ask why we should reward couples who do not support each other or why we should allow rights shopping. I discuss all these concerns in the Subpart on theoretical foundations.<sup>168</sup>

For now, it suffices to say that the law already recognizes, in some instances, that state benefits could be divided not only based on marital status, but also on the function of the family or the choice of the

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168. The proposed system would create some legal challenges for the system that exists today, but not so many that it would require fundamental changes or new legal theories. One question concerns the validity of other documents that possibly contradict the RCR agreement. In Colorado, the designated beneficiary agreement is superseded and set aside to the extent that it conflicts with another valid legal instrument, such as a will, a power of attorney, or a beneficiary designation on an insurance policy or pension plan. Such a legal rule seems to create unwanted consequences because it gives the partners an opportunity to suppress the meaning of the RCR agreement, possibly without the other partner's knowledge. Thus, I suggest that the partner who wants to sign documents that contradict the agreement needs to notify the registrar by depositing the document creating the change with the registrar, in order to make sure that the other partner knows about the change.

person. For example, while marital deduction of estate tax is still privileged, every person also receives an equivalent estate tax exemption that allows them to avoid estate taxes on up to \$2 million of property left to nonspouses.<sup>169</sup> Another example of a functional approach is that a divorced, surviving partner is eligible for Social Security survivor benefits upon meeting some conditions, including caring for a child of the deceased partner.

The law also imposes obstacles in granting some rights in the form of the required time period that the couple must spend together in order to establish eligibility for certain rights or benefits (temporal requirement). Under the current law, in some cases a married couple is eligible for rights and benefits only after they have been married for some time. For example, a spouse is eligible for Medicare coverage if the couple is married a minimum of a year.<sup>170</sup>

On a more essential point, the American legal system simply grants too many rights based solely on marital status—often when the status is unrelated to the function of the family or is not a good proxy for economic interdependency between the spouses.<sup>171</sup> In fact, in many areas of the law, the legal justifications behind the statutes that give preference to married couples are outdated and undesirable. Therefore, until the correlation between marriage and benefits distribution changes, the RCR might perpetuate such flaws in the current system. In other words, because a married couple acquires some rights based on status even though marriage is no longer a proxy for economic interdependence, registered couples should likewise receive such benefits. Thus the RCR should generally entail most of the benefits marriage currently provides—if the couple so chooses.

*Termination.* Registration should be designed to provide two routes for termination of the relationship, in the same way as some of the domestic partnership laws in the United States are.<sup>172</sup> One route should reflect the contractual nature of the relationship, thus providing an easy means of termination without the need for a court decree. The second route would be for couples with minor children who have not

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169. 26 U.S.C. § 2056 (2006).

170. *What Are the Requirements To Receive Medicare Benefits? There Are Many Ways To Qualify for Medicare.*, TENN. DEP'T OF TREASURY, <http://treasury.tn.gov/oasi/PDFs/MEDICARE-INFORMATION.pdf> (last visited Jan. 29, 2013) (“If the spouse in question is living, the marriage to that spouse must have been in effect for one year to be eligible for Social Security benefits and/or Medicare.”).

171. See Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 40-44 (2012).

172. See, e.g., NEV. REV. STAT. § 122A.300(2) (2012) (describing the “simplified termination proceedings” and the terms of eligibility for such a process).



executed any agreement about the custody or support of their children and thus must move through the regular divorce procedure. Because some will use an RCR as a prelude to marriage, couples who would like to convert their registration to marriage would not need to terminate the registration; it—as well as the contract—would automatically terminate upon marriage.

*Eligibility.* Theoretically, in a flexible model like the RCR, the legal designations that stem from the relationship could be divided between more than two partners. This is especially true with a forward-looking approach because, in the near future, information technology would allow third parties and state agencies to know which person is designated for what purposes. For example, one could designate their mother to make end-of-life decisions and designate their intimate partner to be their only heir. Yet, I suggest, registration would be permitted only between two people.<sup>173</sup> This position stems from the pragmatic nature and realpolitik approach that are the foundation of the RCR. First, politically, having the RCR open to more than two people may destroy the possibility that RCRs will be developed from current civil unions—an institution that is open only to two people. In addition, opening the institution to more than two people would ignite the political resistance of people who oppose polyamorous relationships. Second, the legal system in the United States is bound up so closely with, and organized so thoroughly around, the concept of couples that it is very difficult to disaggregate this concept from that of the conferral of many rights and benefits. Thus, adding more than one person to an RCR poses the same fundamental difficulty that polyamorous relationships bring to the law: how to divide state benefits and rights between more than one designated person. While disaggregating marriage from many of the attached rights and benefits seems like the right thing to do, and perhaps is even possible, it also does not look, realistically, like it is a process that could happen in the near future. Because RCR's baseline is current U.S. family law, the institution will be limited to two people only.<sup>174</sup>

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173. *But cf.* Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 230 (2007) (“In order to recognize that people can and do rely on multiple people to perform different functions in their lives, and that these people and functions can shift over time, family law would have to go well beyond proposals permitting individuals to name one designated friend or even a spouse plus a best friend.”).

174. The fact that the registration is only open for two people does not mean that registrants cannot designate other people for specific activities. For example, if two friends are registered, one of them may still designate a third friend to be that person's successor (by

There should be no requirements for common residency or the amount of time the couple must have been together, and no fidelity requirement—just as marriage does not have such prerequisites. Registration should be open to every type of partnership—romantic or otherwise, including those between family members—as long as neither partner is married or partnered with another person.

## *B. Theoretical Justifications*

### 1. Autonomy

Autonomy—the idea that a “person is a (part) author of his own life,”<sup>175</sup> with the ability to self-govern with minimum restraints—is one of the basic foundations of Western industrial democracies, including American law.<sup>176</sup> In the past, the idea that the family unit (or its members as individuals) enjoyed autonomy in its formation “would have been considered an oxymoron to the extent that the issue arose at all.”<sup>177</sup> Couples had limited options in forming and structuring their relationships as well as in their termination. For example, the legal consequences of marriage—the spouses’ obligations to each other—were rigidly dictated by the state and could not be modified or contracted by the couple. The marriage contract reflected the patriarchal idea that the husband was responsible for the financial support of the family and the woman provided domestic services.<sup>178</sup> Similarly, divorce was strictly controlled by the state; couples could not privately decide that they wanted to end their marriage but had to

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will). One may argue that marriage’s default rules still impose obligations between the partners that justify the states’ decision against imposing any additional requirements to verify the sincerity of the relationship. Because these obligations (spousal support, for instance) are not included in the RCR, one could argue that there are reasons to set minimum requirements of eligibility for an institution that provides some rights and benefits. Nevertheless, marriage does not necessarily include any of these obligations because couples can modify obligations by contract.

175. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 369 (1986).

176. *AUTONOMY IN THE LAW* 1, 1 (Mortimer Sellers ed., 2007).

177. June Carbone, *Autonomy To Choose What Constitutes Family: Oxymoron or Basic Right?*, in *AUTONOMY IN THE LAW*, *supra* note 176, at 1, 11, 12-13. This does not mean that autonomy was completely foreign to family law. Autonomy was given to the family as a unit, just not to its members as individuals. The state avoided interfering in the family, even where it should have, such as in cases of domestic violence and child abuse, because the domain of the family was seen as private. *See generally* Judith G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child*, 75 *MARQ. L. REV.* 569 (1992) (arguing that throughout history “American law and policy have been so fiercely protective of privacy and autonomy within the family”).

178. Jana B. Singer, *The Privatization of Family Law*, 1992 *WIS. L. REV.* 1443, 1456.

provide grounds (selected from a list dictated by the state) to justify their desire to divorce.<sup>179</sup>

However, family law has changed dramatically since then and now grants individuals increased autonomy in choosing the form that their families take, leaning toward allowing private ordering.<sup>180</sup> For example, the wife is no longer required to take her husband's name or to provide domestic work, and the obligation to support the family financially falls on both partners.<sup>181</sup> In many states, premarital couples are free to contract about their property rights and maintenance obligations.<sup>182</sup> No-fault divorce has transformed the termination process, lessening state control and giving couples more freedom to make their own choices. This increased autonomy can also be seen both in the repeal of laws against adultery and fornication in many jurisdictions and in the right of unmarried partners to contract the economic terms of their partnerships (in most states).

Even with these changes, family law in the United States today hardly reflects the full self-sufficiency expected in a society built on the principle of autonomy. Joseph Raz suggests that personal autonomy is an essential feature of flourishing life.<sup>183</sup> For Raz, a person can live an autonomous life only if they are given an adequate range of options.<sup>184</sup> In terms of adequate choices, it is variety that matters, not quantity. For instance, adequate choice does not exist if a buyer can choose from among a hundred houses that are all the same; an adequate choice would be one between town house, town flat, and suburban house.<sup>185</sup> To ensure adequacy of choice, Raz contends, it is not enough that the state be committed to noninterference (negative liberty); rather, the state is obligated to "create conditions which enable [its] subjects to enjoy greater liberty than they otherwise would."<sup>186</sup>

The menu-of-options approach does the most to support such autonomy in family formation.<sup>187</sup> Currently, the ways for people to

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179. *Id.* at 1470-74.

180. *Id.* at 1444-46.

181. *Id.* at 1458-62.

182. UNIF. PREMARITAL AGREEMENT ACT § 3, 9C U.L.A. 39 (1983).

183. RAZ, *supra* note 175.

184. *Id.* at 373.

185. *Id.* at 375.

186. *Id.* at 18-19.

187. Shahr Lifshitz suggests a similar justification for promoting autonomy and plurality in family law. He suggests that "the law should *design* marriage and cohabitation as separate spousal institutions as part of society's responsibility to provide a *diversity of spousal institutions*." Lifshitz, *supra* note 61, at 1569. Lifshitz's model, however, is significantly different from the one I propose because it suggests imposing different obligations upon

arrange their relationships include marriage, civil unions or domestic partnerships (in some states), and informal unions. Couples in informal unions can sometimes contract about the terms of their relationships, but they cannot enjoy the rights and benefits offered by the state and other third parties; thus, they must choose between marriage and giving up important rights. And similar to the person who must select one house from a hundred similar houses, couples who choose between civil union and marriage choose between the same thing under two different names, which allows for only so much autonomy. The RCR offers an additional option, one that allows couples maximum autonomy in choosing the form and legal content of their relationships and is most consistent with Raz's definition of autonomy. In the previous Part, I warned that the list of options currently offered by the menu-of-options approach presents too many choices. While choice is fundamental to autonomy, when there are too many options "choice no longer liberates, but debilitates."<sup>188</sup> Adding the RCR to the menu of options is consistent with this view, as it does not create too many options in a way that may, *de facto*, decrease autonomy—but adds one more alternative that is very flexible.

In essence, in RCRs the state facilitates private ordering and provides benefits that people would not otherwise get. The state helps people to organize their lives under a defined framework and encourages couples to define and address their rights and obligations with each other. Couples may find registering their relationships a useful way to avoid the invasion of privacy and the hassle involved in constantly proving their relationships. Adopting the RCR does not mean that nonregistered couples will have no rights. For example, in some cases it is consistent with the purpose of the law to allow unregistered partners (including friends or intimate partners) to sue for wrongful death. An RCR only saves the couple the necessity of proving the nature or significance of their relationships. Thus the RCR does not decrease selection, but helps some people to organize their lives in advance.

