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MARRIAGE AND OTHER DOMESTIC RELATIONSHIPS:

COMPARATIVE AND CRITICAL EQUALITY ANALYSIS OF DIFFERENCES IN FORM AND SUBSTANCE

LYNN D. WARDLE

INTRODUCTION: THE PERFECT STORM

The controversy and debate concerning proposals and law reforms to legalize same-sex marriage lie at the center of the confluence of numerous currents and counter-currents regarding marriage and other intimate domestic relationships. These include debates over formal-versus-informal domestic relationships; public-versus-private ordering of domestic relationships; legal-versus-extra-legal recognition of domestic relationships; benefits-versus-status; dual-gender-versus-gender-neutral relationships; prohibited-or-tolerated-or-preferred relationships; etc.. These subjects involve not only dyadic positions, but also many varied possibilities along a spectrum between polar positions. These clashing crosscurrents are only the most recent ones. There are numerous controversies regarding marriage and domestic relationships of the past—both resolved and unresolved. Such long-debated, yet still-ongoing marriage policy issues concern permanent-versus-transitory/terminable relationships (including permissive-versus-restrictive dissolution, fault-

1 Bruce C. Hafen Professor of Law, J. Reuben Clark Law School, Brigham Young University. This article is based in part on presentations made at the Symposium on Legal, Secular, and Religious Perspectives on Marriage Equality/Marriage Protection/Same-Sex Marriage, hosted by the Journal of Civil Rights and Economic Development, November 12, 2010 at St. John’s University School of Law, and at the American University Washington College of Law 2009 Founders’ Day Celebration Symposium on Valuing All Families Under Law, January 26, 2009, in Washington, D.C., and Lynn D. Wardle, Gender Neutrality and the Jurisprudence of Marriage, in THE JURISPRUDENCE OF MARRIAGE AND OTHER INTIMATE RELATIONSHIPS 37 (Scott FitzGibbon, Lynn D. Wardle, & A. Scott Loveless eds., 2010). The valuable research assistance of Elizabeth N. Hamish, Christine Christensen, Nephi Hardman, Curtis Thomas and Robert Selfaison is gratefully acknowledged.
versus-no-fault divorce, and unilateral-versus-mutually-agreed termination), generative-versus-consumer relationships, and hedonistic-versus-altruistic relationships.

Looking into the past more deeply and across cultures more broadly we see similar conflicts that have been largely settled in western societies but that still are being debated in other societies. These conflicts include polygamy-versus-monogamy, endogamy-versus-exogamy, age-restricted-versus-age-unlimited, and mutual-consensual-versus-non-consensual. The numerous crosscurrents now clashing have produced a “perfect storm” of controversy about the legal recognition and regulation of marriage and other domestic relationships; same-sex marriage is at the vortex.

Controversies about marriage and other domestic relationships are neither unprecedented nor insignificant. How some have been resolved in the past has had profound consequences for men, women, and children as well as for societies’ stability, infrastructure, and social capital. Some changes, such as the trend toward monogamy, would be identified as having had very positive effects, while other changes, such as the adoption of “unilateral” no-fault divorce in many states, have had more debatable impacts, including unexpectedly detrimental consequences for children, families and society in general.2 And so it will be with the current law reform proposals: they will profoundly impact the welfare of families, children, and of our entire society “for better or for worse.”

For example, the last two decades have seen an explosion of commentary and proposals that all adult relationships of intimacy should receive the same legal treatment. The proposals have been for legally equalizing marriage and non-marital relationships.3 For example, in 2000, capping nearly a decade of study and four successive drafts, the American Law Institute formally adopted Principles of the Law of Family


3 For example, Nancy Polikoff’s 2008 book Beyond (Straight and Gay) Marriage, is subtitled “Valuing All Families under the Law,” and that subtitle succinctly summarizes the main theme of her book. She asserts both equality and beneficence arguments. She writes, “I propose family law reform that would recognize all families’ worth.” NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE (Beacon Press 2008) (hereinafter “POLIKOFF”). Her benefits claim is that “[c]ouples should have the choice to marry based on spiritual, cultural or religious meaning of marriage in their lives; they should never have to marry to reap specific and unique legal benefits.” Id. (emphasis in original).
Dissolution, which was published in a bound volume two years later.\footnote{4} Chapter 6 of the Principles proposes that non-marital couples be given the same financial claims and interests upon breakup as married couples. Additionally, Chapter 3 proposes equivalent-to-traditional (biological, marital, and adoptive) legal recognition with equivalent legal benefits for de facto parenthood and parenthood by estoppel and legal parental status (rights and benefits) for non-biological (and non-adoptive) parents who have assumed some form of quasi-parental relationship with a child. Both proposals (and many other recommendations in Principles) went far beyond the existing law or trend of law in most states.\footnote{5}

About the same time, similar proposals were being made in Canada. In December 2001, following two years of research and meetings, the Law Commission of Canada issued a report entitled Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships.\footnote{6} The Report recommended significant revision of Canadian laws regulating personal relationships, including enactment of new laws allowing virtually all adult conjugal and non-conjugal couples to register their relationships, creating legal status with legally enforceable commitments, including “caring arrangements, consent to treatment, support, and property sharing,” with “opt-out provisions.”\footnote{7} It also recommended legalization of same-sex marriage.\footnote{8}

These proposals and recommendations have not been without some legal impact. For instance, within eighteen months after the publication of Beyond Conjugality in Canada, courts in three provinces had ruled that


\footnote{5}{See Robin Fretwell Wilson, Undeserved Trust: Reflections on the ALI’s Treatment of De Facto Parents, in Reconciling, supra note 4, at 90; Margaret F. Brinig, Domestic Partnership and Default Rules, in Reconciling, supra note 4, at 269; Marsha Garrison, Marriage Matters: What’s Wrong with the ALI’s Domestic Partnership Proposal, in Reconciling, supra note 4, at 305; Lynn D. Wardle, Beyond Fault and No-Fault in the Reform of Marital Dissolution Law, in Reconciling, supra note 4, at 9.}


\footnote{8}{Id. (citing Beyond Conjugality at 122–31, Recommendation 33).}
same-sex marriage should be legalized,⁹ and within four years the Canadian Parliament had enacted legislation to legalize same-sex marriage throughout the country.¹⁰ By contrast, the impact of the ALI Principles in the United States has been largely academic, insignificant, and marginal. Indeed, in the first eight years since adoption of the final version of the ALI Principles, very few states, primarily in New England states, have followed the Principles. The main impact of the Principles has been as an obligatory footnote citation in a string cite in some state court family law cases. That is, it is acknowledged to show that the court was aware of contemporary academic proposals and commentary.¹¹ When the ALI Principles are cited, “[a]lmost half of . . . the Principles recommendations are rejected more often than accepted by a ratio of 1.5 to 1.”¹²

Many legal commentators have added to this literature. In a recent book, Professor Nancy Polikoff asserts that “[m]arriage as a family form is not more important or valuable than other forms of family, so the law should not give it more value.”¹³ Professor Polikoff includes relationships of more than just two persons in the alternative non-marital intimate relationships that she argues should be treated the same as marriages in the law. She argues, “‘Couples, meaning two people with a commitment grounded on a sexual affiliation, should not be the only unit that counts as family.’”¹⁴ She argues that there have been many recent developments to “knock[ing] marriage off its perch,”¹⁵ citing, inter alia, the ALI Principles of the Law of Family Dissolution, which she considers an intellectual victory for the equal-value claim and movements.¹⁶ She also argues that “distinctions between married couples and everyone else [remain in the law] without

¹⁰ Civil Marriage Act, Bill C-38, passed by the House of Commons on June 28, 2005, by the Senate on July 19, 2005, and it received Royal Assent on July 20, 2005.
¹¹ Michael R. Clisham & Robin Fretwell Wilson, The American Law Institute’s Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote?, 42 Fam. L.Q. 573, 575–76 (2008) (“A paltry 100 cases have cited to the Principles [in the nearly eighteen years] since the beginning of the project in 1990. . . . [B]y far and away, the Principles are most frequently used to ‘pile on’—that is, to bolster the court’s holding in a case that would have come out the same way in the absence of the Principles. Thus, in nearly a quarter of cases (24.24%), the Principles serve as an obligatory footnote. Like Judge Robert Sack’s quip about law review articles, judges frequently use the Principles ‘like drunks use lampposts, more for support than for illumination.’”).
¹² Id.
¹³ POLIKOFF, supra note 3, at 3.
¹⁴ Id. at 4.
¹⁵ Id. at 90.
¹⁶ Id. at 87.
assessing the justness of that approach. It's time we make that assessment.”

All laws that “affect families need to be evaluated in light of contemporary realities.” Using marriage to selectively distribute benefits utilizes an incorrect dividing line because these laws no longer “serve their original purpose, which was tied to legally mandated sexuals in marriage.”

She argues that the law should allow all people who wish to declare that their relationship is a family relationship to register, and proposes a “valuing-all-families legal system [that] keeps marriage and extends it to same-sex couples although with a new official name—civil partnership.”

These relational equivalence claims raise many profound issues of fact and value: Are all relationships equal to marriage? Would “leveling” all adult intimate relationships be beneficial for individuals, families, and society, or would it produce side effects that would cause more harm than good? Those are the questions this article examines.

