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Marital status discrimination in the allocation of rights, obligations, and benefits: Legal paths to protect non-normative families

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To each and every person I met throughout this journey

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ABSTRACT

The present dissertation addresses the problem of the insufficient recognition of non-traditional families. “Non-traditional” or “new” family is a composite category which encompasses non-normative conjugal families, as polyamorous relationships, and non-conjugal families (made up of relatives or friends, which lack a sexual component.) The aim of the research is to present the non-recognition of these new networks of care as a problem, and thereafter to build legal arguments to confer private and public family law entitlements upon them in selected legal systems: Canada, the United States, and the two meta-national systems of the European Convention of Human Rights and on European Union in Europe.

The research has been conducted through “fieldwork” in the mentioned systems. It demonstrates that too often the legal framework is not aligned with the current landscape of family patterns, marked by an increasing family pluralism. This misalignment is the by-product of a choice by the systems under review to still take the marital family as the relevant basis for allocating family law benefits, rights, and obligations.

Thus, after having expounded the different models for recognizing new families, the analysis moves to build legal arguments to introduce legal protections in each of the selected jurisdictions. These arguments are: a constitutional and policy-based argument in the U.S., a constitutional and policy-based argument in Canada, and ultimately two arguments resting on the European Convention of Human Rights and on European Union law in Europe.

One is to be alert to the fact that this field of research is still a work in progress, owing to the fact that case law is at an early stage of development and that only a handful of legal schemes open to new families have been enacted so far. This dissertation thus attempts to gather and systematize all the relevant legal material instrumental to building legal arguments, with an awareness that further legal developments are needed before these arguments can reach a high likelihood of success before courts or legislative bodies.

PREFACE

This comparative work is the product of a research largely conducted in the common law systems of Canada and the United States, on the one side, and jurisdictions in continental Europe, on the other. The exposure to different legal cultures contributed to developing an interest in grasping the verbalized and non-verbalized differences between common law and civil law jurisdictions. This effort proves valuable when undertaking comparisons and helps develop a systematic critical attitude toward legal notions of different legal traditions. Yet, this also entailed exposure to divergent approaches to legal research. On the one side are common law systems which I perceived to be more interested in the search of a "best model" for protecting new families, through an approach attentive to the normative implications of legal research as opposed to the descriptive side of it. On the other side are continental European scholars, which would likely label such an approach as being too "activist."

An effort to strike a balance between these two different methods led me to mitigate the normative overtones of the dissertation and to focus on the things "as they are" as opposed to "as they ought to be." Reference is thus often made to the current stage of development of the systems under examination. Reference is also made to a movement towards family legal pluralism which is underway and which could lead us to predict (yet not dictate) change, that is the likelihood of success of legal arguments before judicial courts or legislative bodies. Furthermore, policy arguments are always grounded in legal developments and, since they do not stand in a legal *vacuum*, it would be misplaced to label them as purely *de lege ferenda*. I am aware that this methodological choice only partly eschews the catch 22 situation whereby this research looks not sufficiently courageous to common lawyers or excessively activist to civil lawyers. However, if one contents itself with reaching a Pareto optimality as opposed to an absolute optimality, this is the approach that in my view comes closer to it.

Nausica Palazzo, November 2018

CHAPTER I
INTRODUCTION AND METHODOLOGY[*]

Introduction

This dissertation addresses a topic in comparative family law which is gaining increasing visibility: that of the non-traditional, unmarried family forms which lack legal protection. Empirical data show that, although the rate of marriage is falling in Western countries,[1] the level of care and commitment among individuals in relationships has by no means diminished in the last few decades.[2] Instead, people are investing economically and emotionally in relationships which do not resemble the nuclear, romantic, dyadic, heterosexual family.[3] Empirical data included in the Special Part on the United States, and Europe give a good snapchat of the breadth of the phenomenon. First, on the one side are the rates of marriage which are on the decline. For instance, in the United States only 36.1% of the US population above

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[*] This dissertation adopts the Bluebook's Uniform System of Citations, in its 20th edition. I am aware that this system is thought for American scholarship, and is only sparingly used in other jurisdictions. However, I decided to adopt it since two chapters out of six address the U.S. legal system. Another chapter deals with Canada, a common law jurisdiction with which such a system of citations sits well. The initial and final chapter largely draw from scholarship and doctrines from common law countries. Therefore, given that a large part of this dissertation focuses on the U.S. and Canada, I came to a decision to follow this system, so as to ensure uniformity in citations.

[1] As to Canada *see*: JULIEN D. PAYNE & MARILYN A. PAYNE, CANADIAN FAMILY LAW 2 ff (6th ed., 2015); as to the United States *see*: MARVIN B. SUSSMAN, SUZANNE K. STEINMETZ & GARY W. PETERSON (EDS.), HANDBOOK OF MARRIAGE AND THE FAMILY 528 (2013); as to England and Wales *see*: Claire Miller, *Number of people getting married is falling - and here's the reason why*, THE MIRROR, April 27, 2016; as to Italy *see*: *Matrimoni, separazioni e divorzi, Rapporto ISTAT 2015*, November 24, 2016, http://www.istat.it/it/files/2016/11/matrimoni-separazioni-divorzi-2015.pdf?title=Matrimoni%2C+separazioni+e+divorzi+-+14%2Fnov%2F2016+-+Testo+integrale.pdf (last visited Jul 29, 2017).

[2] I will provide this data in Part II of this script. They concern family pluralism in Canada, the U.S., and Europe.

[3] Lois Harder, *The State and the Friendships of the Nation: The Case of Non-conjugal Relationships in the United States and Canada,* 34 J. WOMEN CULT. & SOC'Y 632, 639 (2009); *see also* SASHA ROSENEIL, quoted in FIONA WILLIAMS, RETHINKING FAMILIES 48 (2004) (interpreting the increasing diversity in households as a trend that flags the queering of heterosexual relationships).

age 15 is married,[4] and the choice not to marry is becoming increasingly popular.[5] In parallel to this trend, new family formations are on the rise. For instance, in Canada multi-generational families composed of grandparents, parents and children are the "fastest-growing household type since 2001 (+38%)."[6] Likewise, in the United States there is no longer such thing as a dominant family form.[7] Along with data showing that new families are on the rise, there is an increasing awareness in legal scholarship of the width of the phenomenon and of the importance of addressing it through an interdisciplinary approach.[8]

New family unions can include (but are not limited to) siblings, friends, relatives, unmarried conjugal[9] couples, queer assemblies, and polyamorous relationships. Those units are "family" unions: Individuals belonging to them are economically and emotionally interdependent and live "familyhood" in ways that challenge traditional notions of family and conjugality. For example, consider two siblings who decide to emotionally and financially support each other long-term in a new family arrangement. They are not conjugal, in the sense that they are not in a pseudoromantic, sexual relationship,[10] and therefore do not share a fundamental feature of the archetypical married couple. However, they do care for each other deeply over the course of their lives. Should financial or emotional problems arise, they will support each other. They might live under the same roof, not only to capitalize on economies of scale, but also because when they are "home," they recognize each other as "family."

The notion of family that better reflects the reality of new families is functional, as opposed to formal (*i.e.* a family based on legal or blood ties,) and echoes the

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[4] U.S. CENSUS BUREAU, SELECTED POPULATION PROFILE IN THE UNITED STATES, 2016 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES 2 (2016), https://factfinder.census.gov/rest/dnldController/deliver?_ts=558088462976 (last visited Oct 23, 2018).