But the RCR can also be the first step toward the development of a much broader understanding of autonomy and pluralism in family formation. It can advance, in the words of Katherine Franke,

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different kinds of cohabiting couples. His proposal is based on an opt-out regime and, in my opinion, suffers from some of the same problems posed by functionalist proposals, mainly the complexity of the legal mechanism and the lack of incentive to register. Most important, his proposal attempts to solve the problem by ensuring couples' rights only upon dissolution.

188. SCHWARTZ, *supra* note 140, at 2.

“nonnormative notions of kinship, intimacy, and sexuality.”<sup>189</sup> The RCR helps repudiate the idea that there is only one path toward happiness and self-fulfillment—that is, marriage—by offering autonomy to people marginalized by the limited choices that legal regimes currently offer.<sup>190</sup> This type of flexible registration, open to friends and family members, enables such people (for example, singles) to celebrate their lives and preferences with dignity. The RCR allows, in some cases, for easier termination of relationships, thus rejecting the notion that all relationships last forever—a notion perpetuated by the fact that termination of marriage requires state approval.

Importantly, an opt-in regime, rather than an opt-out mechanism, offers autonomy because it does not force duties upon couples with which they do not necessarily agree. Having the option of RCR schemes does *not* mean that the law should not enforce contractual or implied agreements between unmarried partners. However, going as far as to impose marital status on couples in the absence of an *ex ante* agreement (as suggested by several legal scholars) misses the point that some unmarried partners choose not to enter into marriage because they do not wish to assume marital obligations—and thus disproportionately interferes with their autonomy.<sup>191</sup>

One may argue that the highest level of autonomy exists when the state refrains from endorsing any relationships and conferring any rights or benefits on any couples.<sup>192</sup> However, the state does have important reasons to acknowledge partnerships.<sup>193</sup> By doing so, the

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189. Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1414 (2004).

190. See Nadine F. Marks & James David Lambert, *Marital Status Continuity and Change Among Young and Midlife Adults: Longitudinal Effects on Psychological Well-Being*, 19 J. FAM. ISSUES 652, 670-74 (1998) (finding that people who have never married become more depressed and less happy over time, have less positive relations with others, but also are more likely than married people to be autonomous and to experience personal growth).

191. See, e.g., *Tapley v. Tapley*, 449 A.2d 1218, 1220 (N.H. 1982) (“We realize that couples enter into these unstructured domestic relationships in order to avoid the rights and responsibilities that the State imposes on the marital relationship.”); see also Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2696-98 (2008) (arguing that the ALI principles expend the shadow of marriage, and that under the ALI principles, the form of the relationship, not the parties’ intent, is relevant).

192. Cf. Emens, *supra* note 63, at 263-69 (imagining a world in which “there would not only be no marriage, there would be no enforceable contracts between intimate partners”).

193. I do not argue that marriage provides the only way to fulfill the regulatory component, just that some sort of partnership recognition is essential for identifying partners for a variety of reasons.

state responds to the reality that people frequently organize their lives with a partner and that such partnerships have significant emotional, financial, and legal implications.<sup>194</sup> For example, by recognizing relationships, the state allows a person to live with a partner from a different country and grants the latter citizenship.<sup>195</sup> Similarly, when a partner in a state-recognized relationship inherits the property of their deceased partner, that inheritance is exempt from estate taxes.<sup>196</sup> State interventions like these are not inconsistent with the notion of autonomy as Raz conceives it. Such interventions are simply a form of positive liberty; accordingly, the state intervenes “actively to create the conditions necessary for individuals to be self-sufficient or to achieve self-realization.”<sup>197</sup>

Notwithstanding the importance of the foregoing benefits of state-recognized relationships, I do not endorse state intervention that favors partners in relationships, on the one hand, and comparatively disfavors single persons, on the other. By limiting the extension of a panoply of rights and benefits to married people, the state is not only unjustly excluding single persons and others in nontraditional relationships from enjoying such privileges but also diminishing their autonomy. Therefore, while the state should intervene to help its subjects to organize their affairs, it should not isolate marriage (or any other legally recognized partnership) as a means for distributing benefits.<sup>198</sup>

One purported alternative is to disinvolve the state from recognizing varying forms of relationships and, instead, to have the state recognize and enforce contracts entered into by such partners. This model, it could be argued, would absolve the state from encouraging partners to adopt a registration scheme and, accordingly, respect the autonomy of persons who would rather not register and

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194. Case suggests that the rationale behind the state endorsement of partnerships may be “the assumption that the social good is likely to be promoted when government facilitates people working together to achieve joint ends.” Case, *supra* note 109, at 1782.

195. Immigration and Nationality Act, 8 U.S.C. § 1151(b)(2) (2006); Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 WM. & MARY J. WOMEN & L. 537, 546-49 (2010) (describing the significance of marriage under the Immigration and Nationality Act).

196. See 26 U.S.C. § 2056(a) (2006).

197. Ian Carter, *Positive and Negative Liberty*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/archives/fall2008/entries/liberty-positive-negative/> (last revised Oct. 8, 2007).

198. See Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, 1989 OUT/LOOK 9, reprinted in WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK IN GAY AND LESBIAN POLITICS 757 (Mark Blasius & Shane Phelan eds., 1997) (asserting that marriage allows the state to make a distinction in distributing public funds).

who consider any such encouragement to register to be the state's invasion of their privacy. I argue that this assertion, though logical, is simplistic. In essence, even if the state endorses a deregulation regime based on contracts only, the state's enforcement of contracts or grant of rights flowing from that regime still constitutes state intervention. In addition, the union of two people has so many consequences in the fields of inheritance, medical decision making, taxes, debt, and property, to name just a few, that it is important for the state to respond to these consequences with an efficient mechanism. It can do so through a registration scheme, rather than by relying on several documents: a will, power of attorney, contract between the partners, and so on.<sup>199</sup> Thus, when the state does not rely solely on contracts but offers an opt-in scheme as well, the government is not intruding into people's lives but, instead, giving people a better means of regulating the legal implications of their relationships. The state also has a compelling interest in offering registration schemes, based on an efficiency justification: with opt-in schemes, the state would not have to examine the relationship of each and every applicant for each benefit based on contracts alone.<sup>200</sup> Moreover, relying on contracts for each right would open up an opportunity for fraud.

Finally, one could argue that the justification to provide rights and benefits via marriage is that marriage imposes some duties on the couples—toward each other and toward third parties. The obligations toward each other can be divided into two groups: responsibilities during the marriage (the duty of support and services) and obligations at the end of the marriage (spousal support). Indeed, an RCR may not include any of these duties, or may include only very modest obligations between the partners. Therefore, the argument goes, the state should not expand benefits to registered partners who do not have obligations similar to those incurred by married couples. I argue that the basic assumptions in this argument are flawed. The duty of support and services, in reality, is not only vague but very often unenforceable.<sup>201</sup> Further, marriage today does not necessarily entail any obligations between the partners and third parties after divorce because

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199. Cf. Case, *supra* note 109, at 1780 (“While it is theoretically possible with some changes in the law to achieve through a network of private contract many of the benefits of marriage, marriage may have some efficiency advantages, especially given how much of the law is currently structured around it.”).

200. Such a system demands that for each benefit the state provides there will be a system that examines the validity of contracts.

201. See Perry, *supra* note 131, at 13-16.

couples can contract about alimony and division of property, and they can waive these obligations completely.

## 2. Gender Equality

In addition to reflecting and supporting the ways in which people live their lives—thus promoting autonomy and pluralism by permitting individuals to explore diverse ways of living—family law should advance gender equality.<sup>202</sup> By offering an alternative that is not associated with marriage's symbolism and acts to reduce the harm that symbolism creates, the RCR may have enormous effects on gender equality. At the same time, however, the shift to a more private and contractual type of relationship regime may exacerbate existing gender inequalities. In this Subpart, I first examine how RCRs help to achieve gender equality, and then what its disadvantages to gender equality might be.

### a. Reducing the Symbolic Harm of Marriage

Some people, me included, view the expressive component of marriage, which has clear practical effects, as harmful.<sup>203</sup> Historically, “[m]arriage was the principal institution that maintained the patriarchy.”<sup>204</sup> It left women without legal rights or legal personhood,<sup>205</sup> it was a venue in which rape was exempted from punishment,<sup>206</sup> and it is still a regime in which domestic violence often occurs.<sup>207</sup> While marriage, as a legal and societal institution, has gone through dramatic changes—such as the repeal of coverture and marital rape exemptions—and continues to do so,<sup>208</sup> it would nevertheless be a mistake to believe that its expressive symbolism is only historical.<sup>209</sup>

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202. Rosenbury, *supra* note 173, at 194-201.

203. See, e.g., Chambers, *supra* note 129.

204. Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U. J. GENDER SOC. POL'Y & L. 167, 170 (2000).

205. See BARBARA ALLEN BABCOCK ET AL., SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY (2d ed. 1996) (explaining the legal meaning of coverture).

206. See generally Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000) (describing the legal history of marital rape exemptions and feminists' efforts to repeal these laws).

207. See Claudia Card, *Against Marriage and Motherhood*, 11 HYPATIA 1, 8 (1996).

208. Cf. Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 588-91 (1994) (arguing that marriage can continue to evolve to meet the needs and values of people).

209. See Nan D. Hunter, *Marriage, Law and Gender: A Feminist Inquiry*, 1 L. & SEXUALITY 9, 18-19 (1991).



Indeed, marriage is “still a central instrument in the denial of women’s status as full citizens.”<sup>210</sup> Some critics of marriage argue that marriage perpetuates the gendered division of labor roles,<sup>211</sup> and as a result of that division, women fare more poorly in the employment market and thus are more dependent on their spouses.<sup>212</sup> Feminist accounts indicate that marriage is a tool to control and direct women’s behavior and to reinforce traditional gender roles by stigmatizing unmarried women when they reach a certain age.<sup>213</sup>

RCRs could help to reduce some of marriage’s expressive harm. First, it provides a different option for legal recognition of relationships, with a different name. Marriage’s name is important; language affecting status and naming is used by the state, particularly in family law, to “reflect and reinforce a gender-hierarchical conception of marriage.”<sup>214</sup> In the same way that marriage-equality advocates argue that civil unions are inferior to marriage because the word “marriage” has cultural value,<sup>215</sup> critics of marriage contend that marriage has a negative universal and historical meaning and that its significance and impact have not disappeared, nor can they easily be changed. With an RCR, the wedding is replaced by registration, thus eliminating some of the harmful aspects of the wedding ceremony and marriage’s name. In addition, legal recognition of nonmarital relationships may lessen the rigid gender role division associated with marriage because research has consistently shown that unmarried couples are less bound by traditional gender roles and the associated division of household responsibilities.<sup>216</sup>

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210. Jyl Josephson, *Citizenship, Same-Sex Marriage, and Feminist Critiques of Marriage*, 3 PERSP. ON POL. 269, 276 (2005); see also Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J.L. & GENDER 37, 44 (2011) (“Although women’s legal status within marriage has improved significantly, marriage still reflects and reinforces gender hierarchy to a significant degree.”).