Part I begins by summarizing the status of legal recognition for same-sex relationships in the world today. It also reviews the status of other domestic relationships (as of 2010). Then it explains that legal recognition of adult domestic relationships (both heterosexual and same-sex) in the United States and in other nations has taken four different forms. The differences between them are of form, substance, and operational temporal perspective. This shows that the global trend and the overwhelming grassroots trend in the United States is to preserve the unique legal status for marriage as the union of man and woman. The extension of marriage-equivalent benefits under a new, or another, status is controversial. Registration and extension of specific benefits is also controversial for different reasons. Informal status with informal (often non-legal) or retroactive conferral of benefits is also possible, but potentially problematic as well.

Part II distinguishes two categories of marriage incidents and benefits that may help in evaluating the claims of particular legal benefits for particular relationships. It considers the “equivalent-benefits” claim, noting that marital status and marital benefits are distinguishable and that

17 Id. at 8.
18 POLIKOFF, supra note 3, at 9.
19 Id. at 19.
20 Id. at 131. The purpose of some marriage benefit laws is to give maximum autonomy to certain individuals. Marriage is not the sole criteria for that, nor is it a substitute for dependency.
21 Id. at 132.
true "marital incidents" benefits should be distinguished from "marriage benefits of convenience." While this article concludes that it would be unwise to extend true "marital incident" benefits to non-marital couples, it also suggests some marriage benefits rooted in administrative convenience could appropriately be extended to some non-marital couples. It discusses the relevance of the distinction between legal protection for foundational social relations and institutions and the real limits of positivist theory to construction equivalence.

Part III addresses the "equality of relationships" argument and discusses whether (and if so, when and why) legal distinctions between various forms of domestic relationships are justified, particularly the strong wall that separates marriage from same-sex and other relationships. It will suggest that protection of the institution of conjugal marriage is essential to protect adults, children, families, and all of society. It considers the claim that all (or all relevant) adult intimate relationships should be treated the same in terms of legal status and effects. It critically examines and responds to the "equal-value" claim, reviewing some of the evidence that form matters in intimate relations; that conjugal marriage provides the safest, most beneficial environment in which to raise children; and that heterosexual cohabitation is significantly less beneficial for adults, children, and society than conjugal marriage. This section of the article also considers the dual-gender requirement for marriage and discusses the centrality of gender integration to the purposes and functions of the institution of marriage.

The conclusion reiterates the importance of preserving and protecting marriage as the union of a man and a woman as a unique legal status with some unique legal benefits—for the sake of society and families, and especially for the sake of children. It concludes that conferring marriage upon other kinds of relationships, giving equivalent domestic relationships status and benefits to all relationships, and giving all of the benefits of marriage (including what are called herein marital incident benefits as well as what are labeled administrative convenience benefits) to those alternative relationships, would fail to achieve most of the social purposes that underlie marriage, as well as the personal purposes that people have for entering into alternative forms of adult intimate relationships. It would be like trying to force the proverbial round block into the proverbial square hole. It would result in a mere marriage of convenience that might achieve some temporary and illusory success but in the long run would be—for the individuals in those relationships, for the institution of marriage, and for society—a tragedy of disastrous proportions. It would destroy marriage, for if everything is marriage, nothing is marriage, and marriage means
nothing.

I. THE STATUS OF MARRIAGE AND OTHER DOMESTIC RELATIONSHIPS IN THE LAW

A. Same-Sex Marriage and Equivalent Civil Unions

1. Same-Sex Unions Have Marriage-Like Status in Few Jurisdictions

In this nation there has been a strong movement to legalize same-sex relationships as marriage or marriage-equivalent. As Appendix A1 shows, since 2004, same-sex marriage has been legalized in six of the fifty United States of America, as well as in the District of Columbia.22 Also, same-sex unions equivalent to marriage have been created in ten other US states.23 Additionally, three other states now allow some form of same-sex partnership registration with some selected benefits, less than the total bundle of benefits extended to marriage and civil unions, as noted in Appendix II.24 While informal marriage (common law marriage of male-female couples) is allowed today in only ten states and the District of Columbia,25 no case in any state has held that same-sex couples can have common law marriage, and at least one professor suggests that it is not permitted anywhere (though that may be debatable).26

22 See infra App. I. Additionally, California legalized same-sex marriage by judicial decree briefly in 2008, but the voters quickly overturned that by passing Proposition 8 in November 2008. Lower-court rulings by state courts in Hawaii and Alaska also legalized or ruled in favor of same-sex marriage, but before those rulings became effective, voters in each state adopted amendments to the state constitutions to prohibit same-sex marriage. See Charles M. Cannizzaro, Marriage in California: Is the Federal Lawsuit Against Proposition 8 About Applying the Fourteenth Amendment or Preserving Federalism, 38 PEPP. L. REV. 161, 162–66 (2010).

23 The term “civil unions” is an inexact term, not a term of art. It is generally used (and used herein) to refer to formal same-sex legal relationships that enjoy all, or substantially all, of the benefits, privileges, and duties of marriage. However, the same such relationships are denominated “domestic partnerships” in some states, including California and Nevada. See CAL. FAM. CODE § 297 (West 2005); NEV. REV. STAT. §§ 122A.010–122A.510 (2009). By the same token, formally-created and legally-recognized same-sex legal relationships that are afforded less than identical, or substantially-identical, legal rights, duties and benefits are generally called “domestic partnerships,” but could just as well be called “civil unions.” See generally Lynn D. Wardle, Counting the Costs of Civil Unions: Some Potential Detrimental Effects on Family Law, 11 WIDENER J. PUB. L. 401 (2002).

24 See infra App. II.


26 Only two jurisdictions of the ten states (plus the District of Columbia) that allow common law marriage also allow same-sex marriage. Those two jurisdictions are Iowa and The District of Columbia. In D.C., since legalization of same-sex marriage was accomplished by enactment of positive law (an
Globally, as the Appendices show, same-sex marriage has been legalized in only ten of 193 sovereign nations and that has occurred within the past dozen years.\textsuperscript{27} Also, same-sex unions equivalent to marriage have been created in seventeen other nations. Same-sex registrations with limited benefits are provided in six identified nations.\textsuperscript{28} We have gone from no nations with legal same-sex marriage in 2000, to ten nations with same-sex marriage in 2012, and from three nations with marriage-equivalent civil partnerships in 1995 to seventeen such nations in 2012, plus another half-dozen nations with specific benefits. In summary, just one-sixth of sovereign nations give any significant formal legal status or marital benefits to same-sex couples, and only fourteen percent (14\%) of sovereign nations provide those couples access to marriage or marriage-equivalent status or rights. Eighty-three percent (83\%) of the nations in the world give no legal relationship status or benefits to same-sex couples.

2. Same-Sex Unions Lack Marriage-Like Status in Most Jurisdictions

On the other hand, the “backlash” grassroots movement rejecting same-sex marriage turns out to be much more substantial in America than internationally. In the past decade, as the Appendices document, thirty-one (31) states (that is sixty-two percent of all American states) have passed state constitutional amendments defining marriage as the union of husband and wife,\textsuperscript{29} including twenty state constitutional amendments that also prohibit creation of marriage-equivalent same-sex civil unions, however labeled.\textsuperscript{30} At least forty-one states have passed their own “defense of

\textsuperscript{27} See infra App. I.

\textsuperscript{28} See infra App. II.

\textsuperscript{29} ALA. CONST., amend. 774; ALASKA CONST., art. I, § 25; ARIZ. CONST., art. 30, § 1 (Prop. 102); ARK. CONST., amend. 83; CAL. CONST. art. I, § 7.5 (Prop. 8); COLO. CONST., art. II, § 31; FLA. CONST. art. 1, § 27 (Amend. 2); GA. CONST., art I, § 4, para. 1; IDAHO CONST., art. III, § 28; KAN. CONST. art. XV, § 16; KY. CONST., § 233A; LA. CONST., art. XII, § 15; MICH. CONST., art. I, § 25; MISS. CONST., § 263-A; MO. CONST., art. I, § 33; MONT. CONST., art. XIII, § 7; NEB. CONST., art. I, § 29; NEV. CONST., art. I, § 21; N.D. CONST., art. XI, § 28; OHIO CONST., art. XV, § 11; OKLA. CONST., art. II, § 35; OR. CONST., art. XV, § 5a; S.C. CONST., art. XVII, sec. XV; S.D. CONST., XXI, § 9; TENN. CONST., art. XI, § 18; TEX. CONST., art. I, § 32; UTAH CONST., art. I, § 29; VA. CONST., art. I, § 15-A; WIS. CONST., art. XIII, § 13.

\textsuperscript{30} See infra Apps. I, II.
marriage” policies by statute, constitutional amendment, or both. Such defense of marriage policies effectively prohibit courts in those states from recognizing same-sex marriages performed in other jurisdictions and also express strong public policy in the states barring same-sex marriage recognition.31 Two-thirds of American states (thirty-four states) clearly reject and prohibit either marriage or any marriage-like legal status or marital benefits for same-sex couples.32 Forty-four American states now recognize marriage as the union between a man and a woman only.