[5] U.S. CENSUS BUREAU, HISTORICAL LIVING ARRANGEMENTS OF ADULTS (2017), https://www.census.gov/data/tables/time-series/demo/families/adults.html (last visited Jan 23, 2018).

[6] *Id*.

[7] Brigid Schulte, *Unlike in the 1950s, there is no 'typical' U.S. family today*, THE WASHINGTON POST, Sept. 4, 2014, https://www.washingtonpost.com/news/local/wp/2014/09/04/for-the-first-time-since-the-1950s-there-is-no-typical-u-s-family/?utm_term=.281cf9b68890 (last visited Mar 12, 2018).

[8] ANITA BERNSTEIN, MARRIAGE PROPOSALS: QUESTIONING LEGAL STATUS 19 (2008).

[9] The term "conjugal" tends to be a synonym with sexual relationships, as opposed to relationships lacking a sexual component.

[10] Brenda Cossman & Bruce Ryder, *What is Marriage-Like Like? The Irrelevance of Conjugality*, 18 CAN. J. FAM. L. 294-300 (2001).

definition provided by the American Home Association ("AHA") in 1973. According to the AHA, "family" is a union of:

> "[T]wo or more people who share resources, share responsibility for decisions, share values and goals, and have commitments to one another over time. The family is that climate that one 'comes home to' and it is the network of sharing and commitments that most accurately describes the family units, regardless of blood, legal ties, adoption or marriage."[11]

The definitional section will further elaborate on the notion of familyhood. What emerges is that this definition is quite broad and can encompass various formations, such as non-conjugal relationships and non-normative conjugal relationships, as polyamorous families.

Owing to the breadth of the definition here adopted, each of these forms deserves separate considerations concerning both the social acceptance of the phenomenon, and the legal solutions to address it. For instance, when it comes to non-normative families featuring an unusual sexual component, such as polyamorous relationships, social acceptance seems to be low and the grip of the state on policing their performance stricter. By contrast, non-conjugal families composed of friends or relatives where a sexual component is absent pose a lesser threat to the social order in that they perform essential caregiving duties without disrupting current notions of proper sexuality. Thus, the social acceptance of a multigenerational family where a grandparent and a grandchild take care of each other could be far more acceptable as compared to a polyamorous family.

Yet, a cross-sectional theme is that, notwithstanding the increasing incidence of family pluralism in Western countries, that I will flag in the Special Part (concerning the U.S., Canada, and Europe,) the dominant notion of family is still tied to the nuclear, marital family from a juridical and cultural perspective.

Parties to these non-traditional networks of care are "legal strangers" amongst them, since states tend to overlook their caregiving activities and fail to recognize their commitment. Therefore, the question arises as to why these new unions are currently

[11] NANCY POLIKOFF, BEYOND STRAIGHT AND GAY MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 33 (2008).

excluded in the majority of legal systems from benefits, rights, and obligations and treated as legal strangers. The reasons are complex and I will attempt to flag them throughout this script. One tentative reason, however, should be anticipated, and lies in their subversive nature. These new family forms are "queer" in the sense that they are subversive to a pre-arranged and state-approved "proper way of living" familyhood.[12] The state's promotion of "proper" familyhood – the heterosexual nuclear family – is a means of ordering society. Large systems of ordering, whether political, economic, social, or literary preserve their apparent seamlessness at all costs.[13] These systems accomplish this appearance of uninterrupted continuity in a variety of ways, including concealing disruptive information[14] and exercising disciplinary power.[15] Pursuant to this line of reasoning, silencing potentially disruptive knowledge is a *condition for the very existence* of any such system.

By contrast, queering a system[16] exposes its fissures, ruptures, and biases through individual experience that deviates from proscribed steps.[17] Queering a system undermines a system's ability to appear seamless. In this sense, the state has an interest in preserving normative families and hiding any disruptive knowledge, including anything concerning non-traditional family forms. This interest is instantiated by state policies that channel people into marriage or by other, subtler policies, such as regarding individuals who do not marry as social outcasts.

This dissertation sets out to expose these ruptures and biases by presenting the current non-recognition of new families as a problem, as a form of subjugation of deviant experiences that should be fixed. The state's reaction toward new phenomena can consist in several strategies ranging from repression, tolerance, indifference, to recognition, protection and promotion. I contend that the current attitude toward new

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[12] *See, e.g.*, CARLA A. PFEFFER, QUEERING FAMILIES. THE POSTMODERN PARTNERSHIPS OF CISGENDER WOMEN AND TRANSGENDER MEN (2016) (surveying one example of queer family: that of cisgender women partners of transgender men).

[13] MICHAEL FOUCAULT, THE ARCHEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE 12 (1982); *see also* EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 71 (1990).

[14] Marvin J. Taylor, *Queer Things from Old Closets: Libraries — Gay and Lesbian Studies — Queer Theory*, 8 RARE BOOKS AND MANUSCRIPTS LIBRARIANSHIP 21, 22-23 (1993).

[15] The core disciplinary powers are hierarchical observation, normalizing judgment, and the examination. FOUCAULT, *supra* note 13. *See also* Maria Rosaria Marella, *Critical Family Law*, 19 AM. U. J. GENDER SOC. & POL'Y 721 (2011).

[16] *Id*.

[17] MICHAEL FOUCAULT, THE ORDER OF THINGS: AN ARCHEOLOGY OF THE HUMAN SCIENCES xx-xxi (1973). This in turns amounts to showing its weakness and dependency on the status quo, and opens the possibility for the system to be replaced by a different one.

families materializes in repression carried out by indifference. Yet, a second contention is that the most viable approach toward these new networks of care should shift the focus on legal recognition and protection, if not promotion.

The current distribution of government benefits and privileges is largely based on marriage. Other times it is based on parenthood. Much less often, it is based on blood ties, such as in the field of succession law or legal standing for wrongful death statutes. Yet, if we focus our attention to horizontal relationships, that is to the horizontal relationship between adults, rather than the vertical relationship with children, marriage is predominantly used as the basis for allocating family law benefits in society.

I believe, as many others do, that this approach is flawed. Family law benefits, rights and obligations that single out married couples for special treatment are not tailored to demographics and to the actual landscape of modern relationships.[18] The legal systems here under review, namely the United States, Canada, and European states, offer indicators that they are selectively and slowly moving to afford legal recognition and the benefits thereof to new families. My central claim is that this evolution can no longer be ignored and that full legal recognition is the most appropriate way to embrace such slow but steadfast movement.

This research is divided into two Parts: Part I, which I call the "General Part" addresses the problem of new families' invisibility and the potential solutions to overcome it. Part II moves to building *legal,* as opposed to merely political, *arguments* to extend family law entitlements to new families in the U.S., Canada, and Europe. I will attempt to craft in each of the selected legal system constitutional arguments and, where applicable, policy-based arguments based on legal developments in the jurisdiction under review, with a view to introducing a country-specific remedy.

In more detail, the General Part (Part I) addresses the problem of non-recognition from both a theoretical and empirically-informed perspective. This part attempts to answer two fundamental questions:

(1) What is the problem?

(2) What are the possible solutions?

[18] For instance, the increasing diversity in household is seen as a queering of heterosexual relationships. ROSENEIL, quoted in WILLIAMS, *supra* note 3, at 48.