211. See, e.g., Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2188 (1995).

212. See Jyl J. Josephson & Cynthia Burack, *The Political Ideology of the Neo-Traditional Family*, 3 J. POL. IDEOLOGIES 213, (1998).

213. Kathryn Abrams, *Choice, Dependence, and the Reinvigoration of the Traditional Family*, 73 IND. L.J. 517, 521 (1998).

214. Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 IND. L.J. 893, 895 (2010).

215. Cf. Misha Isaak, Comment, “What’s in a Name?”: *Civil Unions and the Constitutional Significance of “Marriage,”* 10 U. PA. J. CONST. L. 607, 612 (2008) (arguing that because state recognition of marriage carries with it social acceptance, denial of such recognition may be unconstitutional).

216. BOWMAN, *supra* note 15, at 144.

Another way in which RCRs can help reduce marriage's harm is by transforming the married-versus-unmarried dichotomy, which has stigmatized single women and pushed them to marry, because it provides an alternative to marriage that is open to nonromantic couples. It has become increasingly common for people to rely on friends to fulfill important roles in their lives, such as that of caregiver.<sup>217</sup> For example, the lesbian, gay, bisexual, and transgender (LGBT) community and the African-American community are known for historically relying on friends, neighbors, and extended or alternative families for support in caring for themselves and their children.<sup>218</sup> Therefore, "[e]xplicit legal recognition of friendship could . . . eliminate some of the stigma experienced by people living outside of state-sanctioned coupling, because other personal relationships would be recognized by the state."<sup>219</sup> A menu of options would significantly alter the discourse: people could be registered with a friend, a sexual partner, or a future spouse.<sup>220</sup>

b. Perils of Privatization for Women

While privatization of family law—including the creation of contractual regimes and the easy termination of relationships—can offer women tremendous freedom, it can also reinforce gender inequality in a few ways.<sup>221</sup> First, a contractual regime is often unequal when one party is weaker. Second, if a woman declines maintenance and property division rights upon signing a contract, she cannot later win an ex post contractual remedy. In such a case, she might have been better off in an informal cohabitation arrangement without an RCR. Third, an easy termination process—in which there is no judge to supervise the process and in which fewer cultural and legal hurdles

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217. Rosenbury, *supra* note 173, at 208-12 (describing a series of sociological studies showing that people are not engaging in romantic relationships as much as they once did and that instead of relying on family members with whom they share a home, they are relying on friends outside the home).

218. See Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 96 (2004).

219. Rosenbury, *supra* note 173, at 228.

220. *Cf. id.* at 220-29 (arguing that legal recognition of friends as family or a focus on the care that couples provide each other, rather than the status of the couple, could eliminate stigma experienced by nontraditional couples).

221. *Cf.* Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms*, in DIVORCE REFORM AT THE CROSSROADS 191, 192-93 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) ("Given the persistent sex-based disparities in social, economic, and political resources in this society, such laissez-faire policies are not gender-neutral. As in other contexts, the abdication of state responsibility on divorce-related issues has served to reinforce gender inequalities.").

exist to make the breakup tougher—may make divorce even more common, rendering some women and children more vulnerable.

The first problem is that of bargaining power. There is no doubt that, because of marriage's societal power and the economic inequalities that pressure women to get married, many women do not have bargaining power equal to that of men when entering into marriage and setting its terms.<sup>222</sup> This inequality is also exacerbated by the fact that women often marry earlier than men and thus may have less of an understanding of what they want their marriage to look like.<sup>223</sup> Therefore, the risk of RCRs is that women would not have equal power to bargain over the legal terms of their relationships. Without default rules of distribution of property and maintenance (or a requirement to opt out in the case of status-based remedies for cohabitants), some women could end up with even less favorable rights than those they have under the current regime.

On the other hand, while these concerns are valid, RCRs may improve the situation of some women by making the women aware of their own vulnerability and providing them with greater certainty about their legal rights.<sup>224</sup> Unmarried partners, unless they have contracted, currently live with uncertainty about what rights (if any) they may have upon dissolution of their relationship. Their rights are dependent upon the state in which they live, the judge assigned to their case, and their ability to prove that they had an implied contract. Furthermore, many cohabitants may not give much thought to what rights they deserve. In the same way that marriage conceals the inequality of the employment market from some women—because they get health insurance through their husbands' employers and combine their salaries with those of their husbands—the pooling of unmarried couples' incomes may make some women unaware of the difficulties that they will face upon the end of their relationship.<sup>225</sup> Therefore, even if RCRs perpetuate the weaker bargaining power of some women, they still have a "signaling effect," which allows individuals to determine their partners' intentions;<sup>226</sup> women would at least be more informed of their legal position and their partners' intentions.

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222. Abrams, *supra* note 213, at 520-22.

223. *Id.* at 521.

224. *Cf.* Scott, *supra* note 72, at 242-43 (arguing that the official requirements of marriage registration help to clarify the terms and the meaning of the contract and encourage deliberation about the contract's terms).

225. Rhode & Minow, *supra* note 221, at 193.

226. *Cf.* Robert Rowthorn, *Marriage as a Signal*, in *THE LAW AND ECONOMICS OF MARRIAGE AND DIVORCE* 132, 132 (Antony W. Dnes & Robert Rowthorn eds., 2002)

The second problem is that when a woman signs a contract that does not include rights for distribution of property and spousal support, she may lose the option to win an ex post facto contractual remedy for distribution of property and spousal support. Accordingly, by signing a contract, the partners show that they did not intend to have obligations for distribution and maintenance. While this argument has some merit, a deeper analysis is required to understand why, in most cases, it is better to have an RCR than to rely on a court to award compensation based on contractual claims, which can be costly to pursue and certainly does not ensure that the outcome will be in the woman's favor.

Most of the population that would take advantage of RCRs would still benefit from them. We can divide opposite-sex couples who would use RCRs into three categories: those informal cohabitants who, without signing a contract, do not have any sort of arrangement for legal recognition of their relationship; those couples who would get married if RCRs did not exist (but would prefer not to); and those who would use the registration only temporarily as a prelude to marriage. For the first group, RCRs would allow them to enjoy more rights from the state during the relationship, which may compensate for some of the losses at the end of the relationship. The second group probably consists of women who are more educated and empowered and thus are in a better position to negotiate the contract they benefit from.<sup>227</sup> The third group, premarital couples, often do not have any expectations concerning property distribution or support, and on average, short-term relationships will not be granted spousal support or will be granted a very small amount.<sup>228</sup> Thus, it is not clear that a woman's "right" to claim an ex post contractual remedy—which demands lawyers, a trial, and an invasion of privacy—is any better for her than an RCR without property distribution and spousal support.

The final concern with regard to the privatization of relationship regimes is divorce, which often results in greater losses for women

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(explaining that marriage functions as a signal that one party is interested in a committed relationship and offers the rest of the world information about the couple's intentions).

227. I assume that this group would be composed of women who are more educated and better economically situated, because there are some indications that educated, career women prefer cohabitation because it gives them more freedom at work and allows them to avoid traditional gender roles. See BOWMAN, *supra* note 15, at 121-22.

228. In New Zealand, for example, the rules of equal property distribution require that the couple cohabit or be married for three years before the rule is applicable to them. "The justification for a restriction of this kind is that the statutory regime should be imposed on people only where there has been some level of commitment over a period of time." Atkin, *supra* note 159, at 316.

than for men. Not infrequently, for instance, women lack the money to hire an attorney and thus represent themselves.<sup>229</sup> Women can be pressured—by financial means or even abuse—to agree to unfair divorce settlements.<sup>230</sup> Moreover, it is often difficult for some divorced women, who have spent their lives attending to their families, to enter the job market;<sup>231</sup> women often remain their children's main caretakers after a divorce, which places limitations on their ability to work. The presence of a judge in the divorce process, which in an RCR would occur only when the couple has minor children and would still require a court decree, may reduce some of these inequalities if the judge rejects a divorce stipulation that is unfair, or if the judge helps the woman understand the need for a lawyer. In addition, removing the current legal, psychological, and cultural hurdles for termination of relationships may make couples' separation even more widespread than it currently is.<sup>232</sup>

Although enabling people to dissolve unions more easily may exacerbate existing societal inequities, the easy route to termination provided by the RCR also has positive aspects. Importantly, it is assumed that some couples who would otherwise informally cohabit (an arrangement in which they can simply leave the partnership) will choose the RCR; the RCR creates few barriers to separation because the couple need only officially finalize the dissolution of the relationship. Moreover, some feminists believe that it is better to have an easy termination process, which allows women to more quickly end an abusive or oppressive relationship.<sup>233</sup> Divorce termination may also mean escape from dependency on and subordination to husbands and may assist and encourage more women on their way to self-realization.<sup>234</sup>

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229. Penelope Eileen Bryan, *The Coercion of Women in Divorce Settlement Negotiations*, 74 DENV. U. L. REV. 931, 931 (1997).

230. *Id.*

231. Scott, *supra* note 92, at 555.

232. *Cf.* Scott, *supra* note 161, at 104 (arguing that under modern divorce law spouses who are not deterred by nonlegal barriers like religion are more likely to divorce than under no-fault divorce law).

233. See Linda J. Lacey, *Mandatory Marriage "For the Sake of the Children": A Feminist Reply to Elizabeth Scott*, 66 TUL. L. REV. 1435, 1443-46 (1992).

234. See Scott, *supra* note 161, at 109 (presenting the feminist approach to an easy divorce regime).

Additionally, the duration of marriages has declined in the past decades, and some marriages end shortly after they begin.<sup>235</sup> Such short-term relationships often carry fewer legal consequences, and an easier dissolution process is more appropriate for these relationships. Because the nature of the RCR is that of an institution that is flexible in dealing with different levels of commitments, it seems plausible that some people (for example, those in the premarital stage and the divorced) would choose it precisely for its easy termination process.

In summary, the RCR can be a double-edged sword. It can facilitate the move toward reducing marriage's harm, a significant problem for women today. But at the same time, this legal reform—intended to achieve a more egalitarian society—can actually exacerbate disparities because of already existing inequalities. Yet, despite the problems that the RCR may pose, its implementation is more likely to lead to important social changes, fostering greater equality and increased autonomy. In other words, while the intention of the RCR model is to increase gender equality, it also aims to promote autonomy and pluralism in family formation. Thus, even if the RCR results in a net loss for women as a class in a minority of cases, its other benefits nonetheless justify its adoption.

### C. *Possible Weaknesses of RCRs*

There are three other possible concerns about the RCR model. First, would states actually adopt such a scheme? Second, even if some states do, would the federal government follow suit and, if it did not, would registration at the state level still be attractive to partners? Third, is it realistic to think that people would choose contract-based registration over marriage given that common wisdom suggests that most Americans would choose marriage over other alternatives due to its cultural and religious significance? This Subpart explores these concerns.