Internationally, the legal rejection of same-sex marriage is the dominant and growing rule of law. Forty-seven nations—twenty-four percent (24%) of the 193 sovereign nations recognized by the United Nations—have constitutional provisions that expressly define or by gendered terms clearly refer to marriage as a conjugal union of a man and a woman.33 All but one of these constitutional provisions has been adopted since 1970!34 By contrast, no national constitution expressly protects or requires same-sex marriage.35 Additionally, same-sex marriage is prohibited either by statute,


34 The Constitution of Japan, which was adopted in 1947, is the only such constitution adopted after 1970 that limits marriage to male-female couples.

35 However, by creative judicial interpretation of equality provisions, not marriage provisions, courts in Canada and South Africa have distilled a requirement for legal recognition of same-sex marriage. See Harrison v. Canada, [2005] 290 N.B.R.2d 70 (Can.); Minister of Foreign Affairs v. Fourie 2005 (1) SA 524 (CC) (S. Afr.).
common law, or binding legal custom in all nations that do not explicitly forbid or allow same-sex marriage in their constitutions.

The Universal Declaration of Human Rights recognizes that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Similar statements about the foundational importance and specially-protected role of families are found in dozens of other international conventions, compacts and instruments, such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Hague Convention on the Civil Aspects of International Child Abduction, and the Convention on the Rights of the Child.

Advocates of same-sex marriage have long argued that these documents should be interpreted to provide a right to same-sex marriage. Those claims have been notably unsuccessful. These human rights charters have not been interpreted as requiring member states to redefine marriage to include same-sex couples. For example, in Joslin v. New Zealand, the United Nation's Human Rights Committee affirmed in 2002 that the internationally recognized civil right of marriage created by the International Covenant on Civil and Political Rights confers the obligation on states "to recognize as marriage only the union between a man and a


woman wishing to marry each other.'\textsuperscript{43} This became the touchstone of understanding these human rights documents, and the various member states have been left to determine for themselves what recognition will be given other domestic relationships. Similarly, in\textit{Rees v. United Kingdom}, the European Court of Human Rights held that the right to marry, as protected by the European Convention on Human Rights, applies only to "traditional marriage," leaving the individual states free to individually determine the nature and degree of recognition to extend to other relationships.\textsuperscript{44} In March 2012, the European Court of Human Rights declared in\textit{Gas and Dubois v. France}: "The European Convention on Human Rights does not require member states’ governments to grant same-sex couples access to marriage."\textsuperscript{45} While it is to be expected that some pro-same-sex union developments will come, given the political nature of the issue, the consistent, overwhelming rejection of the claim for same-sex marriage in the global arena to this point is noteworthy.

Thus, as a matter of comparative constitutional law and international law, the trend to legalize same-sex marriage seems to have stalled (though it is inching forward – in a total of ten nations in the past twelve years). The trend now seems to be against same-sex marriage, with the sole regional exception of a few jurisdictions in Western Europe and a few former European colonies in North America and elsewhere. The global norm is not to recognize same-sex marriage and to protect as a matter of international human rights the ability of each nation to settle that policy issue for itself.

B. Heterosexual Non-Marital Cohabitation

The status of non-marital heterosexual cohabitation without marriage\textsuperscript{46} is quite tenuous in the United States of America.\textsuperscript{47} No American state extends


\textsuperscript{44} Rees v. United Kingdom, 9 Eur. Ct. H.R. 56 (1986).


\textsuperscript{46} Common law marriage in the United States is a full, valid marriage, differing from licensed formal marriages only in the degree and details of formality required for celebration of the marriage. It is not non-marital cohabitation, although in some parts of the world, the term "common law marriage" is colloquially and misleadingly applied to non-marital cohabitation.

\textsuperscript{47} See generally Margaret M. Mahoney, \textit{Forces Shaping the Law of Cohabitation for Opposite Sex Couples}, 7 J. L. & FAM. STUD. 135 (2005); Ann Laquer Estin, \textit{Ordinary Cohabitation}, 76 \textit{NOTRE DAME
generally full marital rights and benefits to cohabiting non-marital non-gay couples. Few states provide any benefits by statute specifically for unmarried cohabitants. Some legal benefits (usually division of property acquired during a relationship) derivative of a heterosexual may be awarded in a handful of states (such as California and Washington). However, most states (one recent Law Review Note says all but six states) allow for enforcement of private ordering by non-marital couples of their financial relationships, such as by contract, partnership, or other kinds of financial sharing or exchange. Professor Margaret Mahoney has noted “the relationships established between cohabiting, opposite sex couples are not regarded as family status relationships for most legal purposes.” She identifies only five state legislatures (Hawaii, Vermont, California, New Jersey and Maine) that have enacted domestic partnership laws with statewide application and thirty-five municipalities that have enacted domestic partnership ordinances. However, “[m]ost of the enacting jurisdictions are municipalities, where the primary rights established are employee benefits for public employees with domestic partners, such as family health benefits.” Professor Tom Oldham has noted, in his review of the status of non-marital cohabitation in the United States, that “because in most states cohabitants have no ‘status’-like rights, regardless of the duration of the cohabitation or whether the relationship was childless or minor children were in the household, an ‘unmarried’ couple can cohabit for a long period and raise children and still have no rights or obligations (other than child support) when the relationship ends.” Professor Thomas Gallanis agrees that, “[t]he doctrines of common-law marriage and the putative spouse aside, neither the case law


49 Mahoney, supra note 46, at 160
50 Id. These numbers may include jurisdictions that have domestic partnership or such status for only same-sex couples as well as jurisdictions that have domestic partnership or such status for heterosexual couples alone or both same-sex and heterosexual couples.
51 Id. at 161.
52 Oldham, supra note 46, at 1411.
nor the statutes of most states provide much recognition or protection for unmarried cohabitants as a matter of status.\textsuperscript{53}

Additionally, under "palimony" and similar judicial doctrines, some states allow cohabitants to claim a share of the property acquired by their former partner during cohabitation or to assert claims for support or equitable claims to some property or financial assets or income of their former partner.\textsuperscript{54} However, most of the states that allow such recovery base the recovery on ordinary express or implied contract, partnership, or equitable theories, not derived from the relationship itself. Moreover, recovery of claims under these judicial doctrines has proven very difficult. For example, in the seminal 1976 "palimony" case, \textit{Marvin v. Marvin},\textsuperscript{55} even though the California Supreme Court authorized many different possible routes to establish a palimony claim (including written contract, oral contract, implied contract, quantum meruit, partnership, implied partnership, constructive trust, unjust enrichment, and other equitable theories), the plaintiff, Michelle Marvin, was unable to prove any basis for palimony recovery and received nothing.\textsuperscript{56} Moreover, the financial security provided for non-marital cohabitants by these doctrines is very limited. As Professor Ann Laquer Estin wrote,

\begin{quote}
Taken altogether, the legal norms of ordinary cohabitation developed in the quarter century since \textit{Marvin} are not particularly generous. Only a small percentage of cohabitants will have even a possibility of legal recovery when their relationships end. To the extent that these rules have any effect on the choice between cohabitation and marriage, they are likely to encourage marriage for anyone seeking financial security and to encourage cohabitation rather than marriage for anyone seeking to avoid financial commitments.\textsuperscript{57}
\end{quote}

Non-marital cohabitation by heterosexuals is given some legal recognition and quasi-marital benefits in some foreign nations under some, though typically restricted, circumstances. However counting, let alone classification, is extremely difficult due to the substantial difference between legal systems, as well as due to the frequency of marginal or informal protections afforded heterosexual non-marital couples or partners. Many of the current legal practices, provisions, statuses and benefits

\textsuperscript{53} Gallanis, \textit{supra} note 25, at 293–94.


\textsuperscript{56} \textit{Marvin}, 176 Cal. Rptr. at 559.

\textsuperscript{57} Estin, \textit{supra} note 46, at 1402–03.
provided for heterosexual non-marital couples are vestiges of former times. During those times, concubinage and similar relations were widespread and divorce was very difficult or impossible to obtain. In some cases, such protections for heterosexual non-marital couples functioned (especially among the poor) like a form of common law marriage. As in the United States, it appears that more countries give some domestic partnership registration, status, or benefits to same-sex non-marital couples than to heterosexual non-marital couples. As Professor Mahoney explains,

[M]any foreign laws impose significant limitations on domestic partnership status eligibility for opposite sex cohabitants by restricting the status to same sex couples, and by excluding non-formalized, unregistered relationships. Furthermore, the substantive legal consequences for recognized opposite sex domestic partners are quite limited in many countries. Still, by comparison to the laws of many other nations, the legal recognition extended to opposite sex cohabitation as a significant family relationship in the United States is minimal.

From a comparative law perspective, it is hard to draw any conclusion from the practice of giving some legal recognition to some non-marital heterosexual relations in some foreign nations. The diversity of practice, the variety of approaches, the divergences in the legal systems, the wide variations in the extent, scope, and type of recognition or benefits extended, the conditions for obtaining them, and the holes in the data are so great as to make even broad comparisons misleading at best and analytically unreliable.

Overall, the movement toward legal recognition of both same-sex unions and dual-gender-non-marital unions is slow and spotty. In the U.S. recognition of heterosexual non-marital relationships is quite restricted. While some other countries clearly do offer some heterosexual non-marital couples greater legal recognition or benefits than most American states, the record is quite ambiguous. The differences among the other legal systems in legal treatment of such relationships are vast, and specific legal customs of other nations, such as concubinage, often proceed from a history of class, gender, and economic exploitation and corruption that hardly makes those practices a model for our nation or legal system.