The problem is that non-normative families are usually invisible in the eyes of the law, and that the current trend toward recognition is slow and patchworked. When recognized, recognition is either incidental or non-systematic. As to "incidental" recognition, I refer to those cases where these new families are able to shoehorn their situation into an existing legal category, such as "relative of the descendent" in the case of a non-conjugal family comprised of two committed relatives. Other times, they receive recognition in a handful of jurisdictions and through a mechanism that often provides a pared-down array of benefits. I believe that it is too premature to speak of a consensus toward recognition of new families. Perhaps, it is even too early to speak of a "trend" toward it, although some experiments in Canada, the U.S. and Europe suggest that soon we will be able to speak of a "trend." Thus, my contention is that the crucial problem this dissertation is meant to address is the current non-recognition (or insufficient recognition) of new families from a legal perspective.

Yet, I believe that invisibility should not be assumed, as many socio-legal scholarship tends to do. Therefore, I do not intend to respond to question "what is the problem?" in the abstract. Despite there being a copious *corpus* of legal and feminist scholarship on the topic of non-recognition of new networks of care, that I often cite to throughout this script, I decided to answer the first question through a financially-driven, pragmatic approach, by analyzing a case-study. My case-study is the United States.

I preferred this approach over a theoretical one since legal recognition often comes with a price.[19] Sometimes legal recognition will make families financially worse-off.[20] This could well be the case with government programs that are means-tested, as in the case of Medicaid or Supplemental Security Income (SSI) in the U.S.[21] Since both spouses' finances are considered, status might cause the couple to lose this important benefit, where before, as two individuals, they might have qualified.[22]

[19] The assertion is thoroughly pointed out by Erez Aloni in his pivotal article "Deprivative Recognition." Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276 (2014).
[20] Nancy Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUT. L. REV. 529, 548 (2009).
[21] Supplemental Security Income § 2102 in SOCIAL SECURITY ADMINISTRATION, SOCIAL SECURITY HANDBOOK (2017), https://www.ssa.gov/OP_Home/handbook/handbook.21/handbook-toc21.html (last visited Jul 30, 2018).
[22] *Id*, at § 2113, 2122.3 (B).

Extending eligibility requirements to new families could similarly entail a loss of benefits (unless the government provides for an opting-out system.)

Given this broad premise, the question "what is the problem?" could be better framed as follows: to what extent are new families invisible? What is the potential treatment they would receive if equated to spouses in terms of material benefits? Marital status is thus taken as the benchmark in that it triggers the larger array of benefits/obligations, and epitomizes the most systematic way of family's recognition. The assumption is that if marital families receive a worst treatment as compared to non-recognized families, recognition entails a cost.

To answer this question, I offer a legal analysis of the entitlements and rights, especially at the federal level, that the U.S. government confers upon families. The rules under examination are those that Duncan Kennedy calls Family Law 2 ("FL2.")[23] FL2 rules are rules governing all the mechanisms through which the states afford legal protections/obligations to families, unlike Family Law 1 rules, which deal with entrance into and exit from status (mainly marriage.)

This approach better reflects the need to account for the redistributive consequences of governmental programs, and to understand the shifting of bargaining power that they produce over the members of the families that are included *and* excluded from their scope. When analyzing the case studies in the Special Part, I operate under the assumption that this question receives the same answer ("new families receive a worse treatment") in Canada, and Europe, as I believe is the case.

The second question, concerning the solutions, is answered by providing a primer on the available models to recognize non-normative relationships, that is a comprehensive menu of legal options for future reforms. To this end, I will attempt to carve out general models of recognition by drawing from both concrete experiences in some jurisdictions, and proposals from legal scholarship.

Part II, which I call the "Special Part," then examines three case studies, namely the United States, Canada, and Europe, with a view to crafting legal arguments to introduce legal solutions for new families. Therefore, the method adopted is both theoretical and practical. It intends to gather some material on the constitutional doctrine and the policy-based reasons to protect these unions, so as to build, when

[23] Duncan Kennedy, *Savigny's Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought*, 58 AM. J. COMP. L. 811 (2010).

times are ripe, either a constitutional argument or a policy-based argument (where applicable) to introduce legal solutions. The arguments have different audiences. A constitutional argument is presented before courts, while a policy argument is naturally addressed to the legislature. It is usually prohibited for lawyers to raise policy as opposed to legal arguments before courts.[24]

The analysis is intensely context-specific in the sense that both arguments are conducive to introducing a different legal solutions in each of the countries under examination, as Figure 1 below shows.

FIGURE 1.

Proposed legal remedies in each country/meta-national framework

Country/meta-national framework	Constitutional/conventional arguments	Policy-based arguments
United States	Comprehensive scheme (ideally a registration scheme)	Area-specific solution (ascription)
Canada*	Area-specific solution (ascription)	Comprehensive scheme (ideally a registration scheme)
ECHR	Area-specific solution (ascription) and later in time comprehensive scheme (ideally a registration scheme)	N.A.
EU	Area-specific solution (ascription)	N.A.

*Canada provides an additional route consisting in framing arguments under human rights codes. The preferred remedy is an area-specific solution (ascription.)

[24] For instance, consider the judicial review of rules under the Administrative Procedure Act in the U.S. If lawyers want to challenge policy choices for policy-related reasons before judicial courts or administrative agencies the only way left for them is to frame it as a procedural challenge to such rule.

There are many pitfalls in a thus-framed research. First, in terms of methodology, the choice of including the United States, Canada, and Europe suffers from a path dependence that leads a Western-educated researcher to focus on like-minded legal systems. The hegemonic bias underlying this methodological choice is evident. Yet, I intend to reduce it by confining the scope of the research to the countries under examination, rather than supplying universally-applicable truths for all legal systems throughout the world.

Secondly, the hidden dangers in a comparison between civil law countries in Europe and two common law countries are only partially reduced by a decision to analyze the two main meta-national systems in Europe, namely the European Convention of Human Rights ("ECHR") system and the European Union ("EU.") The increased compatibility of EU/ECHR and common law countries derives from at least two key features. First, the two meta-national systems both adopt an anti-discrimination approach (mainly based on grounds for discrimination) rather than an equality approach, as most European civil law countries.[25] I will return to the difference between the two approaches in a moment. The capability of the dyad EU/ECHR and common law systems to communicate increases if one considers that these systems adopt so-called autonomous concepts with respect to those of the contracting parties/member states to the ECHR/EU, and often use argumentative and decisional techniques which are more akin to those of a common law system. The ways in which the European Court of Human Rights ("ECtHR") identifies the relevant precedents are examples for this.[26]

Therefore, I chose to focus my attention in Europe on these two systems, while at the same time accounting for the domestic legal systems when their examination is functional to building arguments to protect new families within the meta-national frameworks. Any result thus achieved at the meta-national level can then percolate and affect the domestic legislation, thereby yielding its influence on member states and contracting parties.

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[25] The equality approach is in force in many civil law countries, such as Italy, and Germany, particularly before the "new formula" (*neue Formel.*) *See* Christopher McCrudden & Sacha Prechal, *The Concepts of Equality and Non-Discrimination in Europe: A practical approach*, 2009 EUR. COMM'N, DIRECTORATE-GENERAL EMP., SOC. AFF. & EQUAL OPPORTUNITIES 15.

[26] Vladimiro Zagrebelsky, *Corte cost. n. 49/2015, giurisprudenza della Corte europea dei diritti umani, art. 117 Cost., obblighi derivanti dalla ratifica della Convenzione*, OSSERVATORIO DELL' ASSOCIAZIONE ITALIANA DEI COSTITUZIONALISTI (AIC), 1 May, 2015, at 3.