#### 1. *Could the RCR Happen?*

The idea of adopting marriage alternatives based on contracts in the United States may sound revolutionary and unrealistic; it is not. Marriage alternatives based on registration already exist in several states. The existence of such models does not present new theories or

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235. See, e.g., Paula Mergenbag DeWitt, *Breaking Up Is Hard To Do*, 14 AM. DEMOGRAPHICS 53 (1992) (“Over one-third of those divorced in 1988 were married four years or less.”).

complexities in the law, because contractual relationships are now an inseparable component of legal jurisprudence in the United States. Moreover, the legislature has some compelling reasons to introduce such alternatives, as I explain below.

The process leading to the creation of marriage alternatives has its roots in the days when the LGBT movement tried to introduce domestic-partnership legislation with the declared intent of creating options other than marriage and motivated by its ideological resistance to marriage.<sup>236</sup> Ironically, despite dogged efforts by today's LGB<sup>237</sup> organizations to legalize same-sex marriage (often by casting civil unions and other alternatives as "inferior" to marriage), the struggle for same-sex marriage has been an important force in the creation of marriage alternatives. It brought about the enactment of compromises, in the form of civil unions and domestic partnerships, that are sometimes open to opposite-sex couples as well. William Eskridge observes that these alternatives will continue to exist and thus will be a force in the creation of a menu of choices because "[e]ach step toward same-sex marriage is typically (but not always) *sedimentary*: rather than displacing earlier reforms, the new reform simply adds another legal rule or institution on top of an earlier one."<sup>238</sup>

This has occurred, however, much less often than Eskridge suggests: in most cases, in both Europe and the United States, alternatives to marriage were abolished once same-sex marriage was legalized.<sup>239</sup> In fact, only in a minority of cases have the alternatives

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236. Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 529, 532-33 (2009).

237. I use the acronym "LGB" rather than "LGBT" because I am not sure if organizations that are focused on transgender rights are also concerned about the issue of marriage equality.

238. WILLIAM N. ESKRIDGE JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 121 (2002).

239. In this regard, we can divide civil union schemes into two groups: those that are automatically abolished when same-sex marriage is legalized and those that survive. In cases falling into the former group (for instance, New Hampshire's), couples' unions have been automatically "upgraded" to marriage, often leading to confusing legal situations in which many couples who never expressed a desire to be married suddenly are. *See, e.g.*, N.H. REV. STAT. § 457:46(II) (2012) (ordering that effective January 1, 2011, all existing civil unions would legally be converted into marriages).

In other places, such as Norway, couples who are already registered have the option to stay registered or to convert their unions to marriages, but new civil unions can no longer be registered, rendering them extinct. *A Marriage Act for All*, MINISTRY CHILD. EQUALITY & SOC. INCLUSION (June 17, 2008), <http://www.regjeringen.no/en/dep/bld/Topics/equality-and-discrimination/homosexuality/a-marriage-act-for-all--entering-into-fo.html?id=509376>. In Vermont, similarly, the legalization of same-sex marriage "discontinued the need for the separate status of 'civil unions.'" Thus, couples cannot register new civil unions, but the

survived the legalization of same-sex marriage, and even in places where civil unions still exist, they are hardly used (with the exception of Belgium).<sup>240</sup>

One could argue, then, that the destiny of the RCR will be no different; it will be used as a compromise in the absence of same-sex marriage and will be abolished when same-sex marriage is legalized. While there is merit to this argument, the RCR may be different from the institutions that have been abolished. When civil unions are solely intended to block or slow the process toward same-sex marriage, and when they are almost identical to marriage, there is no reason to maintain the separate institution after the legalization of same-sex marriage, nor is there a reason for most opposite-sex couples to choose them. In addition, marriage alternatives are new and thus often unfamiliar to many, which is a disadvantage that conventional institutions like marriage do not have.<sup>241</sup> However, if these alternatives were truly different from marriage (not just different in name), they would be much more likely to survive the legalization of same-sex marriage. What happens to the RCR and other marriage alternatives that are significantly different from marriage will be dependent, to a large extent, on the number of people who use them, the legislature's and the general public's awareness of them, and the way they are integrated into popular culture and everyday life.

A change in the public's perception of marriage alternatives could happen if states understand that marriage alternatives have a more important role than just hindering the legalization of same-sex marriage. Importantly, it is not only the legislature and the general public who need to recognize the importance of marriage alternatives. Same-sex marriage advocates should stop degrading civil unions in their efforts to legalize same-sex marriage; they can do this by acknowledging that alternatives to marriage are beneficial to many and

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status of couples who are already registered is still respected. *Civil Unions & Reciprocal Beneficiary Relationships*, VT. DEP'T HEALTH, [http://healthvermont.gov/research/records/cv\\_reciprocity.aspx](http://healthvermont.gov/research/records/cv_reciprocity.aspx) (last visited Jan. 29, 2013).

240. In Belgium, the number of people making a declaration of legal cohabitation per year (*cohabitation légale*) nearly doubled in three years, from 34,605 in 2006 to 67,561 in 2009. *Cohabitation légale*, STAT. BELG., [http://statbel.fgov.be/fr/statistiques/chiffres/population/mariage\\_divorce\\_cohabitation/cohabitation/](http://statbel.fgov.be/fr/statistiques/chiffres/population/mariage_divorce_cohabitation/cohabitation/) (last visited Jan. 29, 2013).

Moreover, in 2009, 65,406 opposite-sex couples registered, compared to 2155 same-sex couples. *Id.* Further, in 2009 only 43,303 weddings were performed, compared to the registration of 67,561 new cohabitations. *Id.*; *Mariages*, STAT. BELG., [http://statbel.fgov.be/fr/statistiques/chiffres/population/mariage\\_divorce\\_cohabitation/mariages/](http://statbel.fgov.be/fr/statistiques/chiffres/population/mariage_divorce_cohabitation/mariages/) (last visited Jan. 29, 2013).

241. Eskridge, *supra* note 136.



by arguing that a number of options, including marriage, should be open to everyone.

Despite its innovative nature, the RCR does not present unprecedented and complex legal issues or values. Privatization of family law and a contractual approach to relationships are concepts that already exist in American law.<sup>242</sup> Not only are marriage alternatives already in existence and familiar to legislatures, but it is also possible that moderate-to-liberal legislatures will look upon marriage alternatives as a solution for unmarried couples that is more appealing than other proposals. The reason is that registration is, for the purposes of the state, better than informal unions because it establishes a defined set of rights and allows the state to regulate some of the aspects in which it takes an interest (statistics, efficiency, and the like).

Finally, it is important to emphasize that despite states' current policy of disregarding unmarried couples, legislatures will have to address this problem at some point. Marriage has changed—it does not hold the significance it once did, and marriage has become only one option (even if still a powerful one) among a few with which to arrange one's family life.<sup>243</sup> Cohabitations and alternative families are likely to become increasingly common,<sup>244</sup> and at some point in the future, a more comprehensive arrangement (not just ex post judicial remedies) will have to be negotiated.

## 2. Would the Federal Government Recognize RCRs—And Does It Matter?

A 2004 study found that 1138 federal laws tie benefits, protections, and responsibilities—such as tax incentives, property and inheritance rights, social benefits, joint filing for bankruptcy, and immigration rights—to marital status.<sup>245</sup> Many of these rights and benefits are essential to couples. They are currently denied to same-sex spouses, even in states in which such couples can marry, because the Defense of Marriage Act (DOMA) states that “the word ‘marriage’ means only a legal union between one man and one woman as

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242. See Singer, *supra* note 178.

243. J. Herbie DiFonzo, *How Marriage Became Optional: Cohabitation, Gender, and the Emerging Functional Norms*, 8 RUTGERS J.L. & PUB. POL'Y 521, 527-39 (2011) (arguing that although many in the United States still aspire to marry, cohabitation and adoption have become increasingly popular alternate ways to create a family).

244. BOWMAN, *supra* note 15, at 101-02.

245. U.S. GEN. ACCOUNTING OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (2004), <http://www.gao.gov/new.items/d04353r.pdf>.

husband and wife.”<sup>246</sup> A few challenges to DOMA’s constitutionality have been filed in federal courts,<sup>247</sup> political efforts are being made to repeal it,<sup>248</sup> and some believe that it is likely to be repealed soon.<sup>249</sup> The question therefore is whether the federal government would recognize marriage alternatives in a world without DOMA.

Based on Congress’s long-held attitudes about the significance of marriage, it seems unlikely that the federal government will recognize a marriage alternative for opposite-sex couples. However, even if the federal government does not explicitly and comprehensively recognize marriage alternatives, that does not mean that each and every right granted on the federal level would be restricted to married couples. The Internal Revenue Service (IRS) recently informed an Illinois taxpayer that opposite-sex partners in a civil union are treated as husband and wife for purposes of filing a joint return because the state law provides that civil partners should be treated the same under the law as married couples.<sup>250</sup> Thus, if the IRS treats opposite-sex couples in civil unions as married, there is no reason for other departments and agencies of the government to treat them differently.<sup>251</sup>

Recognition of alternatives to marriage, under the current Republican-controlled United States House of Representatives or even under a more liberal Congress, seems very unlikely because marriage holds a strong cultural and religious significance in the United States.<sup>252</sup> During President George W. Bush’s administration, a great

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246. 1 U.S.C. § 7 (2006).

247. *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (finding DOMA unconstitutional); *In re Balas*, 449 B.R. 567 (Bankr. C.D. Cal. 2011) (finding that section 3 of DOMA is unconstitutional).

248. Helene Cooper, *Obama To Support Repeal of Defense of Marriage Act*, N.Y. TIMES (July 19, 2011), <http://thecaucus.blogs.nytimes.com/2011/07/19/obama-to-support-repeal-of-defense-of-marriage-act/>.

249. Andrew Koppelman, *Why the Supreme Court Will Strike Down DOMA*, SCOTUSBLOG (Aug. 19, 2011, 8:44 AM), <http://www.scotusblog.com/2011/08/why-the-supreme-court-will-strike-down-doma/>.

250. Letter from Pamela Wilson Fuller, Senior Technician Reviewer, Internal Revenue Serv., to Robert Shair, Senior Tax Advisor, H&R Block (Aug. 30, 2011), <http://law.scu.edu/blog/samesextax/file/IRS%20Civil%20Union%20letter.pdf>.

251. There is an argument to be made that even if the federal government recognizes civil unions it does not follow that it would recognize unions under the RCR. Accordingly, RCRs would be different than civil unions, because civil union law declares civil partners as equivalent to spouses, while the RCR sets out a different set of rules. However, in both cases the rationale and legal situation are similar. If the states decide to grant some rights and benefits to couples who are not “married,” it should be irrelevant to the federal government whether they are granted through civil unions or RCRs. Nothing stops a state from promulgating statutes that require, for the purpose of specific laws, registered couples to be treated as married couples.

252. *See infra* Part VI.E.

deal of money was invested in programs intended to promote marriage.<sup>253</sup> On the other hand, in a world without DOMA, the federal government's refusal to recognize civil unions would incentivize states to legalize same-sex marriage and to reject civil unions as a compromise because they provide fewer rights than marriage.