59 Mahoney, supra note 46, at 163.
II. A RESPONSE TO THE "EQUAL-VALUE" CLAIM: ALL RELATIONSHIPS ARE NOT ALIKE

It is hard to disagree with the proposition that "the law should support the diverse families and relationships in which children and adults flourish." The problem and disagreement come in identifying and agreeing on which relationships are the kinds of relationships in which children and adults actually do "flourish." Many advocates of giving legal status to same-sex marriage or of giving full marital benefits and status to non-marital intimate relations, argue that non-marital relationships are just as beneficial to children, adults, and society as marriage is, and contribute just as much to society as marriage does. Thus, these advocates argue that same-sex couples deserve to receive equal treatment with marriage in the laws.

The equal value claim forces all of us to address two key questions that have been ignored in our society for some time. First, what is it about marriage that justifies it being defined so narrowly and exclusively? Second, why should only conjugal heterosexual marriages be given legal marriage status and certain marital benefits?

We have taken marriage for granted for a long time, and the "treat-all-relationships-as-equal-to-marriage" proposal forces us to rediscover what marriage is, why it is so important to society, and why it is given such a unique and preferred status in law. Surprisingly, despite the strong, decades-long, growing challenge of same-sex marriage and other non-marital relations, the public discourse in America has yet to seriously grapple with those questions.

Legal scholars, students, and policy-makers in particular need to address these questions. Whether non-marital intimate relations should be given legal treatment equivalent or largely equivalent to marriage ultimately turns on whether heterosexual conjugal marriage makes a unique contribution to society, advancing the social purposes for which the state has established the preferred legal institution of marriage, or whether non-marital intimate relations make the same or equivalent contributions towards the achievement of the social purposes of marriage.

To answer this question we must (1) identify the social interests that constitute the public purposes of legal marriage, and (2) compare the

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61 POLIKOFF, supra note 3, at 3.
contributions that heterosexual conjugal marriages make toward those social interests with the contributions that non-marital intimate relations make toward those or similar social interests. The comparison requires that we compile lists of both positive and negative qualities and characteristics, including a list of the benefits and contributions provided to society by the particular form of relationship and a list of the harms and problems associated generally with the form of relationship. Then we must balance the ledger, so to speak. This task is difficult and makes some people uncomfortable for two reasons.

First, some of the qualitative benefits of marriage are hard to measure. Not all of the value of marriage can be reduced to quantifiable figures and statistics. There are some dimensions of the human experience, including human emotional relationships that may not yet be adequately understood or quantified by existing social science.

Second, making comparisons about personal lifestyles makes many of us feel awkward. Many people do not like to make comparisons of such intimate and personal things. Even if they think that one kind of relationship is bad, and another is good, they believe that modesty or privacy preclude them from saying that publicly. It seems judgmental to some to compare. Others believe that such things are completely relative or subjective; that whatever kind of relationship a person thinks is best is the best for that person. They believe there is not any objective, best kind of relationship for society. Some people oppose making comparisons so much that they get very upset, and start labeling people who undertake the task as “judgmental,” “bigoted,” “homophobic,” or “narrow-minded.” This hostility generates and supports the taboo against asking such comparative questions or doing such comparative research, unless it is designed to show that conjugal marriage is not superior to non-marital relationships, including same-sex relationships.

Whether non-marital intimate relations really do contribute as much to society and social needs as conjugal heterosexual marriage is a critical question, which deserves to be taken seriously and given a serious answer.

What is marriage, and why is it defined so narrowly as to include only the monogamous union of an adult, consenting, unmarried, competent man and woman? Marriage is a term used in many different contexts with

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62 Indeed, a major contribution of contemporary feminism and several other perspectives (such as the Therapeutic Jurisprudence movement) emphasizes this reality by valuing emotion qua emotion, and in trying to protect good relationships qua relationships.

63 These six qualities are both historically prevalent and widely accepted in the modern world. A survey in 1996 of marriage laws in sixteen nations around the world identified these six qualities as the
MARRIAGE AND OTHER DOMESTIC RELATIONSHIPS

many possible meanings. It may mean different things in law than in religion, sociology, psychology, or within particular families. The questions raised by Professor Polikoff concern the public institution of legal marriage. The proposed legalization of same-sex marriage concerns the meaning of legal marriage—that is, the state-regulated public status called “marriage,” and the essential legal benefits flowing from that legal relationship. It is not about whether some private group of people may or should consider same-sex couples as “married” for their own purposes, i.e., for purpose of membership in their church or private organization, or for purposes of religious doctrine, or for purposes of etiquette—who should be invited to what events, or seated next to whom. If same-sex marriage is not legalized, that does not prevent some individuals, some families, some religions, some psychologists, or other private groups from considering same-sex unions as marriages for their own private purposes.

At a simplistic, positivist level, it can be said that legal marriage is whatever lawmakers say it is. That answer tells us very little about marriage, but tells us something important about law. The lawmakers in any legal system may define marriage however they choose. If they choose to confer the legal status of marriage only on relations between one adult male and one adult female, it is so. On the other hand, if they choose, they could provide that two men, or two women, or three persons of any gender may marry. They could allow father-daughter relations, or brother-sister relations—to be legal marriages and for purposes of law in that jurisdiction, that is what legal marriage would be. This reductionist answer, however, does not help us know much about marriage, only about who decides what marriage is.

Historically, sociologically, and anthropologically, marriage is a pre-legal institution. The law does not create marriage any more than it creates children or land. Rather, the law attempts to regulate marriage to protect common requirements of marriage globally. Lynn D. Wardle, International Marriage and Divorce Regulation and Recognition: A Survey, 29 Fam. L. Q. 497, 500 (1995). At that time, a few dozen Muslim nations allowed polygamous marriage, and since then, five nations (less than three percent of all sovereign nations) and a handful of dependent or subordinate jurisdictions (municipalities, provinces, states, etc.) have legalized same-sex marriage. But the overwhelming globally prevailing pattern continues to define marriage in terms of these six requirements.

I know some people who were lawfully married and later divorced by their spouses who still, in their own hearts, consider themselves married in some ways (for purposes of giving gifts at Christmas, or for purposes of giving financial support), or in the eyes of their family or in-laws' family they are treated for many purposes as if they were still married, or in the eyes of church they are still considered married.

and promote important social interests and the well being of all individuals in society.

Substantively, in law, marriage refers to two things. First, it refers to a specific, unique legal institution that has been and is recognized and given special treatment in the law of domestic relations and which is defined and regulated by the state. It is a special kind of family relationship, namely the relationship of husband and wife. This can be called marriage status, and the area of law that regulates it is called marriage law, or (more generally) family law. This can be distinguished from what can be called marriage benefits, which is a set of legal rights and privileges for which marriage status provides eligibility or qualification.

What is it about the special committed relationship between a man and a woman that has led lawmakers throughout all time, and across all cultures, to confer upon this relationship the special, preferred legal status of marriage? Why has the state chosen to make conjugal marriage between a man and a woman (and no other kind of intimate relationship) a unique public institution and given special legal benefits to the institution and its spouses? The answer to these and similar questions is that conjugal heterosexual marriages have been given special legal preference because they make uniquely valuable contributions to the state, to society, and to individuals. Heterosexual marriages have been singled out from all kinds of adult relationships for preferred status because they are so distinctively important and uniquely valuable to society and to the stability and continuity of the state, and to achieving the purposes for which the state exists. Legal marriage, as distinct from marriage as a religious, social or familial institution, is a public institution established to achieve public purposes. It is not the private consequences but the public consequences of heterosexual conjugal marriage that are relevant to the public policy issue of whether a particular relationship should be given the public status of marriage.

Advocates of extending truly marital benefits to non-marital intimate relations, including same-sex couples, assert their challenge: Prove that...
conjugal relations are unique and uniquely beneficial to society. But they have the burden of proof backward. The burden of proof is upon those who propose a radical redefinition, or “leveling,” of marriage to show that their proposal will not harm the long-established dual-gender social institution of marriage or otherwise harm society, especially families and children.

There are many important public interests in and social purposes for marriage as to which conjugal marriages provides tremendous benefits to society that are unequalled by non-marital intimate relations. Elsewhere, I have identified and discussed at least eight concurrent and unique contributions of conjugal marriage in general to social welfare that are demonstrably significant. These include: (1) safe sexual relations, (2) responsible procreation, (3) optimal child-rearing, (4) healthy human development, particularly for the most vulnerable, (5) protecting the status of women, especially of wives and mothers, (6) securing the stability and integrity of the basic unit of society, (7) fostering civic virtue, democracy, and social order, and (8) facilitating inter-jurisdictional compatibility.