As to the difference between the anti-discrimination and equality approach, one should consider that a large number of European states have equality provisions under which citizens (and sometimes non-citizens) shall be treated as equals before the law[27] or under the law.[28] In short, this is a conception of equality as rationality meaning that, save when an adequate justification is put forward, like cases must be treated alike and different cases must be treated reasonably differently. Pursuant to this conception, equality acts as a "self-standing principle of general application."[29] The concept is intrinsically relational in the sense that for it to apply, one needs to preliminary specify "who" should receive equal treatment and "with respect to what" equality is warranted.[30] Thus, this type of review calls an inquiry into the rationality of the distinction or of the same treatment, where different treatment is warranted.

Furthermore, one must be alert that the principle is so deeply-rooted in European continental systems that often, even when the constitution includes an anti-discrimination provision whereby discrimination is prohibited only with respect to specified grounds for discrimination (*e.g.*, race, sex, etc.,) the prevailing conception is one pivoting on equality as a principle of general application.[31] This is the case of Italy, where the constitutional court after a handful of initial decisions embracing an anti-discrimination approach based on a closed list of grounds for discrimination,[32] soon moved to adopt a broader equality approach.[33] This is also the case of Germany. There, the federal constitutional tribunal clarified that the list of prohibited grounds (sex, parentage, race, language, national origins, faith, political and religious opinion) had the "sole" purpose of specifying under which circumstances a differentiation will surely *not* pass muster (except for a *verfassungsimmanente Gründe*, *i.e.*, under the circumstances specified in the constitution itself.)[34]

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[27] McCrudden & Prechal, *supra* note 25, at 3 (mentioning amongst these Bulgaria, Estonia, Cyprus, Finland and Germany). I shall add Italy to this group.
[28] *Id*, at 3 (mentioning amongst these Belgium).
[29] *Id*.
[30] Mauro Barberis, *Eguaglianza, ragionevolezza e diritti,* 1 RIVISTA DI FILOSOFIA DEL DIRITTO 191, 193 (2013).
[31] Spain is an exception to this. The constitutional tribunal has interpreted Article 14 as encompassing in the first paragraph the principle that all Spaniards are equal before the law (equality-as-rationality) and in the second paragraph a clause protecting individuals against discrimination based on specified grounds, which historically proved particularly invidious.
[32] *See e.g.*, Corte cost., sentenza n. 28/1957.
[33] Barberis, *supra* note 30, at 193-94.
[34] McCrudden & Prechal, *supra* note 25, at 24.

In addition to this, many European states, with a visible prevalence of states in Western Europe, as opposed to former socialist states in Central and Eastern Europe,[35] adopt substantive (or *de facto*) equality provisions. These are provisions placing upon the state an obligation to actively promote equality, either for all individuals[36] or for specific groups.[37] This conception aims at correcting the imbalances in the previous and present distribution of social goods and resources, by reaching an equality of opportunity for all social groups[38] (while it that cannot be construed to include an equality of outcomes for all.) Affirmative actions are usually justified under a thus-framed provision.[39]

By contrast the approach adopted in Canada and the U.S. is an antidiscrimination one. This is particularly evident in Canada, where a right not to be discriminated against is protected under section 15 of the Charter of Rights and Freedoms. For a claimant to successfully bring a section 15 claim, she necessarily has to link her factual claim to a listed or analogous ground. This is to say that the duty of the state is mainly that of shielding the individual from invidious discriminations which occur because the person has or is perceived to have certain characteristics.

Likewise, the U.S. feature an anti-discrimination system. Pursuant to well-settled constitutional doctrine, different grounds for discrimination will trigger different standards of review. The main distinction within the U.S. jurisprudence is that between a mere rationality test (the norm) and strict scrutiny (carved out as an exception.) One can find a scale of protections associated with each ground. Pursuant to the rational basis test, where a ground is not invoked, a mere rational connection

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[35] McCrudden & Prechal, *supra* note 25, at 42 (linking the prevalence of Western European states to the disillusionment that former socialist countries experienced with the substantive notion of equality in force in Soviet Union).

[36] *E.g.*, Article 3.2 of the Italian Constitution of June 2, 1946; and Article 9.2 of the Spanish Constitution of December 6, 1978.

[37] *E.g.*, Article 3.2.2 of the German Constitution of November 26, 1949 (requiring the state to take steps to eliminate current disadvantages suffered due to one's sex).

[38] ANTONELLA OCCHINO, L'ASPETTATIVA DEL DIRITTO NEI RAPPORTI DI LAVORO E PREVIDENZIALI (2004) (arguing that Article 3.2 of the Italian Constitution, laying out the principle of substantive equality, enshrines an "ideale di giustizia," or an idea of justice); SYLIVIANE AGACINSKI, LA POLITICA DEI SESSI 173 (1988).

[39] For instance, this is the conception of equality informing the preamble to the Protocol 12 to the ECHR and the Protocol as a whole. The mentioned preamble to Protocol 12 allows member states to adopt affirmative actions as long as reasonably justifiable. It reads: "Reaffirming that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures." Convention for the Protection of Human Rights (Protocol No. 12) Preamble, 4.XI.2000, Europ. T.S. 177.

between the discriminatory action and the legitimate aim is required.[40] While this might resemble an equality approach, this equation would be misplaced since this approach is the extremely deferential toward the legislature. Here, a presumption of rationality operates in favor of state action. Challenged laws under this standard of scrutiny are thus unlikely to succeed.

In contrast, the strict scrutiny test, linked to a sensitive ground such as race or national origins, is more stringent in that the aim must usually be a compelling one, and the law or policy must be narrowly tailored and result in the least restrictive means which can be adopted to further the public interest.[41] Finally, there is an intermediate scrutiny, usually for discriminations based on sex, which triggers a less demanding standard compared to strict scrutiny.[42]

The analysis will now move to lay out some methodology. It will first explain why the focus of my dissertation is family law. It will then lay out the comparative method I intend to adopt. It will ultimately provide a definitional section, whereby I clarify the definition of "new family" and some key concepts such as status, benefits, rights, obligations, and prerogatives.

1. Why a dissertation in (public) family law

Civil law-educated readers of this dissertation might at first be surprised by the very topic of this dissertation (legal paths for new family units.) They might notice the strong and deep connection that this analysis holds with family law, that in civil law jurisdictions tends to fall under the purview of private law[43] in quite an axiomatic way.[44] However, as a preliminary disclaimer to the analysis, I shall urge readers to not over-rely on sharp distinctions, such as that running between public and private law, for the reasons set out below.

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[40] Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 443-46 (1985).
[41] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
[42] Craig v. Boren, 429 U.S. 190 (1976).
[43] JACQUES GHESTIN & GILLES GOUBEAUX, WITH MURIEL FABRE-MAGNAN, TRAITE DE DROIT CIVIL : INTRODUCTION GENERAL n.101 (4th ed. 1994).
[44] Quebec is no exception to this: Robert Leckey, *Family Law as Fundamental Private Law*, 86 LA REVUE DU BARREAU CANDIEN 69, 71 (2007). In Canada, the dispute over the private versus public nature of family law is not merely theoretical, having it profound implications in terms of vertical separation of powers and division of competences. If family law is understood as being part of private law, it would then fall under the jurisdiction of the provinces (as a matter of "property and civil rights"). *See infra* Chap. V.