Should the federal government respect each state's characterization of what constitutes a family? Traditionally, family law was the states' domain, but in recent decades the federal government's involvement in family law has significantly increased, particularly in relation to children.<sup>254</sup> Yet despite the complex relationship between the federal and state governments, the increased number of family law issues that are addressed by the federal government, and the federal courts' tendency to allow preemption of state family law when it contradicts the policy of the federal government,<sup>255</sup> when it comes to the law of domestic relations, the question of what constitutes a family is most often determined by state law.<sup>256</sup> Normatively speaking, in the words of Ann Laquer Estin, "the intervention of the national government into the sphere of family regulation is less appropriate and less useful if it is designed to serve symbolic or political purposes, or if it restricts the states in their efforts to support and protect families and children."<sup>257</sup>

What if the federal government refuses to recognize, or only partially recognizes, the rights of couples who are registered under the RCR scheme? Would people still have a reason to register? Certainly partners would have less incentive to do so, but I believe that many would nonetheless opt for an RCR. Registration with the state would compel many employers to offer those employees who registered their relationships health coverage equivalent to that offered to married couples (but would not exempt the employer from federal taxes on the total cost for the insurance).<sup>258</sup> Registrants could, moreover, receive

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253. See, e.g., Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (funding for marriage-promotion programs).

254. Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267, 269-70 (2009).

255. *Id.* at 331.

256. *Id.* at 324.

257. *Id.* at 335.

258. In New Jersey, where civil unions are restricted to same-sex couples, several employers have refused to offer health insurance benefits to an employee's civil partner. Their argument is that under the federal Employment Retirement Income Security Act (ERISA) "self-insured" companies are governed by federal law and thus can refuse to grant rights for civil partners, based on DOMA. See N.J. CIVIL UNION REVIEW COMM'N, THE LEGAL, MEDICAL, ECONOMIC & SOCIAL CONSEQUENCES OF NEW JERSEY'S CIVIL UNION LAW

many significant rights from the state: state tax benefits (including inheritance tax benefits), the ability to take the surname of one's partner, inheritance rights, medical decision-making privileges, rights regarding division of property, spousal support, testimonial privileges, standing in a wrongful death lawsuit, pension and insurance rights governed by state law, and state property tax exemptions for surviving spouses of deceased veterans (who do not remarry).<sup>259</sup> These are all important partnership rights and protections; they carry strong financial incentives to register. In addition, registration helps couples avoid the hassle of proving the nature of their relationship in order to win rights and privileges.

One might argue that divorce-related rights are often secondary in a couple's decision to register because most people are not thinking about the possibility of divorce when they enter into marriage. Thus rights related to separation are less important than those related to immigration status and federal taxation (covered by federal law). While this argument has some merit, RCRs would still, even in the absence of federal recognition, offer sufficient benefits and protections to attract couples.

### 3. People Will Choose Marriage Even If They Are Offered Other Options

Couples rarely consider the legal consequences of marriage on a possible separation, let alone those of nonmarital unions.<sup>260</sup> As mentioned earlier, most couples do not sign prenuptial agreements, and the majority of cohabitants do not contract about property divisions and mutual obligations.<sup>261</sup> Couples are too optimistic about their relationships.<sup>262</sup> Why, therefore, would the RCR work differently?

There is no guarantee that things will be different with the RCR. But there is a great difference between a contract between the partners only (as in the case of most contracts between couples) and a contract that prompts a change of status and offers rights from the state and other third parties. Recognition and rights from the state provide

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11-18 (Dec. 10, 2008), available at <http://www.nj.gov/lps/dcr/downloads/CURC-Final-Report-.pdf>.

259. See Dana J. Chase & Daniel J. Sennott, *State Survivor Benefits: An Overview*, ARMY LAW., Dec. 2008, at 25 (surveying states that provide tax breaks to surviving spouses and dependents of eligible veterans).

260. See, e.g., Lifshitz, *supra* note 61, at 1577-78.

261. See Robbennolt & Johnson, *supra* note 70.

262. See Sanger, *supra* note 134, at 1314.

enormous incentives for couples to file a contract and register under the RCR.

An additional concern is that most people will choose marriage over alternatives due to its cultural, historical, and religious components.<sup>263</sup> A recent Pew Research Center survey found that most people who have never married would like to do so someday.<sup>264</sup> While many people may choose marriage over its alternatives, it is important to note that the choice of the RCR over marriage does not have to be permanent. It can serve as a temporary solution for people who want a trial period or who are waiting for a financial change before getting married. In addition, while the majority of people want to get married because of that institution's cultural and historical value, others avoid marriage for the exact same reason. Moreover, if alternatives to marriage gain support, the culture that now views marriage as sacred and inevitable may come to accept alternatives as valuable institutions with their own cultural heritages. Most important, while the law can be changed because of public opinion, it is also true that "public attitudes can be influenced by changes in the law."<sup>265</sup> In France, as discussed below, legal reform was needed; but it was the creation of the PACS that changed people's behaviors and attitudes. In short, the introduction of the RCR might well move public opinion toward favorable reconsideration of marriage alternatives.

## VI. EVOLUTION AND REVOLUTION OF THE FRENCH PACS

As noted above, the number of opposite-sex couples who have registered civil unions in other countries and provinces (New Zealand, South Africa, the Netherlands, and Quebec) is significantly low.<sup>266</sup> Interestingly, in France and Belgium the data on civil partnerships differ from the statistics in other countries. In France, the success of the PACS is demonstrated by its skyrocketing popularity and its integration into the French language and cultural habits. More than a

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263. See Stein, *supra* note 5, at 365 ("Finally, it seems that when offered the opportunity to choose alternative relationship forms, most U.S. families opt for basic marriage, not an alternative to it").

264. Cohn et al., *supra* note 14.

265. ESKRIDGE, *supra* note 238, at 115.

266. In Quebec, both opposite- and same-sex couples overwhelmingly choose marriage over civil unions: from 2002 (when civil unions were enacted) to 2010, no more than 225 opposite-sex couples registered annually, while every year more than 21,000 weddings were celebrated. *Mariages et unions civiles selon le sexe des conjoints, Québec, 2002-2011*, INSTITUT DE LA STATISTIQUE QUÉBEC (June 12, 2012), [http://www.stat.gouv.qc.ca/donstat/societe/demographie/etat\\_matrm\\_marg/501b.htm](http://www.stat.gouv.qc.ca/donstat/societe/demographie/etat_matrm_marg/501b.htm).

million PACSs have been registered since the form's enactment in 1999, and the number of registered couples has increased every year (except for 2001).<sup>267</sup> In 2009, 175,000 PACSs were registered, as opposed to 251,000 marriages (only 5% were same-sex couples)<sup>268</sup>—meaning that for every two marriages in France, a PACS is registered.<sup>269</sup>

Evidence of the popularity and success of the PACS goes beyond the numbers. Daniel Borrillo and Eric Fassin explain that the PACS “is now part of the culture, as evidenced by its acceptance in the French language: the acronym *PaCS* is no longer capitalized, as both noun—*les pacésés* [parties to a PACS]—and verb—*se pacser* [to enter into a PACS]—have entered everyday parlance.”<sup>270</sup> The cultural significance of the PACS is further indicated by the fact that wedding fairs have been renamed to recognize the existence of the PACS, department stores now offer PACS gift registries, and travel agencies offer PACS honeymoon packages.<sup>271</sup>

In this Part, I describe the way in which the PACS was conceived. This process and legislative history are important because they show how societal stigma and the way the perception of legal institutions can change. An analysis of the PACS as a legal institution reveals that, despite some similarities to other civil unions, it is actually a registered cohabitation. Subsequently, I present some of the recent studies examining the populations who use the PACS and the impact of the PACS on the rate of marriage. Finally, I suggest some lessons that the United States can take from the French experience and discuss why those lessons are important, despite the significant legal and cultural differences between these two countries.

#### A. *Dual Purpose of the PACS*

In France, the demand for legal recognition of same-sex partnerships was the catalyst for the enactment of the PACS, which

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267. Joëlle Godard, *PACS Seven Years On: Is It Moving Towards Marriage?*, 21 INT'L J.L. POL'Y & FAM. 310, 313 (2007).

268. Prioux, Mazuy & Barbieri, *supra* note 11, at 377-78.

269. Edward Cody, *Straight Couples in France Are Choosing Civil Unions Meant for Gays*, WASH. POST, Feb. 14, 2009, at A13.

270. Daniel Borrillo & Eric Fassin, *The PACS, Four Years Later: A Beginning or an End?*, in SAME-SEX COUPLES, SAME-SEX PARTNERSHIPS & HOMOSEXUAL MARRIAGES: A FOCUS ON CROSS-NATIONAL DIFFERENTIALS 19 (Marie Digoix & Patrick Festy eds., 2004).

271. Scott Sayare & Maïa De La Baume, *In France, Civil Unions Gain Favor over Marriage*, N.Y. TIMES (Dec. 15, 2010), <http://www.nytimes.com/2010/12/16/world/europe/16france.html>.

served as camouflage for the refusal to legalize same-sex marriage.<sup>272</sup> At the same time, the French legislature also genuinely wished to respond to the demographic and social reality of cohabiting opposite-sex couples.<sup>273</sup> This ambivalent attitude, as evidenced by the reasons for the PACS legislation, explains the uniqueness of the PACS. “[The PACS] is neither a legal union nor a simple property contract. It is neither public nor private. It is neither for couples nor for pairs of friends. It is neither a legal recognition of same-sex couples nor is it non-recognition.”<sup>274</sup> It is important to mention that the PACS has been revised dramatically over the years. Each addition of rights and alteration to its default rules has triggered a new rise in demand.<sup>275</sup> Descriptions of the PACS in this Article are based on current law.

The PACS, signed into law in 1999, was the outcome of a fierce debate lasting over ten years.<sup>276</sup> To a large extent, the decision to open the PACS to both opposite- and same-sex couples was a result of France’s universalism—a defining and fundamental principle of the republic—and the way it defines and protects human rights.<sup>277</sup> French universalism opposes particularism, whether in ethnic, religious, or national terms, and promises equality before the law, rather than special treatment.<sup>278</sup> Under this ideology, no legal institution can be created solely for a particular group.<sup>279</sup> For this reason, the biological

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272. See Ian Curry-Sumner, *Same-Sex Relationships in Europe: Trends Towards Tolerance?*, 3 LEGAL PERSP. ON GENDER & SEXUAL EQUALITY 43, 50 (2011); cf. CATHERINE RAISSIGUIER, REINVENTING THE REPUBLIC: GENDER, MIGRATION, AND CITIZENSHIP IN FRANCE 112-28 (2010) (arguing that behind the enactment of the PACS and the debates surrounding it were homophobic and racist fears that same-sex couples would ruin the family and that the PACS would lead to increased immigration because it might be used as a vehicle for immigrants to gain citizenship); see also *id.* at 131 (“The parliamentary debates that preceded the passage of the Pacs [sic] clearly demonstrate a strong attachment to heteronormative family structures . . .”).