The evidence that committed heterosexual unions that are called marriages make unique and uniquely important contributions to achieving the public and social purposes of marriage is overwhelming. To quickly summarize: Committed conjugal unions of marriage provide the best setting for the safest and most beneficial expression of sexual intimacy. Conjugal marriage provides the best environment into which children can be born. Conjugal marriage provides the greatest and most advantageous environment in which children can be reared, providing profound benefits of dual-gender parenting to model inter-gender relations, and best showing children how to relate to persons of their own and the opposite gender. Conjugal marriage provides the most enriching and liberating relationship to facilitate human men and women to personally develop and achieve the fullest potential. Conjugal marriage provides the best security for the status of women (who take the greatest risks and invest the greatest personal effort in creating and maintaining families). Conjugal marriage provides the strongest and most stable companionate unit of society, the most secure setting for intergenerational transmission of social knowledge and skills, and reflects the understanding of marriage that has been constant across

cultures and throughout history. Marriage is of such profound importance to society that there is great danger if its meaning and definition become ambiguous. Conjugal marriage provides the best seed ground for democracy, the most important schoolroom for self-government, the most important wellspring of (and testing ground for) civic virtue, and the most valuable unit of social organization. Conjugal marriage facilitates inter-jurisdictional comity and intercultural understanding in many ways that would be threatened by legalizing same-sex marriage.

These are long established, historically recognized, currently substantiated qualities of conjugal marriage. If they are true, or even substantially so, it must be acknowledged that conjugal marriages contribute much more to the social interests in and public policy reasons for legalized marriage than do non-marital intimate relations. Overall, the benefits and value of conjugal marriages to society far exceed those of non-marital intimate relations. The burden of disproving them lies upon the advocates of the equal-value claim, and until now they have failed to carry their burden of proof. Absent such proof, from the perspective of the social interests and public purposes that underlie the legal status of marriage, the claim that non-marital intimate relations are equivalent to heterosexual conjugal marriage must fail.

Today it is not uncommon to hear advocates of same-sex marriage or equivalent unions argue that non-marital relationships (including same-sex relationships) provide a good, safe, and healthy environment for raising children equivalent to that provided by marriage. It is also common to hear claims that non-marital relationships have no higher rates of social pathologies (such as domestic violence, child physical abuse, child sexual molestation, break-up, and poverty) than do marital relationships. While there are certainly significant failings in marriages today, these claims rest in some part upon a tragically blind denial of reality.

While one need not believe that all of the claims about the profound gap between quality factors in marital and non-marital relationships and between child development experiences for children raised in marital and non-marital relationships are flawless or unimpeachable, the overwhelming size, scope, depth, and weight of the social science evidence, which has grown consistently, from researchers on the left and right, from a variety of disciplines, for three or more decades, leaves no room for reasonable minds to doubt that there is a very real, measurable, persistent, significant gap

67 Id. at 78–82.
between conjugal marital and all non-marital relations generally. Significant advantages for conjugal marriage exist with respect to the number, rate, degree, kinds and nature of benefits they provide to children, adults, families and society. There also exists a very real, measurable, persistent, significant gap between marital and non-marital relations demonstrating significant potential risks associated with non-marital relationships with respect to the number, rate, degree, kinds and nature of harms they produce for children, adults, families and society. Today, it is beyond serious dispute that statistical rates of some social pathologies (such as domestic violence, child physical abuse, child sexual molestation, drug/alcohol abuse, break-up, and poverty), and particularly disadvantages for children, are significantly higher in non-marital relationships than in marital relationships, and the rates of some positive social goods (education, employment, physical and mental health, income, wealth acquisition, quality of relationships) are notably lower for non-marital (including same-sex) relationships and families than for conjugal marriages and marital families. The refusal to acknowledge the uncontestable reality that, compared to non-marital cohabitation, including same-sex coupling, conjugal marriage is a very real, powerful, statistically significant dividing line separating families with respect to at least some benefits and burdens, especially regarding children, is remarkable.

Factually, the evidence is clear that “[t]he notion that all ‘family forms’ are equally as helpful or healthful for children has no basis in science.” For example, following an impressive review of the quantitative data, Professors W. Bradford Wilcox and Robin Fretwell Wilson recently concluded that, generally, “children do best in a married home, compared to the alternatives.” While human relations always produce exceptions, it bears emphasizing that an impressive body of empirical research strongly

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supports the immense value of conjugal-marital child-rearing generally.\textsuperscript{73} Taking a macro-perspective of the accumulating data (rather than a precise methodological examination of each quantitative study), it appears that the evidence is simply overwhelming and growing,\textsuperscript{74} but it is still very unpopular in many circles. As Psychologist and Professor A. Dean Byrd explained,

Children [raised by their married mother and father] navigate developmental stages more easily, are more solid in their gender identity, perform better in academic tasks at school, have fewer emotional disorders and become better functioning adults when they are reared by dual-gender parents. This conclusion, supported further by a plethora of research spanning decades, clearly demonstrates gender-linked differences in child-rearing that are protective for children.\textsuperscript{75}

In fact, "[t]here is no fact that has been established by social science literature more convincingly than the following: all variables considered, children are best served when reared in a home with a married mother and father."\textsuperscript{76} Homes with a father and mother who are married to each other (and do not have high conflicts) provide the best environment for raising

\textsuperscript{73} See supra note 65, for a list of the author’s prior publications reviewing the social science evidence. See also Regnerus, supra note 68.


\textsuperscript{75} Byrd, supra note 70, at 214.

\textsuperscript{76} Id.; see also Popenoe, supra note 73, at 176 ("Social science research is almost never conclusive . . . yet in three decades of work as a social scientist, I know of few other bodies of data in which the weight of evidence is so decisively on one side of the issue: on the whole, for children, two-parent families are preferable to single-parent and step-families.").
emotionally stable children. Research published in 2012 by Professor Mark Regnerus round that children of mothers who have had same-sex relationships were significantly different as young adults on 25 of the 40 (63%) outcome measures, compared with those who spent their entire childhood with both their married, biological parents. For example, children parented by lesbian mothers reported significantly lower levels of income, more receipt of public welfare, lower levels of employment, poorer mental and physical health, poorer relationship quality with current partner, and higher levels of smoking and criminality. Their outcomes were comparable to (and in some cases lower than) the outcomes for children raised in never-married and divorced parents.

Many experts have noted that “[t]he most important causal factor of [recent declines in American] child well-being is the remarkable collapse of marriage, leading to growing family instability and decreasing parental investment in children.” University of Chicago demographer Linda Waite has stated that, “[o]n average, children of married parents are physically and mentally healthier, better educated, and later in life, enjoy more career success than children in other family settings. Children with married parents are also more likely to escape some of the more common disasters of later-twentieth-century childhood and adolescence.”

This is true of virtually all forms of non-marital relations. Thus, compared to children of marital families, children of divorce or without fathers in their home are at the greatest risk of crime, child abuse, premarital sex, premarital pregnancy, poverty, lower education, and such children perform more poorly in school and have less career success. “Compared with children with continuously married parents, children with divorced parents continued to score significantly lower on measures of academic achievement, conduct, psychological adjustment, self-concept, and social relations.”

77 POPENOE, supra note 73.
78 Regnerus, supra note 68.
81 Id. at 124–34; see also E. MAVIS HETHERINGTON AND JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED (W.W. Norton & Co. 2002); JUDITH S. WALLERSTEIN, SANDRA BLAKESLEE, AND JULIA M. LEWIS, THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY (Hyperion 2000).
One specific example (and not necessarily the strongest) is the relationship between family structure and adolescent (especially male) crime. Single-parent Sara McLanahan of Princeton has shown that “[b]oys raised outside of intact marriages are two to three times more likely to commit a crime leading to incarceration by the time they are in their early thirties, even after controlling for race, family background, neighborhood quality, and cognitive ability.”

Separation of children from their fathers for whatever reason, in whatever alternative relationship structure, is generally recognized to be “the engine driving our most urgent social problems, from crimes to adolescent pregnancy to child abuse to domestic violence against women.” The 2006 National Report on Juvenile Offenders and Victims from the Office of Juvenile Justice and Delinquency Prevention of the U.S. Department of Justice states, “Juveniles who lived with both biological parents had lower lifetime prevalence of law violating behaviors than did juveniles who lived in other family types.” For example, the U.S. Department of Justice 2006 National Report noted that one study found that 5% of youth age 17 who lived with both biological parents reported ever being in a gang, compared with 12% of youth who lived in other family arrangements. Similarly, youth at age 17 living with both biological parents reported a lower lifetime prevalence, compared with youth living in other types of families, of widely ranging problem behaviors: marijuana use (30% vs. 40%), hard drug use (9% vs. 13%), drug selling (13% vs. 19%), running away from home (13% vs. 25%), vandalism (34% vs. 41%), theft of something worth more than $50 (19% vs. 17%), and assault with the intent to seriously injure (20% vs. 35%).


84 See The Marriage Movement, supra note 80 (citing Cynthia C. Harper and Sara S. McLanahan, Father Absence and Youth Incarceration (1998) (paper presented at annual meeting of American Sociological Association, San Francisco, Aug. 1998); see also McLANAHAN ET AL., supra, note 73 (discussing the many negative outcomes for children that are associated with being raised by a single parent).