I intend here to sidestep the long-lasting debate on whether family law is essentially private or public in nature.[45] However, here the assumption is not that family law can no longer be characterized as part of private law, but, less ambitiously, that it "can no longer be characterized *simply* as an area of law falling within the domain of private law."[46]

Many reasons buttress this point. The first aspect that sheds light on the public dimension of the family has been hinted to above. Namely, the distributive economic regimes of public law based on family status, and, specularly, tax law regimes, that usually take into account the family (exemptions, deductions, lower taxation, etc.) However, there is a much more intertwined net of family law protections under both private law and public law that affect the bargaining powers of the members of the family, which is what I referred to above as Family Law 2. I analyze these rules in the next chapter. Such a complex apparatus of rules and government protections undoubtedly sheds light on the public projection of the family.

A second reason lies in the fact that the notion of family is often to some extent constitutionalized, as the sections devoted to the constitutional dimension of the family in the U.S., Canada, and Europe show. The European case is particularly illustrative in that each country features a different degree of constitutionalization of the concepts of family and marriage. There, regardless of the taxonomy adopted, what clearly emerges is a visual idea of how much mingling there can be between the state and the family. I shall anticipate that such a mingling is substantial.

The extension of the state intervention in the field of family largely rests on the type of state and on the balance struck between liberty and authority. The decision as to whether, and the extent to which, family and marriage should be constitutionalized will tend to depend on such underlying theoretical preferences, the constitutional "cycle," and the prevailing ideological and cultural stances within the constituent assembly.

For instance, based on the degree of constitutionalization of family in Europe, states can be classified at least into three categories.[47] The first category groups those

[45] On the debate in the Canadian context *see id*, at 69-96.
[46] Alison Harvison Young, *The Changing Family, Rights Discourse and the Supreme Court of Canada*, 80 CAN. BAR REV. 792 (2001).
[47] I believe there are many more categories in fact, and I will expound them in Chapter VI.

countries, as Ireland,[48] Greece, and Italy,[49] elevating family and marriage to the status of foundations of the socio-legal order.

A second group refers to those countries that recognize a special protection and specific public law benefits to the family, without endowing it with a definition and/or a foundational status.[50]

Finally, in the third group one finds those countries without any reference to family. The category includes countries as the Netherlands, and Denmark. The foregoing omission does not entail that family lacks a constitutional dimension – these countries provide constitutional aegis to the family through the application of international agreements and covenants.

Clearly, constitutionalization as a process through which family-related provisions were engrafted in the constitutions (or constitutional doctrine in the U.S. and France) cannot be denied. Yet, the meaning attributable to this process is heavily debated. For instance, Professor Leckey, discussing the extent to which the Canadian Charter of Rights and Freedoms played a role in shaping substantive family law, opposed enthusiastic proponents of the public law thesis on several grounds. Particularly, he noted how family law underwent change well before the enactment of the Charter, and that such a thesis overstates differences across Canadian provinces.[51]

The first point is hard to address as it would require a counterfactual inquiry over whether Charter-driven family law reforms would have been achieved even without the Charter. In cases where this analysis has been carried out, the takeaway is that the

[48] Article 41.1 of the Constitution of Ireland of December 29, 1937 recognizes the family as "the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law." Furthermore, the constitution commits to protect the family nucleus "in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State."

[49] Under Article 29 of the Italian Constitution, the family is defined in terms of a 'natural society' founded on marriage, based on the moral and legal equality of the spouses.

[50] This category is much more controversial, and many alternative classifications exist. According to the categorization proposed by French scholar Joël-Benoît D'Onorio states belonging to this group are Germany, France, Portugal, Spain, and Switzerland. Joël-Benoît D'Onorio, *La protection constitutionnelle du mariage et de la famille en Europe*, 1988 REVUE TRIMESTRIELLE DE DROIT CIVIL 1 ff. However, it seems more appropriate to place Germany at the cross-roads of the first and second group. Unlike other countries in this category, Article 6 of the *Grundgesetz* guarantees family and marriage a special protection. Stefano Ceccanti, *Costituzioni, famiglie, convivenze in Europa*, 2006, FEDERALISMI 4-5.

[51] Leckey, *supra* note 44, at 74-75.

Charter actively changed the way judges think about equality issues.[52] The same conclusion applies to my country of origin, Italy, where the constitution has guided many decisions in family law that could have not occurred wihtout the new set of values that the Italian constitution has enshrined.[53]

The second point acquires special meaning in federal and regional states, such as Spain,[54] that preserve some sub-state entities' jurisdiction over family matters (such as property, and succession.) By contrast, it does not apply to other types of governments. Yet, even in states where it would apply, as the U.S., one could hardly deny the propulsive force of the federal constitution in informing a specific field of family law: namely the recognition of new families previously excluded from legal protections. The issue of same-sex marriage is a chief example for this and many more challenges will ensue (*e.g.*, polyamorous units are rallying their forces to come next.)

Another reason for Leckey's skepticism pivots on the limits of a Charter-based litigation, which is one that adopts a "binary logic in which exclusion of the claimant group from a statutory scheme is permissible or impermissible."[55] This logic would prevent more nuanced claims, which do not necessarily aim at extending an existing

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[52] Avigail Eisenberg, *Rights in the Age of Identity Politics*, 50 OSGOODE HALL L. J. 609, 630 (2013) ("the Charter has a made a difference in expanding the capacities of courts and the willingness of judges to reflect on the ways in which their decisions advance ideals of inclusiveness and group-based equality. To take one example, the Court's approach to religious freedom has changed over the last thirty years from one that essentialized religion and openly maintained a "sectarian Christian ideal," as Chief Justice Dickson described the Lord's Day Act in 1985, to one that recognized, as the majority decision in Big M Drug Mart did, that state support for one religion can undermine equal democratic citizenship and signal the social exclusion and second-class status of adherents to other religions.").

[53] Corte cost., sentenza n. 138/2010 (urging the introduction of legal protections for same-sex couples, while at the same time rejecting the contention that recognition could only be achieved through marriage.) Article 29, stating that the family is a natural society founded on marriage, has been consistently read in conjunction with Article 2 of the Constitution, recognizing the inviolable rights of the individual, both as such and in the social arena, and calling for a fulfilment of the fundamental duties of solidarity. The family has thus been construed as one of the "formazioni sociali" within which the individual has a right to develop and fulfill herself. This Article has thus allowed to give constitutional aegis to de facto couples, albeit within Article 2 alone (not in conjunction with Article 29,) thereby rejecting claims that the marital and de facto family should receive the very same legal treatment. *See* Corte cost., sentenze n. 140/2009 and 237/1986. *See also* BARBARA PEZZINI (CUR.), TRA FAMIGLIE, MATRIMONI E UNIONI DI FATTO. UN ITINERARIO DI RICERCA PLURALE (2008).

[54] In Spain, there is a partially overlapping jurisdiction in family matters between the central government (laying out the *derecho común*) and the Autonomous communities (laying out the *derechos autonómicos*.) Suffice it to say that Spain allowed some territories to maintain their civil law. Among these, those entitled to regulate civil matters are Catalonia, Aragon, Navarre, Galicia, the Basque country and the Balearic Islands.