273. Cf. Robert A. Nye, *The Pacte Civil de Solidarité and the History of Sexuality*, 21 FRENCH POL. CULTURE & SOC’Y 87, 89 (2003) (“One cannot say these views are simply a matter of anti-homosexual prejudice, *tout court*.”); Claudina Richards, *The Legal Recognition of Same-Sex Couples: The French Perspective*, 51 INT’L & COMP. L.Q. 305, 322 (2002).

274. Claude Martin & Irène Théry, *The PACS and Marriage and Cohabitation in France*, 15 INT’L J.L. POL’Y & FAM. 135, 150 (2001).

275. Prioux, Mazuy & Barbieri, *supra* note 11, at 376.

276. Enda McCaffrey, *The PACS Debate and the Implications for Universal Equality in France*, in FRENCH CULTURAL DEBATES 22, 22 (John Marks & Enda McCaffrey eds., 2001).

277. See, e.g., JOAN WALLACH SCOTT, PARITÉ!: SEXUAL EQUALITY AND THE CRISIS OF FRENCH UNIVERSALISM 104-10 (2005).

278. Naomi Schor, *The Crisis of French Universalism*, 100 YALE FRENCH STUD. 43, 43 (2001).

279. See Daniel Borrillo, *The “Pacte Civil de Solidarité” in France: Midway Between Marriage and Cohabitation*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY

sex of the individual does not matter under the terms of the PACS.<sup>280</sup> In this way, the problem of same-sex couples was collapsed into a more generalized inquiry into the rights of cohabitants and thus led to a more universalist definition and recognition of cohabitation.<sup>281</sup>

Social conditions also played a role in the creation of the PACS. The PACS offered a solution to an existing societal and legal problem: the steep rise in the number of cohabiting opposite-sex couples, who enjoyed only limited partnership rights (which I describe in more detail below). Therefore, proponents of the PACS claimed that while the legislation was initially designed to address the interests and needs of same-sex couples, it may have ended up being more beneficial to opposite-sex couples.<sup>282</sup> Hence, the “gay marriage” problem paved the way for the creation of a significant societal and legal watershed: legal recognition of cohabiting couples.

To clarify, I am not idealizing the French legal and political system. Universalism is often a cover for suppression of human diversity. The French avoid equating “differences” with “disparate treatment,” but they sometimes also fail to recognize or celebrate difference. As is widely known, the recognition and celebration of diversity is critical to identity and social acceptance. But because French society strives to treat difference as a nonissue, difference—and sexual difference in particular—is treated as a private matter and is not acknowledged in the law or discussed in public debates. Thus, as Enda McCaffrey argues, “Difference, whilst assumed in the concept of ‘la vie privée,’ is subsumed in the public concept of equality for all.”<sup>283</sup> In addition to this difficulty with French law, marriage in France is still restricted to opposite-sex couples and thus continues to foster inequality.<sup>284</sup>

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OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 475, 476 (Robert Wintemute & Mads Andenæs eds., 2001).

280. See SCOTT, *supra* note 277, at 104.

281. *Id.* at 106 (“From this perspective, gay couples could be assimilated to the category of cohabitants.”).

282. M. JEAN-PIERRE MICHEL, LA COMMISSION DES LOIS CONSTITUTIONNELLES, DE LA LÉGISLATION ET DE L’ADMINISTRATION GÉNÉRALE DE LA RÉPUBLIQUE, NATIONAL ASSEMBLY, No. 1097, Onzième Législature (1998), available at <http://www.assemblee-nationale.fr/11/rapports/r1097.asp>.

283. ENDA MCCAFFREY, THE GAY REPUBLIC: SEXUALITY, CITIZENSHIP AND SUBVERSION IN FRANCE 168 (2005).

284. See Martin & Théry, *supra* note 274, at 263 (“The principle of ‘republican equality’ . . . has led to a much more unequal law than in other countries.”).



*B. Structure of the PACS: A Registered Contractual Cohabitation*

The PACS is a legal institution that is different from marriage and civil unions because it is dedicated to dealing with cohabitation. It is a more flexible legal institution in that its default rules regarding partners' obligations are less stringent than those of civil union.<sup>285</sup> Other civil union statutes, in defining their terms, often refer to the marriage law—that is, these laws simply state that the words “civil union” and “spouse” are equivalent to the words “marriage” and “civil partner;” respectively, as they appear in the marriage law and other legislation.<sup>286</sup> Conversely, the PACS is governed by contract law<sup>287</sup> and is not located in the *Code civil* in the same place as marriage law.

The PACS also has some important symbolic characteristics and legal consequences that make it markedly different from marriage. For instance, while couples get married in the presence of two witnesses at city hall (a place with cultural authority), a PACS lacks any ritualized component and is simply registered at the *Tribunal d'Instance*, a court that usually deals with routine conflicts, such as disputes between property owners and tenants.<sup>288</sup> Similarly, a PACS is terminated differently from marriage; a PACS may be immediately terminated if either party marries or by mutual agreement or may be terminated three months after a unilateral repudiation is communicated to the registrar and the other party.<sup>289</sup> A PACS can also be converted into a marriage (without any process of dissolution), allowing couples to avoid some of the procedures associated with marriage, such as the requirement that news of the marriage be publicized in advance.<sup>290</sup>

At the same time, the PACS is similar to marriage in many ways. The PACS contemplates the creation of a committed relationship—a “life in common,” which has been interpreted by the *Conseil constitutionnel* (Constitutional Court) as “life as a couple”—not just

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285. See Richards, *supra* note 273, at 322.

286. *E.g.*, Illinois Religious Freedom Protection and Civil Union Law § 10, 750 ILL. COMP. STAT. 75/5 (2013) (“[A party to a civil union] shall be included in, any definition or use of the terms ‘spouse,’ ‘family,’ ‘immediate family,’ ‘dependent,’ ‘next of kin,’ and other terms that denote the spousal relationship.”).

287. Godard, *supra* note 267, at 313.

288. See Wilfried Rault, *The Best Way to Court: The French Mode of Registration and Its Impact on the Social Significance of Partnerships*, in SAME-SEX COUPLES, SAME-SEX PARTNERSHIPS & HOMOSEXUAL MARRIAGES: A FOCUS ON CROSS-NATIONAL DIFFERENTIALS, *supra* note 270, at 27, 27.

289. Helen Stalford, *Family Law*, in PRINCIPLES OF FRENCH LAW 243, 260-61 (John Bell, Sophie Boyron & Simon Whittaker eds., 2d ed. 2008).

290. Richards, *supra* note 273, at 305.

people sharing a common residence.<sup>291</sup> Further evidence of this design is the law's prohibition against unions between close relatives or among more than two people<sup>292</sup> and the requirement that the parties provide each other with "mutual and material support."<sup>293</sup> Unlike marriage, however, the PACS does not impose the requirement of fidelity.<sup>294</sup>

Significantly, the PACS is a contract that is shaped by the parties themselves, and because it is a contract, the rules of contract law apply to it.<sup>295</sup> In the absence of a specific provision in the contract, the default rule is separation of property. Article 515-5 of the *Code civil* provides that unless there is an agreement to the contrary: "[E]ach partner keeps the administration, enjoyment and free disposal of his or her personal property. Each remains alone liable for the debts arising in his or her self, before or during [the PACS]."<sup>296</sup> The parties can, however, easily opt for a joint property regime, as provided by the law.<sup>297</sup> Conversely, in marriage, unless otherwise contracted, the default rule is the opposite: shared property.

Tellingly, the PACS law does not mention filiation or parental issues at all.<sup>298</sup> While the PACS is silent regarding parental rights, French law both explicitly and implicitly prohibits joint and second-parent adoption as well as the use of assisted reproductive technology by same-sex couples.<sup>299</sup> In other words, conjugality and parenthood are

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291. *Id.* at 315.

292. *Id.* at 317.

293. CODE CIVIL [C. CIV.] art. 515-4.

294. Stalford, *supra* note 289, at 246.

295. Richards, *supra* note 273, at 316.

296. Godard, *supra* note 267, at 318 (internal quotation marks omitted).

297. CODE CIVIL [C. CIV.] art. 515-5-1.

298. Nye, *supra* note 273, at 89.

299. Article 343 of the *Code civil* provides that only married couples may adopt. CODE CIVIL [C. CIV.] art. 343. Because same-sex couples cannot get married, joint adoption is prohibited. Until recently, the only way gay people in France were able to adopt was by concealing their sexual orientation during the application process. Camille Robcis, *How the Symbolic Became French: Kinship and Republicanism in the PACS Debates*, 26 DISCOURSE 110, 113-14 (2004). The ban was lifted in 2008 after the European Court of Human Rights ruled that French law discriminated against LGB people. *E.B. v. France*, Eur. Ct. H.R. 91, 93 (2008), available at <http://hvdocus.echr.coe.int/sites/eng/pages/search.aspx?i=001-84571> (finding that a refusal to allow an unmarried lesbian to adopt violates the nondiscrimination principle guaranteed by article 14 of the European Convention on Human Rights). However, second-parent adoption, the process in which one partner adopts the legal child of the other, is still restricted to opposite-sex couples; this ban was recently and unsuccessfully challenged in the European Court of Human Rights. See *Gas v. France*, Eur. Ct. H.R. (2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109572>; see also Connie Cho, *Defining Parenthood: Assisted Reproduction in France*, YALE J. MED. & L. (Apr. 7, 2011), <http://www.yalemedlaw.com/2011/04/defining-parenthood-assisted-reproduction-in-france>

two different issues in France, and the PACS is less privileged than marriage in that regard.

*C. What Makes the PACS So Useful to Couples in Nonmarital Relationships?*

While the reasons for the PACS's success are not yet totally clear<sup>300</sup> and are the subject of much scholarly inquiry, I suggest that the following characteristics make the PACS an attractive and necessary legal institution.

1. The PACS Provides More Rights for Unmarried Couples and Responds to a Societal Need

What makes the PACS a really attractive alternative is that it provides a valuable response to a demographic trend—the decline in the number of marriages and the rise of nonmarital unions and the associated legal and societal consequences of that decline. Before 1970, it was rare for couples in France to live together outside marriage.<sup>301</sup> Starting in the 1970s, the number of people choosing to do so rose steeply.<sup>302</sup>

Despite these societal changes, the legal system did not follow suit, and cohabitating couples in France enjoyed very limited rights.<sup>303</sup> The legal situation of cohabiting couples started to change only during the 1970s, when the *Cour de cassation* (the supreme court for judicial matters) ruled that in a case for wrongful death, the surviving partner

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("However, government legislation tightly controls access to ARTs—only heterosexual, young, medically infertile couples that have been married or have cohabitated for at least two years are eligible.").

300. The reason couples choose the PACS over marriage has been under-investigated because, among other reasons, until 2007 the data published by the French Ministry of Justice did not include such details as the sex of the partners and the mean duration of dissolved PACSs. See BADGETT, *supra* note 105, at 62; Prioux, Mazuy & Barbieri, *supra* note 11, at 378. In addition, as the PACS has expanded to offer more rights, the reasons for registration have become more varied. For example, after the 2005 change that allowed PACSed couples to file joint tax returns, there was an increase in the number of registered partners. See Marion Leturcq, *Would You Civil Union Me? Civil Unions and Taxes in France: Did the Reform of Income Taxation Raise the Rate of Civil Unions?* (Paris Sch. of Econ., Working Paper No. 2009-17, 2009).