85 See BLANKENHORN, supra note 73, at 1.


87 Id.
The "presence of a residential and biological father reduces the likelihood of violent behavior by his sons grown to adulthood," and "[d]ata analyzed across the U.S. indicate that father absence, rather than poverty, [is] the stronger predictor of young men's violent behavior."\(^8\) The likelihood that a young male "will engage in criminal activity doubles if he is raised without a father, and triples if he lives in a neighborhood with a high concentration of single-parent families."\(^8\) Many surveys show that children living apart from their fathers are far more likely than other children to display emotional and behavioral problems, to have difficulty getting along with their peers, and to get in trouble with the police. "They . . . have more social adjustment problems . . ."\(^9\)

Data analyzed across the U.S. indicate that father absence, rather than poverty, was a strong predictor of young men's violent behavior. Predictions of violent crime rates based on the level of out-of-wedlock births from the prior generation were superior to predictions that were based on adult violent crime rates and levels of out-of-wedlock births from the same time frame. A consonant pattern was found in cross-national surveys.\(^9\)

Likewise, an increase in out of wedlock births significantly increased the homicide arrest rates among those children when they were 15 to 19-year-olds, suggesting a long-term negative effect of childbearing out of wedlock.\(^9\) The effect of family structure was "both statistically significant and substantively strong."\(^9\) One government report concluded that regardless of all other socio-economic factors, adolescents living apart

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\(^9\) M. Anne Hill & Jine O'Neill, Underclass Behaviors in the United States: Measurement and Analysis of Determinants (New York, City University of New York, 1993); see generally Patrick Fagan and Robert Rector: The Effects of Divorce on America, WORLD AND I MAG. (Oct. 2000) (listing numerous negative outcomes, especially relating to children, from divorce). Another study reported that the "relationship between crime and one-parent families" is "so strong that controlling for family configuration erases the relationships between race and crime and between low income and crime." Blankenhorn, supra note 83, at 31.

\(^{87}\) See Hill, supra note 87; see also Wardle, the Fall, supra note 81, at 88–97.


\(^{90}\) Robert O'Brien & Jean Stockard, The Cohort-Size, Sample-Size Conundrum: An Empirical Analysis and Assessment Using Homicide Arrest Data from 1960-1999, 19 J. QUANTITATIVE CRIMINOLOGY 1, 22 (2003) ("[T]he effects of relative cohort size and family structure on age-period-specific homicide arrest rates are both statistically significant and substantively strong. As in earlier analyses, the influence of family structure is stronger than that of relative cohort size in all analyses.").
from a biological mother or father are 50-150 percent more likely to abuse and be dependent on drugs and need illicit drug-abuse treatment compared to their peers living with both biological parents.94

It is apparent that even intact families that have high levels of conflict show delinquency rates as high as disrupted families.95 Marriage certainly is not a guarantee of success in family life. (In this day of high divorce rates, does that surprise anyone?) So family structure (e.g., marriage) may be a shorthand way of referring to family interaction factors and dynamics such as conflict, control, communication, caring and trust, identity, support, etc., which other research has shown to correlate with delinquency.96 But that is the whole point of marriage as a dividing line or classification—research consistently shows that intact conjugal marriage is a statistically reliable “short-hand” for positive characteristics and the generation of positive social benefits and the minimization of negative social qualities and pathologies.97 Numerous studies have shown a clear link between family form or structure and juvenile delinquency, and some family paradigms are more closely linked with juvenile delinquency than others.98 Marriage provides a much better environment for the successful development and raising of children and for fostering successful, healthy adult intimate relationships than the various forms of non-marital cohabitation (including same-sex coupling).99

There also is strong evidence that form matters in adult intimate relations for adults, as well. Heterosexual cohabitation is significantly less

beneficial for adults, children, and society than conjugal marriage. Researchers and cohabiters both agree that cohabitation is distinguished and distinguishable from marriage in many significant aspects.\textsuperscript{100} National survey results show that cohabiters generally report poorer relationship quality than their married counterparts.\textsuperscript{101} Cohabitation fosters attitudes about commitment and relationships that foster instability and break-up.\textsuperscript{102} Symptoms of depression are higher among some persons in cohabitation relationships (especially men) than among married persons.\textsuperscript{103} Domestic violence is notably higher in cohabitation relationships than in marriages.\textsuperscript{104} Most cohabitation is short-lived—only ten percent (10\%) of cohabiting relationships last five years or longer.\textsuperscript{105} Children being raised in a cohabitation relationship are at severe disadvantages in numerous dimensions of their lives, from potential for abuse to molestation to poverty to exposure to drugs, to school under-performance. As a pair of researchers recently documented, 

[w]e find that youth in "intact" families differ in important ways depending on whether the two biological parents are married or cohabiting and on whether they have children from a previous relationship. In addition, we find that youth who reside with a single biological parent who cohabits with a non-biological partner exhibit an unusually high rate of antisocial behavior, especially if the custodial parent is the biological father.\textsuperscript{106}


\textsuperscript{104} POPENO\E & DAFOE, \textit{supra note} 98, at 3.

\textsuperscript{105} Seltzer, \textit{supra note} 98, at 924.

Thus, the overwhelming evidence is that the welfare of adults, as well as children, is enhanced and advantaged in conjugal marriage as compared to non-marital relationships in general. The claim in _Beyond_ that all relationships are essentially equal in quality is factually untenable in the twenty-first century.

Thus, as a matter of rational public policy, it makes sense for the law to entice and channel (but not force) willing couples into the optimal form of relationships (marriage) to prevent harm to children, adult individuals, families, society, and the institution of marriage. The law and courts utilize marriage as a shorthand substitute for substance. The form is presumed to raise a presumption of substance usually rebuttable only upon proof that a party has fallen below the minimum-tolerable level of parenting.

The focus primarily on marriage as a dividing line for benefits preserves and reinforces marriage as an institution. There are no formless institutions; the forms of institutions are part of its presence and identity. To level all forms of adult intimate relationships (by making them equal in the law, by piercing the form and focusing on substance instead) would destroy marriage as an institution, and destroy with it its positive institutional influence. By making the form of marriage invisible, the institution of marriage also becomes invisible. As institutions such as marriage wither and deteriorate, the social influence they exerted on members of society (especially on children, adolescents, and adults in times of turmoil) also weakens and wanes. As the informal, non-legal influence of social institutions weakens, the need for government to exert its influence increases. Thus, as the law moves from making the form of marriage primarily determinative of legal benefits and to focusing on internal substance, or levels all relationships of intimacy, it undermines the ability of the institution of marriage to perform valuable social channeling and regulating functions through informal means, and increases the need for the state to exert its power over individuals and families through more coercive and - may we say _formal_ - means.\(^\text{107}\)

Moreover, marriage as a form or dividing line does not merely represent, substitute for, and raise a presumption of the substance of good relations and good parenting and responsibility. Conjugal marriage actually engenders, generates, reinforces, nurtures, supports, cultivates and enhances the very substance of good relations, good parenting and responsibility. The substance of these socially desirable qualities thrives in

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some forms (such as in marriage and marital parenting) and struggles in many others (including cohabitation, same-sex unions, polygamous relations, etc.). Thus, the form of marriage is substance not only because it is demonstrably associated with good substance, but also because to some extent it actually helps to create, foster, engender, and increase the socially beneficial substances that public policy wants to promote.

Similar concerns about "false equivalence" exist regarding "civil union" regimes in which all of the same rights, benefits and privileges of marriage are accorded to same-sex couples who register in civil unions. Such civil unions are functionally and effectively same-sex marriages with another label. Marriage is not just a label. There also is a substance of marriage. The substance of marriage is the bundle of rights and duties which the laws and which society confers upon the unique (and uniquely valuable) relationship. Relationships that are given that bundle of rights are in substance, in reality, "marriages." As Shakespeare suggested, "that which we call a rose, [b]y any other word would smell as sweet."108

Civil unions give all of the substance of marriage—the entire bundle of legal rights, duties and privileges of marriage—to same-sex couples. Thus, they create same-sex marriage in substance. But they preserve the name, the label, and status of "marriage" for male-female unions. Conceptually, this has some appeal as a compromise proposal. However, to confer the substance of marriage by "cut-and-paste" civil union legislation but not the label of marriage may create a "truth-in-labeling" problem.

Moreover, same-sex civil unions do a disservice to same-sex couples. Marriage, for millennia, has exclusively been a gender-integrating relationship. The legal rights and responsibilities of marriage—the substance of the benefits, duties, and privileges conferred and provided for married couples in the law of marriage—has been customized over the millennia, for the particular qualities of male-female unions. To simply "cut-and-paste" the legal benefits, rights and duties that were specifically crafted for male-female couples and extend them to same-sex couples (by copying the legal qualities and benefits of marriage law and pasting those legal provisions into "civil union" regimes for same-sex couples) is like taking a square peg and forcing it into a round hole. It creates friction; it is a poor fit; it both distorts marriage and it creates significant application problems for same-sex couples.

Civil union laws also may create major religious liberty issues. Individuals with strong moral, religious and conscience objections to

108 WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2.
facilitating same-sex marriage-equivalent civil unions may be harmed. Such problems have led to threats of firing, resignations, lawsuits and major issues in other states that have legalized same-sex civil unions and same-sex marriage.109

A civil union bill that was tailored specifically and drafted carefully to accommodate the qualities and characteristics of same-sex unions would be intriguing, appealing and well worth considering.110 Sadly, none of the civil union laws enacted in the American states with civil unions is carefully tailored to same-sex couple relationships. However, that possibility remains alive, and political limits may constrain both those who favor same-sex marriage and those who oppose it to seriously consider and begin to undertake the task of drafting thoughtfully customized civil union legislation crafted for the particular situation, characteristics and expectations of same-sex couples, and not just copying wholesale marriage laws, benefits and regulations.