[55] Leckey, *supra* note 44, at 71.

regime and "discourages outcomes subtler than total exclusion or assimilation."[56] Likewise, the underlying notion of equality, is an anti-discrimination one based on grounds for discriminations, would likely reify groups.[57]

I completely share these concerns. However, first they only apply to jurisdictions adopting an anti-discrimination approach. Thus, countries with an equality approach as Italy show that the court has dealt with *de facto* couples in a very "nuanced" way, without resorting to a wholesale extension of existing provisions. For instance, in a case involving the exclusion of *de facto* couples from the law mandating that the marital house be assigned, upon separation, to the spouse with the custody of the child, the Court need not resort to what goes under the name of "interpretazione analogica" (interpretation by analogy) to include them.[58] It held that the system as a whole, interpreted in compliance with the constitution, already contained an applicable rule (*regula iuris*,) and that the judge could easily discern it by taking into account the child's best interest and the parental duty of support. This mode of reasoning can thus lead to more nuanced constructions of the law applicable to new families.

Second, the two objections above, while they speak to the limits of pursuing change through the Charter, are silent on the issue of whether the Charter has brought a change to Canadian family law, which I think is undeniable. I set out to show the extent to which Charter-based claims added impulse to the modernization of Canadian family law in Chapter V, particularly with respect to *de facto* couples and same-sex couples.

Furthermore, even assuming that both constitutional and non-constitutional arguments could have been used, I believe that the two are not interchangeable. When inequality is detectable at the statutory level, as it would be *e.g.* in the case of a statute excluding same-sex partners from the same housing options as opposite sex-partners, the proper remedy would be that of striking down the law, rather than granting specific benefits (here access to housing) on a case-by case basis to previously excluded beneficiaries. Furthermore, when it comes to systematic inequalities embedded in our legal system, such as the exclusion of a group from

[56] *Id*, at 71.
[57] *Id*, at 80.
[58] Corte cost., sentenza (interpretativa di rigetto) n. 166/1998.

longstanding privileges perpetrated by the government, these inequalities will not be easily discernible in concrete cases. The problem of the invisibility of new families stems precisely from systematic inequalities. Hence, it is my contention that the most appropriate *fora* to disentangle these inequalities are the courts endowed with the power of constitutional control.

A third crucial aspect is that families had a public dimension also before constitutional provisions were enacted and social benefits attached to them. The family has always enjoyed a public relevance in the sense that the state stands in a peculiar relationship with it. Public lawyers (as well as political scientists, philosophers, historians, and theologians) have thoroughly inspected this relationship. Significant endeavors trace back to the German Historical School[59] and the French Exegetical School.[60] Such a relationship, which has been described as one of ambiguity or a *jeu de mirroir*,[61] unveils the inherent feebleness of the thesis of the natural family.[62] Discussions are often cut off by asserting that family cannot change, as it belongs to nature. Essentializing the family is a powerful argumentative tool, enabling the majoritarian view to trump alternative views, and relegate them to the world of "weirdness." However, there is a constitutive and dialectic nexus between the state and the family, whether nuclear or not, meaning that the family can constitute an "objet juridique"[63] *only* from an institutional perspective. This is not to say that family cannot form an object of analysis for private law. It merely means that, when attaching direct or indirect relevance to the family, or simply ignoring it, the state is giving an answer to one of the most troubled questions of public law.

It is also constituting itself in the sense that rules of kinship are the constitutive element of the state architecture.[64] The constitution of families is deemed to be

[59] FRIEDRICH KARL VON SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW (William Holloway trans., 1979) (1867).

[60] ERIC MILLARD, FAMILLE ET DROIT PUBLIC. RECHERCHES SUR LA CONSTRUCTION D'UN OBJET JURIDIQUE 2 (1995).

[61] Christian Bruschi, *Essai sur un jeu de mirroir: Famille/État dans l'histoire des idées politiques*, in L'ÉTAT, LA RÉVOLUTION FRANÇAISE ET L'ITALIE, Actes du VIIème colloque de l'Association française des Historiens des Idées Politiques (Milan, 14-16 Septembre 1989) 49-65 (1990).

[62] "La famille n'est pas un objecte naturel, n'a même aucune existence en dehors du droit qui la régit seulement un objecte juridique ou, s'il on préfère, un objecte construit ou constitué par le droit". *See* Michel Troper, *Du politique et du social dans l'avenir de la famille*, Intervention au séminaire du Haut Conseil de la Population et de la Famille (Paris 6-7 fevrier 1990) 179 (1992).

[63] MILLARD, *supra* note 60, at 3.

[64] PIERRE BOURDIEU, PRACTICAL REASON: ON THE THEORY OF ACTION 67, 71 (1998).

integral to defining the state. One could mention, for example, the assertions by social conservatives that social phenomena such as same-sex marriage or single parenthood, are all signs of an imminent demise of the state.[65]

Thus, when introducing a constitutional or statutory protection for the family the state is defending the institution that it has constructively created (not just carved out from phenomenological reality, but actively constructed) and that stands in "functional continuity"[66] with the state.

It might seem that I am stating the obvious, and thus I will no longer linger on it, but, once again: conferring a public status to the family – and even denying one – is undoubtedly a public law problem.

2. Comparative method and family law: a functionalist-plus approach

This section will first explore the conceptions that lay claim to a supposed exceptionalism of family law, which would make it inherently unsuitable for comparisons. This line of thought goes under the name of family law exceptionalism. These conceptions are not yet fully overcome. However, there are reasons to reckon that the family law of different legal systems is a suitable object for comparisons as much as other areas of law. Therefore, I will first clarify what the object of comparisons in family law should be, and then the kind of comparative method I intend to adopt, after having contrasted the main methods comparative lawyers employ.

Family law has long been depicted as an exceptional domain of law that is inherently unsuitable to comparisons for a number of reasons. First family law, unlike the market, governs relationships that are intimate and vulnerable in nature. Second, family law, unlike other areas of law, is less amenable to the changes that modernity and globalization impose.[67] Under this line of reasoning family law is an expression

[65] JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE (1996).

[66] MILLARD, *supra* note 60, at 123. The family is endowed with family functions which are the true core object of the attention and protection of a state. Needless say that these functions are construed by the state himself and do not belong authentically to the family.

[67] Janeth Halley & Kerry Rittich, *Critical Directions in Comparative Family Law,* 58 AM. J. COMP. L. 753, 754 (2010).

of traditions, local *mores* and of the national peculiarities.[68] Ultimately, the exceptionalism grounds in the sacred rather than secular origins informing family law.[69]

There is also a tendency to depict family law as exceptional "internally," in the sense that there are elements that make family law unique, and governed by a distinct set of rules, compared to other law domains within the same country. Prominent scholars Halley and Rittich maintained that this uniqueness is reflected in the law curriculum, which sets it apart from other fields of law.[70] However, I think this consideration applies to common law systems, while it does not apply to all civil law countries.

Italy constitutes an illustrative example in this respect. In a law *curricula*, family law is swallowed by private law, which deals both with torts and contracts. The regime of the family is examined, if at all, at the end of the course, and the time devoted to it is infinitely inferior as compared to contracts and, albeit to a lesser extent, torts. A U.S.-educated family lawyer travelling to Italy for a conference will thus be surprised to find out that Italian universities seldom have a family law course. For instance, the university from which I earner my law degree, the Bocconi University in Milan, does not. The same goes for the University of Trento, where I am doing my doctoral studies.

I do not necessarily contend that this internal exceptionalism is not present in civil law countries. To the contrary, the principle being equally applicable, it is only its manifestation that changes. When in civil law countries family law is marginalized and even set apart in law curricula, the underlying idea is that the family belongs to the unspeakable realm of intimacy and to a sacred sphere. By "sacred" I do not necessarily refer to the ambition of religion to govern family life, but to a mixture of religious elements and privacy shielding the family from interferences, including intellectual intrusions. Whilst I concede that other concurrent reasons exist to explain

[68] M.V. Lee Badgett, *Predicting Partnership Rights: Applying the European Experience in the United States*, 17 YALE J. L. & FEMINISM 71, 85 (2005) ("[t]ransferring political lessons and experiences from one continent to another runs the risk of ignoring important cultural or social differences between countries and continents.").