301. Martin & Théry, *supra* note 274, at 135-36.

302. *Id.*

303. Kees Waaldijk, *Levels of Legal Consequences of Marriage, Cohabitation and Registered Partnership for Different-Sex and Same-Sex Partners: Comparative Overview & Comparative Analysis*, in SAME-SEX COUPLES, SAME-SEX PARTNERSHIPS & HOMOSEXUAL MARRIAGES: A FOCUS ON CROSS-NATIONAL DIFFERENTIALS, *supra* note 270, at 47, 80-83.

has standing even if the couple was not married.<sup>304</sup> This case was followed by piecemeal legislation that provided some rights to cohabiting opposite-sex couples, especially in the areas of parental rights and social welfare.<sup>305</sup>

With the enactment of the PACS, informal cohabitation status was also written into the law for the first time. According to article 515-8 of the *Code civil*, “Cohabitation is a de facto [union, characterized by a life in common, offering a character of stability and continuity,] between two persons, of different sexes or of the same sex living together as a couple.”<sup>306</sup> The law does not, however, specify the amount of time necessary to establish cohabitation or what evidence is required to prove stability and continuity.<sup>307</sup> Moreover, the law does not specify what legal privileges or obligations exist between the partners. The legislature’s intention in adding a definition of cohabitation was only to clarify that same-sex couples can also enjoy the rights of informal cohabitation,<sup>308</sup> which the French courts had denied to them prior to the legislation.<sup>309</sup>

Informally cohabiting couples can get a *certificat de vie commune* or *certificat de concubinage*, that is, a certificate bestowed by the mayor or a notary confirming that a couple is cohabiting.<sup>310</sup> The couple must declare that they are living together and provide some supporting evidence, for example, a contract showing a common residence.<sup>311</sup> These certificates, however, have no legal power and do not provide any rights; they simply help couples prove to others that they are cohabiting if they claim the limited benefits for which they are eligible.<sup>312</sup>

Even today, the rights of informally cohabiting couples are quite limited, and the parties do not have any obligations to each other.<sup>313</sup> When it comes to financial issues, property division, and medical

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304. Godard, *supra* note 267, at 318.

305. *Id.*

306. *Id.* at 312 (footnote omitted) (internal quotation marks omitted); Waaldijk, *supra* note 303.

307. Richards, *supra* note 273, at 321.

308. BOWMAN, *supra* note 15, at 211.

309. Richards, *supra* note 273, at 311-13.

310. *Id.* at 321.

311. SYLVIE DIBOS-LACROUX, PACS: LE GUIDE PRATIQUE 126 (13th ed. 2009).

312. Stalford, *supra* note 289, at 255.

313. See Daniel Borrillo & Kees Waaldijk, *Major Legal Consequences of Marriage, Cohabitation and Registered Partnership for Different-Sex and Same-Sex Partners in France*, in MORE OR LESS TOGETHER 93, 95-101 (Kees Waaldijk ed., 2005) (“Informal cohabitation produces very limited legal consequences, essentially connected with social law: health insurance, reductions for certain forms of transport, etc.”).

decision-making rights, informally cohabiting couples simply do not have any rights.<sup>314</sup> For instance, a member of a cohabiting couple cannot use the name of their partner in any official capacity.<sup>315</sup> While many privileges are denied to informal cohabitants, the law recognizes them as couples for the purpose of Social Security and other allowances, which may contribute to a reduction in eligibility for allowances (because the income of *both* partners is calculated when determining their needs).<sup>316</sup>

A PACS provides a better legal status for unmarried couples because it “represents a kind of compromise between marriage and cohabitation, drawing on the legal security and clarity associated with the former, and the freedom and flexibility associated with the latter.”<sup>317</sup> For example, in France, most registered couples pay less income tax than individuals do.<sup>318</sup> Informal cohabitants cannot file a joint tax return, while “PACSeD” couples, like married couples, can.<sup>319</sup> Similarly, the surviving member of an informally cohabiting couple must pay inheritance taxes when their partner dies, but the surviving member of a PACS is exempted.<sup>320</sup> Partners in informal cohabitations do not owe each other any level of support during their life together, while those in a PACS must provide mutual assistance during their union.<sup>321</sup> After dissolution, however, neither PACSeD couples nor informally cohabiting couples are obliged to pay spousal support (unless they contracted otherwise).<sup>322</sup> The PACS, like informal cohabitation, does not confer automatic inheritance rights or entitlements equivalent to survivor’s benefits. When it comes to parental rights, the legal situation of opposite-sex couples—regardless of their marital status—is the same in informal cohabitations and PACSs, because the PACS provides no better legal status than does informal cohabitation in this regard.<sup>323</sup>

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314. Martin & Théry, *supra* note 274, at 142-43.

315. Stalford, *supra* note 289, at 255.

316. *Id.*

317. *Id.* at 258.

318. Godard, *supra* note 267, at 315.

319. Leturcq, *supra* note 300, at 2-3.

320. DIBOS-LACROUX, *supra* note 311, at 160.

321. *Id.* at 130.

322. Godard, *supra* note 267, at 318.

323. See Stalford, *supra* note 289, at 261; Catherine LaBrusse-Riou, *Family Law, in* INTRODUCTION TO FRENCH LAW 263, 269-81 (George A. Bermann & Etienne Picard eds., 2008) (“[O]nce there are children, cohabitation becomes a situation legally recognized as equivalent to marriage . . .”).

Cohabitation before marriage is now the norm among French couples, and the PACS works perfectly for the trial period before marriage—a period that has become longer in the past decade.<sup>324</sup> Indeed, marriage was the reason for the dissolution of PACSs in 34% of cases in 2009 and 47% of cases in 2007.<sup>325</sup> In addition, unlike marriage, the PACS is easily dissolved. While French divorce law was reformed in 2004 and the procedure for dissolution has become easier, “divorce remains a painful and often litigious matter.”<sup>326</sup> French divorce law is complicated, but for the purposes of this Article, it is enough to point out that even a divorce based on mutual consent requires an order of the family court and a review of the divorce agreement by a family court judge.<sup>327</sup> The PACS dissolution process is easier and less expensive than divorce.<sup>328</sup>

In summary, the PACS’s virtue is in its necessity and flexibility: it is a legal institution that meets the needs of a large number of people and the diverse kinds of relationship arrangements in which those people engage. But the PACS has another prominent virtue—it is an alternative that is not associated with marriage’s symbolism and acts to reduce the harm that symbolism creates.

## 2. The PACS Provides an Alternative Free of the Symbolic Harm of Marriage

The PACS reduces the symbolic harm of marriage in several ways. First, the PACS lacks the religious ritual of marriage. Of course, marriage in France is civil marriage,<sup>329</sup> but it still has religious connotations.<sup>330</sup> Moreover, marriage is also perceived by some as heterosexist and historically discriminatory against women. Interviews conducted by Wilfried Rault and Muriel Letrait confirm that couples who choose the PACS are more secular and more concerned about the religious symbolism of marriage. A survey conducted in 2005 found that while about 46% of PACSed people expressed some distance from or hostility to religious ritual, only about 16% of married people who did not cohabit before marriage shared

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324. Godard, *supra* note 267, at 311 (stating that nine marriages in ten start in cohabitation).

325. Prioux, Mazuy & Barbieri, *supra* note 11, at 376-77.

326. LaBrusse-Riou, *supra* note 323, at 278.

327. *Id.*

328. *See, e.g.*, Cody, *supra* note 269.

329. LaBrusse-Riou, *supra* note 323, at 269.

330. Sayare & De La Baume, *supra* note 271 (“[M]arriage is still viewed here as a ‘heavy and invasive’ institution with deep ties to Christianity.”).

those sentiments.<sup>331</sup> The same survey posed a variety of questions examining respondents' attitudes concerning the division of gender roles.<sup>332</sup> Only 6% of PACSed couples viewed gender roles as being very different, while 17% of married people did.<sup>333</sup>

Second, the solemnization process—which some find offensive, unnecessary, or too public<sup>334</sup>—is required by marriage but not by the PACS.<sup>335</sup> Marriage is a much more formal process: the couple has to publicly announce its intention to marry in advance so people have an opportunity to object, and the bride's and groom's information (including their names, professions, and future addresses) must be posted on the door of their city hall at least ten days before the wedding.<sup>336</sup> Both parties are also required to submit certificates confirming that they have had a medical exam in the two months prior to the wedding.<sup>337</sup> The formalization of the PACS simply involves registration and does not require the couple to exchange vows publicly and in the presence of a state representative and witnesses. Couples who choose the PACS often see their unions as private matters.<sup>338</sup> They view the public nature of marriage as an intrusion and the PACS as offering more sovereignty over their relationships.

In the same way, couples who choose the PACS often see their relationships as more authentic and not a result of social pressure or state intervention.<sup>339</sup> To them, marriage seems to be a *fusion* of two people, while the PACS is a *union* between two people.<sup>340</sup> Some

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331. Wilfried Rault & Muriel Letrait, *Choix du pacte civil de solidarité et rapport à la religion*, 96 POLITIQUES SOCIALES ET FAMILIALES 41, 49-50, 50 fig.3 (2009).

332. The respondents, individuals who were married or PACSed between 1999 and 2005 and had not dissolved their unions, were asked to describe their attitudes toward a few situations, such as the following: during an employment crisis, men should have priority over women for securing employment; and if a woman does not wish to be in a relationship with a man, she should be able to have a child and raise it by herself. Wilfried Rault et al., *Formes d'unions différentes, profils distincts? Une comparaison des pac pacsé.e.s. en couple de sexe différent et des marié.e.s.*, 1 SOCIOLOGIE 319, 326 n.29 (2010).

333. *Id.* at 327 tbl.4.

334. Cf. Katherine Franke, *Delaware's New Civil Union Law—Read It Before You Applaud*, HUFFINGTON POST (Apr. 16, 2011, 7:14 PM), [http://www.huffingtonpost.com/katherine-franke/delawares-new-civil-union\\_b\\_850117.html](http://www.huffingtonpost.com/katherine-franke/delawares-new-civil-union_b_850117.html) (arguing that there is no good reason to require a solemnization ceremony in civil unions).

335. DIBOS-LACROUX, *supra* note 311, at 126.

336. *Id.*; Stalford, *supra* note 289, at 245-46.