III. A RESPONSE TO THE EQUAL BENEFITS CLAIM: DISTINGUISHING TRUE MARRIAGE INCIDENTS FROM GOVERNMENT ADMINISTRATIVE CONVENIENCE BENEFITS

Marriage is not just a public status relationship but it also is a legal classification term, used in literally hundreds of other laws, judicial doctrines, and government programs as the basis for extending or denying rights, privileges, duties, and obligations. These are often called marriage benefits (even though they often are or include legal burdens, duties and obligations), and they exist in almost all areas of the law.111


110 See supra note 23.

111 For example, marriage is a term of classification of benefits in torts (interspousal immunity), evidence (interspousal testimonial privileges), contracts (capacity to contract and limitations on interspousal contracts), welfare law (eligibility for public assistance), insurance law (who is entitled to certain benefits), immigration law (who is entitled to certain preferred status for immigration visas), criminal law (certain crimes and defenses are defined in terms of marital relations), constitutional law (certain fundamental rights are defined in terms of marriage), employment law (nepotism rules), wills
When used to define or regulate marriage benefits, the term "marriage" (or "husband," "wife," "spouse," "married persons," etc.) usually includes all persons who have marriage status, and it also may include some other persons who do not have legal marital status, but to whom lawmakers wanted to extend the particular marriage benefit.

Marriage benefits are of two types: Some legal benefits are extended to marriages and spouses because the legal benefits directly relate to the unique relationship of husband and wife, or the unique qualities of such marital relationships, or to the special contributions marriages make to (or unique burdens they impose on) society. These may be called marriage status benefits. In most cases it would be unjustified, and possibly counterproductive, to extend those marital status benefits to non-marital relations, which do not make the same contributions to society or which do not function the same for the advantage or burden of society regarding the state interest associated with the benefit.

For instance, one of the oldest presumptions in law is the presumption that a husband is father of a child born to his wife. This presumption is the reason that married men do not have to submit to DNA blood tests to establish that they really are the father of each of the children their wives have delivered, and this presumption is the reason that married women do not have to resort to DNA blood testing to establish that their husbands have the legal obligation to support the children born during marriage. The law can rely on this presumption because of two factors that, combined, distinguish marriages from other relations: procreative intercourse and a comparatively high degree of sexual fidelity. For example, the latter factor distinguishes marriages from non-marital cohabitation including same-sex unions. The presumption of actual biological paternity simply could not be applied to unmarried cohabiting couples with as much credibility as it can be applied to married couples. Generally, an unmarried woman must resort to blood testing to ascertain reliably that a particular man really is the biological father of her child and should be obligated to pay child support. Likewise, the first factor distinguishes marriages from same-sex partnerships because same-sex couples cannot engage (together) in procreative sexual relations. Thus, application of the marriage partner presumption to a same-sex partnership would not produce a reliable

and estates (dower, curtesy, spousal shares), tax law (exemptions and deductions), pension law (nonemployees entitled to pension benefits), and most other areas of law.

indication of who is the biological father of the child.

The more closely a benefit is linked with marital status, the more narrowly the scope of beneficiaries is defined. Essential marriage status benefits or incidents generally relate to the rights of marital cohabitation and consortium, the reciprocal financial relations of spouses (mutual support and acquisition of some interest in the property acquired by the other), and the co-equal rights of parenthood regarding the children of the marriage.

The other category of marriage benefits is benefits in which marriage or marital relationship is simply used as a convenient administrative category, not because the particular benefit is designed to protect or support families or because marriage is specially linked to the particular benefit. These can be called marriage convenience benefits. These benefits reasonably might be extended to persons in other relationships by substituting functional criteria for the marriage benefit definition or qualification. The hospital screening rule for visiting patients in intensive care is one good example. These benefits might be extended to some non-marital relationships without detracting from the institution of marriage or diluting the purpose of the classification. Wrongful death benefits and worker’s compensation benefits are two other possible examples where the core concern of the law is protecting dependents. The law could just as well (perhaps better) carefully classify or define eligibility for the benefit using some other criterion than the convenient catchall of “marriage.”

Distinguishing marital status benefits from marital convenience benefits, however, may not be a short or simple task. Marriage is used as a legal basis for extension of benefits, burdens, privileges, and obligations in literally thousands of statutory programs in both state and federal law. For example, in 2004 the General Accounting Office reported that 1,138 federal statutes use one or more of the above-indicated marital status terms.113 (That count did not include the use of those terms in the Code of Federal Regulations and other federal administrative rules and regulations, which would significantly multiply the number of instances of marital status terms.) Similarly, in each state, terms like marriage, and spouse are

used in hundreds of state laws (Hawaii counted over 300 laws; Washington state over 400; a national lesbian organization says 500 in the average state) covering everything from contracts to torts, wills to medical treatment, property to taxes, and parenting to alimony.\(^{114}\) So the number of benefits linked to marriage is huge. Moreover, the task of classification of benefits as truly marital or merely a marriage classification of convenience is complicated by the fact that some marriage benefits overlap both categories. Separating these benefits is a task that must be undertaken by persons seeking to have marriage benefits extended to non-marital relationships, because *marriage status benefits* (designed to support a unique facet of marriage or recognize a unique contribution made to society exclusively by marriage relations) are unique to marriage and should not be extended to non-marital relations, while *marriage convenience benefits* might reasonably be extended to some non-marital relationships.

Thus, legal marriage includes marital status, marriage status benefits, and marriage classification benefits. The status of marriage itself is a highly preferred, very positive, very desirable status and that status itself is the main benefit that some same-sex marriage advocates seek. They seek the dignity, the social preference, and the social endorsement that the status of legal marriage entails. Laws regulating the definition and creation of marriage control the core of marital status. They want to revise laws defining marriage and regulating the creation of marriage to include same-sex relations. Other same-sex marriage advocates primarily seek the marital status benefits that are often linked with valuable economic rights. Others simply want marriage classification benefits, not wishing to equate same-sex relations with marital relations for purposes of status or unique marital status benefits. Many advocates of leveling marriage, such as Professor Polikoff,\(^{115}\) want equal marital benefits (perhaps equal status but clearly equal benefits, including presumably both marital status benefits and marriage convenience benefits) for all non-marital couples, not just

\(^{114}\) See Report of the Commission on Sexual Orientation and the Law in Hawaii (Dec. 8, 1995) (the terms marriage, husband, wife, spouse, and family are used extensively in a wide variety of statutes and programs in state law in Hawaii); id. at 105–26, App. B (listing over 300 Hawaiian statutory provisions containing references to marriage, husband, wife, spouse, and similar familial terms); Legal Marriage Alliance of Washington [State] RCW Project 2004, available at http://lmaw.org/rcw_project.htm (reporting 423 state statutes which confer benefits or obligations based on marital status); see generally, Karen M. Doering, *1,500 Reasons Why We Need Marriage Equality*, NAT'L CENTER FOR LESBIAN RTS. (Jan. 2004), available at http://cdm15025.contentdm.oclc.org/cdm/singleitem/collection/p266301coll9/id/49 (asserting that each state “provides approximately 500” rights, privileges, or obligations to married spouses).

\(^{115}\) See POLIKOFF, supra note 3, at *passim.*
same-sex couples.

Undeniably, many relationships that are not marriages make some contributions that are valuable for particular social purposes. (Even relationships that are believed to be harmful to society and to individuals in some ways may be positive in other ways.) In some circumstances it may be reasonable for the law to recognize those positive contributions and extend certain legal benefits to such non-marital relations if it can do so without undermining the institution of marriage, if the benefits outweigh the harms, and if doing so will not give official encouragement to the gullible to enter into high-risk relationships. For example, when someone is sick in intensive care in a public hospital, some hospitals limit visitors to spouses and immediate family. If the patient is unmarried but has a roommate he has been living with for some time, even though they are not married and not biological family, that person may be as important a source of personal support during hospitalization and recovery as a spouse or family member might be. So it would seem to be reasonable to support a law or policy protecting the right of long-term live-in companions to visitation in hospitals whether the companionship is same-sex or heterosexual, married or non-marital. There are other similar benefits that are related to policies not unique to marriage that also logically could be extended to non-marital couples without any harm to marriage. However, true marital status benefits should not be extended to non-marital relations that simply claim to be the functional equivalents of marriages. Nor should marital status itself be extended to such relationships.

Functional criteria have been suggested in lieu of “marriage” as the basis for awarding marital benefits, such as “dependence” as a substitute for eligibility for marital legal benefits. But mere dependence is too facile a test because dependence may be conditional or temporary in its commitment. It is long-term, committed dependence or interdependence that matters—not temporary, or short-term dependence.

Some opponents of extending any marital benefits, even marriage convenience benefits, to non-marital couples are opposed because it might be the first step on a slippery slope to equalizing all non-marital relationships with marriage, which would functionally destroy the legal institution of marriage. The slippery slope argument is a serious concern for those who are willing to consider the extension of some customized and specifically tailored rights or selected appropriate benefits for alternative relationships. The concern is that offering a package of benefits that meet the needs and qualities of a specific relationship in year one will simply open the door and increase the pressure for the extension of all of the rights
and benefits of marriage in year two or in year three. For persons who are interested in the law conveying an accurate message and avoiding the false advertising of portraying as equivalent to marriage non-marital relationships that are quite different, more risky, and less healthy in significant respects, this “slippery slope” concern is a very serious matter.