[69] Halley & Rittich, *supra* note 67, at 754. This conception of the family as belonging to an inner circle which is sacred was popularly upheld by Benjamin Constant. *See* BENJAMIN CONSTANT, DE LA LIBERTÉ DES ANCIENS COMPARÉE À CELLE DES MODERNES (Italian version, Giovanni Paoletti cur., 2013) (1819). Within the Italian constitutional assembly, the very same idea was expressed by jurist Iemmolo through the popular metaphor of the "island." In his words, the family would be an island that the law can only lap upon ("lambire").

[70] *Id*, 754.

this stunning marginality, I am confident that the family/market dichotomy plays a key role in this respect.

The question of the exceptionalism of family law across different countries is however much more rooted and accepted in legal scholarship and thus harder to overcome. Many texts contributed to the development of the idea of exceptionalism. A key contribution came from Friedrich Carl von Savigny, who theorized the market/family dichotomy, contrasting family law with patrimonial law (what he calls "potentialities law.")[71] To this end, he sketched out the famous paired opposites seeing family law as the domain of status, and contract as that of will; family law as universal in the sense that its fundamentality is recognized everywhere and contract law as particular in the sense that each contract differs from other contracts; and finally family law as particular/local in that it is an expression of *volksgeist*, and contract law as universal since it *can* be the same across states.[72]

This fundamental division within the realm of private law running between family law and patrimonial law is informed by two underlying conceptions. The first dimension along which he makes the distinction contrasts the individual with the organic.[73] According to his reasoning, the subject of family law is an incomplete person. Each person is incomplete since the man needs a woman to feel complete (and vice versa,) as much as men and woman need children to exorcise the threat of mortality and perpetuate themselves in time.[74] By contrast, in the field of patrimonial law, the very same person acts under a different guise. She acts as an independent human being able to exercise her will over other persons.[75]

The second dimension contrasts the "necessary" and the "arbitrary." On the one side is family law, which is necessary in the sense that the relations it covers "stretches beyond the limits of human nature."[76] The theme of the family as belonging to natural law as opposed to positive law has yielded a profound influence over legal theorists and has been translated into some countries' constitutional provisions at

[71] VON SAVIGNY, *supra* note 59.
[72] *Id*, at 757.
[73] Kennedy, *supra* note 23, at 813.
[74] VON SAVIGNY, *supra* note 59, at 277.
[75] Kennedy, *supra* note 23, at 814.
[76] VON SAVIGNY, *supra* note 59, at 281.

various cycles of constitutionalism.[77] On the other side is patrimonial law, which is not necessary and thus arbitrary to the extent it does not belong in natural law. Savigny further elaborates on this dualism to show that family law is not merely natural, but also legal and moral.[78] In doing so he concluded, however, that the natural dimension was prevalent,[79] thereby reinforcing the abovementioned narrative that the family belongs in nature.

In the second half of the nineteen century, came the era of Classical Legal Though (CLS.)[80] CLS was a composite mode of thought that, informed by legal positivism, placed trust in legal science to protect individual freedoms and property rights, and privileged commercial law over other fields of legal practice.[81] This is an oversimplification. However, it is fairly accurate to say that this mode of thought promoted an additional dualism, which is that of core/periphery, with contract law at the core of the legal science, and family law at its periphery. This era justified the exceptional position of family law based on a set of arguments ranging from the autonomous drive behind state regulation in the field, different legal techniques and different paradigms.[82] Professor Marella gives a thoughtful account[83] of how the core/periphery divide within private law percolated into comparative law, under the impulse of Rodolfo Sacco[84] and Alan Watson.[85] This divide optimistically associates patrimonial law with legal transplants from one system to another that can occur without interferences from political or social conditions. By contrast, family law reforms cannot occur without taking into account the socio-political context. Hence, the family law exceptionalism discussed above.

The underlying claim is that the law of the market has universalistic aspirations, while the law of the family is intensely local since it is driven by policy

[77] *See infra* Chap. VI.
[78] VON SAVIGNY, *supra* note 59, at 281-82. On which *see* Kennedy, *supra* note 23, at 816-19.
[79] VON SAVIGNY, supra note 59, at 282.
[80] Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000* in DAVID M. TRUBEK & ALVARO SANTOS (EDS.), THE LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19-20 (2006).
[81] *See* Table 1 in *id*, at 21.
[82] Marella, *supra* note 15, at 722.
[83] *Id*, at 724.
[84] *See esp*. Rodolfo Sacco, *Legal Formants: A dynamic Approach to Comparative Law (Installment I of II)*, 39 AM. J. COMP. L. 1, 10 (1991).
[85] *See esp*. Alan Watson, *From Legal Transplants to Legal Formants,* 43 AM. J. COMP. L. 469 (1995).

considerations.[86] The universalism of contract law derives from its detachment, unlike family law, from the moral and political spheres and from local *mores*. This point, along with the predominant presence of legal technicalities in contracts, makes the discipline of contracts an "elective site"[87] of legal science, while family law is best understood as an object of analysis for sociologists.

This bifurcation, in the work of Sacco and Watson, is enriched by references to the comparative law method to analyze the circulation of each field of law. On the one side, structuralism and the historical approach detect how private law circulates. Detachment from morals and politics make legal transplants independent of the compatibility between the two systems at stake, and dependent on inherent conditions of development.[88] This is to say that law is no different from language, or fashion.[89] The metaphor of language, in particular, gave both authors the opportunity to draw on the rich corpus of structuralist works in linguistics, particularly De Saussure's,[90] to detach the law from political and axiological choices,[91] and to uphold the view that legal reforms cannot be fully *ordered*, due to the survival of cryptotypes in the mentality of legal practitioners that defy the objective of any legal reform.[92]

By contrast, family law is best understood as a domain circulating in functional terms[93] and under better law approaches. To understand this point, the need to sketch

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[86] *Id*, at 726.
[87] *Id*, at 727.
[88] They both give as examples the legal transplant of the Code Napoleon from the France *revolutionnaire* to the XX century Egypt, which had no common legal traditions nor homogenous political and social conditions.
[89] Since law is more akin to language than economics, Sacco stated that law belongs in the superstructure, rather than in the structure of one's society. Rodolfo Sacco, *Legal Formants: A dynamic Approach to Comparative Law (Installment II of II)*, 39 AM. J. COMP. L. 343, 393 (1991).
[90] FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (1972).
[91] Sacco (II), *supra* note 84, at 393; RODOLFO SACCO, INTRODUZIONE AL DIRITTO COMPARATO 12 (1980).
[92] *Id*, at 384-87 (describing cryptotypes as non-verbalized rules that survive in the mindset of jurists, which, as implicit rules, should be revealed through comparative studies, since sometimes rules can be implicit in one system and explicit in another); Raffaele Caterina*, Il crittotipo, muto e inattuato*, in LUISA ANTONIOLLI, GIAN ANTONIO BENACCHIO, ROBERTO TONIATTI (EDS.), LE NUOVE FRONTIERE DELLA COMPARAZIONE 85-97 (2012). *See also* Pier Giuseppe Monateri, *Cunning Passages: Comparazione e Ideologia nei Rapporti tra Diritto e Linguaggio*, in BARBARA POGGIO (ED.), ORDINARY LANGUAGE AND LEGAL LANGUAGE 23-40 (2005).
[93] Esin Örücü, *Developing Comparative Law*, in ESIN ÖRÜCÜ & DAVID NELKEN (EDS.), COMPARATIVE LAW 43-65 (2007); Ralf Michaels, *The Functional Method of Comparative Law*, in MATHIAS REIMANN & REINHARD ZIMMERMANN (EDS.), THE OXFORD HANDBOOK OF COMPARATIVE LAW 369 (2008).

out the two main methods of comparative law developed throughout the 20th century arises.