337. Stalford, *supra* note 289, at 245-46.

338. WILFRIED RAULT, L'INVENTION DU PACS, PRATIQUES ET SYMBOLIQUES D'UNE NOUVELLE FORME D'UNION 55-57 (2009).

339. *Id.*

340. *Id.* at 58.

couples have also indicated that they do not want the demands of fidelity that are required by marriage.<sup>341</sup>

The PACS may help couples avoid the cost of a marriage ceremony, which is often quite high. It has been suggested, as well, that some couples take advantage of the PACS to avoid the drama surrounding marriage,<sup>342</sup> while anecdotal evidence shows that an industry has started to develop around the PACS.<sup>343</sup> In fact, interviews with PACSed couples demonstrate that they feel they have greater flexibility in planning a ceremony and less pressure to conform to tradition and also that they prefer smaller ceremonies to which they invite only close friends and that allow them to avoid the usual social obligations associated with wedding ceremonies.<sup>344</sup>

#### D. *Lessons for the United States*

The French experience provides some valuable lessons to the United States. It shows that societal views of the PACS have gradually changed as people come to see the PACS less as a tool for same-sex couples and more as a legitimate and popular alternative to informal cohabitation.<sup>345</sup> Thus, it does not matter that the PACS—like its American counterparts—was created mainly to deal with the issue of same-sex couples. In addition, the French experience offers a narrative different from that proffered by traditionalists: PACSed couples are often people who, in the absence of the availability of such an option, would still cohabitately informally. The creation of an alternative registration “has encouraged more couples to officialize their unions in a legal framework.”<sup>346</sup> That is, while the PACS has caused a decline in the number of marriages, the total number of couples who are registered or married has risen since the introduction of the PACS. It is clear, then, that the PACS has not led to the dire consequences predicted by traditionalists. In fact, the opposite is true: as mentioned previously, the primary reason for the dissolution of a PACS is conversion to marriage. Thus it seems that alternative registration

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341. *Id.* at 59.

342. *Cf.* Cody, *supra* note 269 (reporting on a couple who returned to their everyday business immediately after getting PACSed and who concluded that “[t]he white dress, champagne and honeymoon would be for later, perhaps much later—perhaps never”).

343. *Cf. id.*; Prioux & Mazuy, *supra* note 10, at 410.

344. RAULT, *supra* note 338, at 60.

345. *See, e.g.,* Sayare & De La Baume, *supra* note 271 (interviewing a recently PACSed individual who indicated, “For me, before, the PACS was for homosexual couples” (internal quotation marks omitted)).

346. Prioux, Mazuy & Barbieri, *supra* note 11, at 376.



provides yet another framework for testing a relationship before marriage and encourages people to mediate and understand their rights.

The PACS does have some disadvantages. Whereas in Belgium, the registration is open to couples “in a communal living situation,” including family members and friends,<sup>347</sup> in France, family members may not register; while it is not stated by the law, the *Conseil constitutionnel* has determined that in order for a PACS to be valid, the partners must live together “as a couple.”<sup>348</sup> Hence, the PACS is more limited in its scope than this Article’s suggested RCR.

In addition, according to Bowman, only 2% of French couples sign a contract, and the rest simply sign the PACS declaration and follow its default rules.<sup>349</sup> This may indeed constitute a disadvantage of the PACS. However, because the PACS is different from marriage, it still fulfills many components of a registered cohabitation institution and serves as a middle-ground institution between marriage and cohabitation. The lesson is, however, that with the creation of a legal institution that is built on contract, the state needs to provide a method (such as a form that is easy to use) that makes contracts more available and accessible.

#### *E. Is the French Model Applicable to the United States?*

Bowman argues that the French model does not suit the United States for three reasons. First, she states that the registration-based model adopted in France is not suitable to protect American cohabitants because French couples who informally cohabit have more rights related to partnership than their American counterparts and are also protected by the social welfare system in a way that Americans are not.<sup>350</sup> (Moreover, she asserts that informal cohabitants in France are not truly protected upon dissolution in the way that married couples in France are.)<sup>351</sup> Second, she contends that most people find the benefits and obligations of the PACS to be unclear and often confusing. Third,

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347. Frederik Swennen & Yves-Henri Leleu, *National Report: Belgium*, 19 AM. U. J. GENDER SOC. POL’Y & L. 57, 73 (2011).

348. Godard, *supra* note 267, at 313.

349. Bowman received this data through an interview with a French law professor. My efforts to find any support for this claim or other data have failed. While there is reason to believe that many people do not deposit a contract, the high number is surprising considering the fact that there are many forms of contracts available via the Internet and books and the fact that notaries in France are skilled in drafting such contracts.

350. See BOWMAN, *supra* note 15, at 213.

351. *Id.*

the legislation of the PACS was unique because it was the result of national debate. In the United States, conversely, Bowman asserts that legal change will take place incrementally—not at the federal level but at the state level—and will involve a more piecemeal process in which one issue at a time is dealt with.<sup>352</sup>

Bowman's main mistake is that she measures the suitability of the French model in accordance with what she thinks the law should achieve: the protection of vulnerable cohabitants upon dissolution.<sup>353</sup> However, the intention of a PACS model (and the RCR model) is more ambitious: to encourage people to define their rights and organize their relationships in a way that suits them. Thus when Bowman asserts that informal cohabitants in France enjoy greater rights than their American counterparts and receive better protections upon the dissolution of their relationships,<sup>354</sup> she disregards the fact that legal recognition has other purposes and benefits beyond protecting people upon dissolution. She also misses the point that the PACS (and the RCR) offers important state-granted rights and benefits for couples during and at the end of their relationship.

Concerning her other objections, there is no proof that the French find the PACS to be overwhelmingly complicated—at least, no more so than the very complicated divorce law and property regimes in France. The fact that the number of registrations grows each time more rights are added to the PACS would seem to indicate that people are aware of and able to understand the PACS, at least well enough to enter into one. Additionally, the Internet provides many clear explanations of the PACS, and there are several books about its legal implications that are aimed toward a general audience.<sup>355</sup> Finally, regarding the incremental argument, it seems that Bowman underestimates the fact that American versions of potential PACS already exist in the different alternatives to marriage adopted by a number of states. While a piecemeal process at the state level is, indeed, the way that the RCR will be created, that is not a valid

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352. *Id.* at 213-14.

353. *Id.* at 222.

354. This is an assertion that is debatable because American cohabitants can win ex post remedies, while in France it is extremely difficult to win such rights. *See* Stalford, *supra* note 289, at 256.

355. *See, e.g.,* DIBOS-LACROUX, *supra* note 311; *Inheritance Planning in France: French Civil Partnership—PACS*, FRENCH-PROPERTY.COM, <http://www.french-property.com/guide/france/finance-taxation/inheritance/pacs/> (last visited Jan. 29, 2013) (informing a prospective PACSed couple about the procedure and advising them that the notary fee for a PACS agreement is around €500).

argument against the RCR or other such schemes; this is the way the federalist structure of the United States functions.

This leads to another fundamental issue: perhaps the cultural and legal differences between France and the United States make comparative family law irrelevant. Indeed, I have stated elsewhere that, although comparison with Europe on issues of marriage law is beneficial, it is also risky because of the differences in legal theory, culture, level of social security, and religiousness.<sup>356</sup> Of course, France is significantly different from the United States in many ways that are fundamentally relevant to the development of family law. Among these, religiousness, separation of church and state, and tradition stand out as the most significant.<sup>357</sup> These factors affect the different approaches these countries have taken in two ways: in the United States, there has been stronger resistance than in France to the creation of marriage alternatives, especially among traditionalists, and the general American public tends to attach stronger cultural significance to marriage and show more commitment to it.<sup>358</sup>

Nevertheless, while these are important differences, a few elements make the French experience applicable. For one thing, the reality is that in the United States, as in France, there is a growing societal need to craft a family law that is responsive to the situation at hand. The number of divorces, nonmarital unions, and children born to unmarried parents necessitates a response from the courts and, eventually, the political system. Furthermore, the creation of an alternative to marriage in both France and the United States originated not from concerns for the well-being of unmarried heterosexual couples, but from the denial of marriage rights to same-sex couples. Importantly, the idea of civil unions and alternatives to marriage is a globalized one. The United States has not been disconnected from the events relevant to the move toward same-sex marriage in Europe and will not be disconnected from the development of a menu of alternatives. In fact, the opposite is true: in their rulings concerning

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356. Aloni, *supra* note 9, at 139-40.

357. *Id.*

358. See NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 2 (2000) ("From the founding of the United States to the present day, assumptions about the importance of marriage and its appropriate form have been deeply implanted in public policy . . ."); *The Decline of Marriage and Rise of New Families*, PEW RESEARCH CTR. (Nov. 18, 2010), <http://pewsocialtrends.org/2010/11/18/thedecline-of-marriage-and-rise-of-new-families/2> ("Americans have a unique relationship with marriage. Compared with most other western nations, the U.S. has one of the highest marriage rates as well as one of the highest divorce rates.").

same-sex marriage, a few American courts have taken direction from the European example.<sup>359</sup> And finally, while some in the United States do attach more importance to marriage than the French do, American values and attitudes concerning family life are changing rapidly. It may take time for the idea of an RCR-type alternative to become reality, but in the same way that cohabitation was once considered deviant, and same-sex marriage unthinkable, some form of alternative registration will succeed in achieving acceptance, even if it is only in the more progressive states.

## VII. CONCLUSION

The growth of alternative families is one of the biggest changes witnessed by the Western world over the past few decades. While family structure and lifestyle continue to change, the law is very slow to do so and has been inadequate in its response. One of the things this Article observes—although it is perhaps too early for such an observation because the law is unsettled—is that some countries have chosen between two different directions in handling the proliferation of unmarried couples and alternative family arrangements. One group of nations, best represented by New Zealand, has chosen to grant cohabitants full rights, similar to those enjoyed by married couples, by imposing marital status upon them. The second group, best represented by Belgium and France, has granted informal cohabitants only limited rights and, in doing so, has encouraged them to register and organize their relationships in registered cohabitations.

This Article observes these two different directions in regulating relationships of unmarried couples and suggests that the United States may benefit from choosing the second way. I recognize that changes such as those proposed here would have a profound impact on U.S. culture and, for that reason, it would most likely take years before they were widely accepted. At the same time, changes in family law and structure in the United States over the past two decades have been so dramatic that the changes I suggest might move more quickly than we can now envision. In any case, an alternative to marriage—not just a duplication of marriage, but a real alternative, whether it is my proposed RCR regime or something else—is an idea whose time has come. The legal infrastructure and knowledge necessary for its

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359. See, e.g., *Baker v. State*, 744 A.2d 864 (Vt. 1999) (referring to articles on Denmark's and Norway's registered partnership schemes when explaining that the remedy can be civil union rather than marriage).

introduction already exist—and the societal situation demands it. Every suggested new model, including the RCR, risks repeating the problems of the models that precede it. But the RCR's flexibility and responsiveness to a social need may allow it to avoid some of the pitfalls of other institutions created for the legal recognition of relationships. It is circular reasoning to argue that, because marriage is so important and special, the people in the United States would not want an alternative institution. The law itself is what currently makes marriage "special"—and culture responds accordingly. Until we try to provide other options, marriage will remain culturally superior and people will continue to choose it or nothing at all. But changes in the law can—and do—affect culture.

Several questions remain open for future research. Is it possible to make a menu of options simple and accessible? How would each "institution of choice" conflict, or integrate, with the others? How can we secure the rights of informal cohabitants while allowing people to keep their autonomy? Similarly, is there a way to expand rights for informal cohabitants without expanding the shadow of marriage? How paternalistic should courts be in cases of ex post lawsuits based on an RCR? These are only a few of the questions that remain open. I hope that this Article will help promote solutions to these critical issues and evoke grater conversation about the regulation of relationships in the United States.