But the short answer to the slippery slope argument is that changes in the law, such as extending some marriage convenience benefits to non-marital couples, have no momentum of their own. The public forces that set the thing in motion must keep pushing for the downhill slide to proceed. In our democratic system, the same forces that cause a modest change in law to be adopted can also prevent the adoption of a more radical change in the future.

Thus, the marriage dividing line between benefits enjoyed by married persons and persons in non-marital relationships need not be rigidly applied to marriage “convenience” benefits. The form of marriage ought not to always make a rebuttable presumption when it comes to marriage convenience benefits, but it should in many instances create only a rebuttable presumption as to qualification for many legal benefits, privileges, and responsibilities. A rebuttable presumption for marriage convenience benefits is necessary because of the overuse of marriage as a classification, extending it beyond the need to protect marriage and using it as a matter of mere administrative convenience.116

Dual-gender marriages are unique and uniquely beneficial to the parties, to children, and to society. Just as men and women are profoundly, beautifully, essentially different from each other in ways that are complementary, so also the integration of male and female into a union (called marriage) creates a union that is equally distinctive, unique, and uniquely beneficial to society and to the individual members of society. We need not ignore such basic realities in order to accommodate political movements when the consequences of doing so will harm the core and fundamental institution of society.

116 The author opposed the proposed interpretation of Utah’s Amendment 3 prohibiting same-sex marriage or giving the “same or substantially equivalent” legal benefits to other relations. See POLIKOFF, supra note 3, at 152–56. Amendment 3 only applies to giving substantially equivalent benefit schemes or relationships, not to extension of particular benefits to same-sex couples and to alternative families.
CONCLUSION: PROTECTION OF DUAL-GENDER MARRIAGE BENEFITS FAMILIES, CHILDREN, AND SOCIETY

Marriage matters because marriage is the foundation of strong and healthy families and families are the infrastructure of society. Marriage is not just another source of social bonding and generation of civic virtue like many other social institutions (such as schools, employers, law, churches, private associations, etc.). Rather, as the Supreme Court noted, marriage "giv[es] character to our whole civil polity."117 Marriage "is the foundation of the family and of society, without which there would be neither civilization nor progress."118

It is not merely coincidental that the movement in the United States for marriage-like recognition of non-marital relationships, including for same-sex marriage, erupted a generation after the legalization of unilateral no-fault divorce in America when the rate of divorce and number of divorces increased dramatically, and the number of children whose childhood lives were disrupted by divorce increased proportionally. Family structure matters, and the transition of their families from intact marital families to divorced families had powerful effects on their lives.

The children of that first generation of children of no-fault divorce are now adult. Approximately thirty million children in America have experienced the divorce of their parents in the last three decades. Divorce is extremely painful for children and very difficult for them to understand. Children often blame themselves for their parents' divorce, and before they can understand the real causes of their parents' breakup, intense feelings sear their souls and leave perceptions that are hard to change by reason alone. Many children of divorce are, as a practical matter, removed physically or emotionally from or feel abandoned by their noncustodial fathers/mothers, and sometimes their overstressed custodial single fathers/mothers. Many other children of baby-boomer parents have suffered from other forms of dysfunctional, unstable, high-conflict family life.

Many of those children of the first generation of liberal (no-fault) divorce and socially accepted childbearing out of wedlock are now of marriage age. The failure of traditional conjugal marriage may be associated with such painful memories that some of the children of this

118 Id. at 211 (emphasis added). Thus, marriage "is an institution, in the maintenance of which in its purity the public is deeply interested . . . ."
generation are determined to find better alternatives. Non-marital cohabitation, same-sex unions and other alternative forms of adult intimate relationship have become popular alternatives to marriage. One symbolic message of non-marital intimate relationships (including same-sex relations) is the rejection of the family form that caused them such pain, and a determination to prove that other relationships can be at least as good as or better than the family relationships they remember with such pain. Some seek to revise the law to convey this message of disappointment, rejection, and pain.

Such persons deserve our compassion, our sympathy, our respect, our understanding, and our assistance, but the cause to treat non-marital relationships in law the same as marriage does not deserve our support. The law reforms they propose are unjust. If they succeed, they will only extend and exacerbate the tragedy of failed and dysfunctional family life to many others, and the painful, expensive costs of it to the next generation.

When marriage is weakened, families fail, and when families fail, the rest of society suffers. As goes the family, so goes the nation or society. No nation can be stronger or more secure than its families. No society can be more successful as a society than its families. "[S]ociety is a chain and... each family constitutes one of the links that together make up the chain. If the links are not individually strong—if marriages are not holding together—then the very foundations of the state itself are threatened."119 Thus, it is of great importance that not only in our laws, but also throughout our culture, we reestablish the importance and ideal of good, healthy, happy conjugal marriages and marital families. We must protect marriage and family against the rising tide of cultural and proposed legal influences that demean, devalue, undermine and threaten the institution of marriage, or marital families. We must, therefore, reject the claims to 'level' marriage by including other relationships such as same-sex relationships, and by extending all benefits, especially marital benefits, to non-marital couples.

119 Judy Pareiko, Stolen Vows, The Illusion of No-Fault Divorce and the Rise of the American Divorce Industry 25 (InstantPublisher 2002).
Appendix I. The Legal Status of Same-Sex Marriage in the USA and Globally\textsuperscript{120}

Legal Status – 1 October 2012

A. Same-Sex Marriage in the USA (50 states + DC):

1. Same-Sex Marriage Recognized in Six (6) USA States (+ DC):
   Connecticut, Iowa, Massachusetts, New Hampshire, Vermont, New York (plus the District of Columbia)

2. Same-Sex Marriage Prohibited by State Constitutional Amendment in Thirty-one (31) States:
   Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin.

B. Legal Allowance of Same-Sex Marriage Globally (of 193 Nations / UN):

1. Same-Sex Marriage Permitted in Ten (10)* Nations (5%):
   Argentina, Belgium, Canada, Denmark, Iceland, The Netherlands, Norway, Portugal, Spain, and Sweden. (*South Africa allows same-sex civil unions which legally may be called and contracted as “marriages.”)

2. Constitutional Rejection of Same-Sex Marriage Globally in 47 nations (24%):
   A) Forty-seven (47) of 193 Sovereign Nations (24%) Have Constitutional Provisions Explicitly or Implicitly Defining Marriage as Union of Man and Woman.
   Armenia, Azerbaijan, Belarus, Bolivia, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, China, Columbia, Cuba, Democratic Republic of Congo, Ecuador, Eritrea, Ethiopia, Gambia, Honduras, Hungary, Japan, Latvia, Lithuania, Malawi, Moldova, Mongolia, Montenegro, Namibia, Nicaragua, Panama, Paraguay, Peru, Poland, Romania, Rwanda, Serbia, Seychelles, Somalia, South Sudan, Spain,# Suriname, Swaziland, Tajikistan, Turkmenistan, Uganda, Ukraine, Venezuela, and Vietnam.
   B) One hundred eighty-three (183) Nations Do Not Allow Same-sex Marriage. (All except those listed in App. I.B.1.)
Appendix II. The Legal Status of Same-Sex Civil Unions in the USA and Globally

Legal Status – 1 October 2011

A. Same-Sex Civil Unions in the USA (50 states + DC):

1. Same-Sex Unions Equivalent to Marriage Recognized in Ten (10) US States:
   - California, Delaware, Illinois, Hawaii, Maryland, Nevada, New Jersey, New York, Oregon, Rhode Island, and Washington (+ District of Columbia)

2. Same-Sex Unions Registry & Specific, Limited Benefits in Three (3) US Jurisdictions
   - Colorado, Maine, and Wisconsin (plus some that allow same-sex civil unions or marriages).

3. Same-Sex Civil Unions Equivalent to Marriage Recognition Prohibited by State Constitutional Amendment in Twenty (20) USA States (40%):
   - Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin.

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121 See generally id.
122 This list only includes general relationship recognition laws that provide some couple benefits; specific narrow particular benefits (such as state employee benefits for same-sex partners) are not included.
B. Legal Allowance of Same-Sex Civil Unions Globally (of 193 Nations / UN):

1. Same-Sex Unions Equivalent to Marriage Allowed in At Least Seventeen (17) Other Nations (plus some that also permit same-sex marriage):
   Andorra, Australia, Austria, Brazil, Ecuador, Finland, France, Germany, Ireland, Liechtenstein, Luxembourg, New Zealand, Slovenia, South Africa, Switzerland, UK, and Uruguay.

2. Same-Sex Unions Registry & Limited Benefits Provided in At Least Six (6) Other Nations:
   Columbia, Croatia, Czech Republic, Ecuador, Hungary, and Israel.

3. One hundred sixty (160) Nations Do Not Allow Any Same-sex Marriage-Like Unions.\(^\text{123}\)

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\(^{123}\) This represents the 193 sovereign nations recognized by the United Nations minus the ten that allow same-sex marriage, seventeen that have civil unions, and six that give some limited recognition and benefits.