Albeit using a different lexicon, contrasting "social-purpose functionalism" with "positive-sociology functionalism," rather than functionalism *tout court* with structuralism, Professor Nicola offers a good primer on the distinction. Thus, on one side is what she calls the social-purpose functionalism, emphasizing legal harmonization, and on the other there is positive-sociology functionalism, emphasizing legal pluralism and diversity.[94] The former theory became dominant at the Paris *Congrès International de Droit Comparé* in 1900. There, comparative lawyers approached comparative law as an anti-formalist and contextualized endeavor that sought to find the best solutions to legal problems.[95]

In my view, what she calls positive-sociology functionalism tends to largely overlap with what is referred to as structuralism. This second type of "functionalism," of which Rodolfo Sacco, Otto Khan-Freund and Max Rheinstein were prominent exponents, maintained that there should be a dissociation between law as a system and external elements.[96] This allows reducing the variables that can influence legal reforms, and allows a focus on legal elements that as such can be analyzed in terms of the relationship with the whole.

Furthermore, legal reforms could not be achieved by choosing in the abstract the better rule. Hence, the emphasis on the need to collaborate with anthropologists and other empirical scientists to find out "hidden legal regimes and bureaucratic mechanisms that could better explain political results."[97]

From the above, the more descriptive nature of this method can be derived,[98] unlike social-purpose functionalism, which was more interested in normative inquiries and in carrying out legal harmonization, as opposed to explaining legal pluralism.

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[94] Fernanda Nicola, *Family Law Exceptionalism in Comparative Law*, 58 AM. J. COMP. L. 777, 792-93 (2010).

[95] Michele Graziadei, *The Functionalist Heritage,* in PIERRE LEGRAND & RODERICK MUNDAY (EDS.), COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 100 (2003).

[96] Alessandro Somma, *At the Patient's Bedside?*, 13 CARDOZO ELECTRONIC L. BULL. 1, 13 (2007) ("the structuralism aims at considering law as the outcome of relationships between its various parts, and not of relationships between these and external elements. Functionalism, on the other hand, sees law as part of a wider system and considers the relationship between law and the system to be the centre of its focus.").

[97] Nicola, *supra* note 94, at 796.

[98] Somma, *supra* note 96, at 12.

Ironically, what both methods seemed to agree on was family exceptionalism. Social-purpose functionalists were focusing on market laws and leaving family law at the margin. While the law of the market was intrinsically rational and its harmonization a scientific enterprise,[99] the family was seen as belonging to tradition and hence convergence was unlikely.[100] Albeit for a different reason, that is the need to emphasize legal pluralism, positive-sociology functionalists treated family law as an elected site of inquiries aimed at showing how the law is the product of different traditions. Unlike the former, however, some positive-sociology functionalism urged that a special place be assigned to family law in comparative inquiries, due to its extreme sensitivity to the local, social, and political realm of each country.[101]

Now, going back to the point of the mode of circulation of family law, I should recall that, according to Sacco and Waldron, family law is best understood as a domain circulating in functional terms and under better law approaches.

However, this functionalism is depicted in a bad light since the drive behind legal borrowings is the achievement of stereotypes such as progress and modernization.[102] Therefore, a foreign model is appealing as long as it enables the government to claim discontinuity with the past and the achievement of a more modern system.[103]

The recent events thus cast doubt on the third paired opposite of Savigny's theory, claiming that family law is intrinsically particular and local. Recently, there has been an actual convergence in family laws across countries. Thus, the invaluable work of structuralists and positive-sociology functionalists, such as Sacco and Rheinstein, aimed at understanding family regimes through a legal pluralism-oriented comparative work,[104] eventually was not successful in its attempt to exalt legal pluralism over legal harmonization. What occurred at the dawn of the 1990s is a clear predominance of comparative law projects intended to pursue the

[99] *Id*, at 794.
[100] Raymond Sailles, *Rapport sur l'utilité, le but et le programme du Congrès*, Procès-verbaux des séances et documents du Congrès International de Droit Comparé (Paris, su 31 Juillet au 4 Aout 1900) 60-61 (1905).
[101] Max Rheinstein, *The Need for Research in Family Law*, 16 U. CHI. L. REV. 605, 691 (1949).
[102] Marella, *supra* note 15, at 729.
[103] Think about the reforms making largely diffused in comparative perspective no-fault divorce, and the equation of legitimate and illegitimate (or born out of wedlock) children. They all follow, under this line of reasoning the goal of emphasizing discontinuity and progress.
[104] MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND THE FAMILY IN THE UNITED STATES AND EUROPE (1989).

harmonization and convergence of Western legal orders.[105] Family governance and human rights law clearly played a key role in furthering the view that convergence is not only possible but necessary across the globe.[106] Some variations only concerned the applicability of the spontaneous convergence thesis to non-Western legal families. According to this line of reasoning the market/family dichotomy is only reproduced in non-Western countries, where the spontaneous process of harmonization is not buttressed by progressive values anchored in human rights and women's equality.[107]

By contrast, the view that family laws could be harmonized took hold in Western states. A notable example is the attempt of the Commission on European Family Law (CEFL) to harmonize family law regimes in Member states of the European Union. To achieve this goal, the market/family dichotomy had to be overcome and replaced with a more "optimistic" view that the family could also be the object of comparative inquiries aimed at finding and exporting the best solutions. As argued above, this way of thinking came close to functionalism (or in the word of Nicola social-purpose functionalism) that finds its *raison d'être* in the need to align family law with "modernity" and "progressivism." Hence, the Commission undertook the task of finding the most advanced legal regime in selected fields (divorce and maintenance between former spouses, parental responsibilities, property relations between spouses,)[108] by way of comparing all existing legal regimes in Europe based on "country reports" drafted by family law experts from each member state.

However, the Commission chair, in upholding the view that the Commission was neutral with respect to the comparative law method,[109] merely collapsed the family/market dichotomy by applying not only to contract law, but also to the family, the usual enthusiasm of functionalism – *i.e.* the confidence in the possibility to

[105] Nicola, *supra* note 94, at 804.
[106] Janet Halley *et al*., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. L. GENDER 335 (2006); GLENDON, *supra* note 104, at 6-7 ("These trends have not proceeded at the same pace everywhere … but almost all the world legal systems have now been affected by the advance of human rights ideas in general, and women's equality in particular.").
[107] Harry D. Krause, *Comparative Family Law: Past Traditions Battle Future Trends-and Vice Versa*, in REIMANN & ZIMMERMANN, *supra* note 93, at 1110.
[108] Commission on European Family Law (CEFL), *Principles*, in CEFLONLINE, http://ceflonline.net/principles/ (last visited Sept 20, 2018).
[109] Katharina Boele-Woelki, *What Comparative Family Law Should Entail*, 4 UTRECHT L. REV. 1, 6 (2008).

harmonize the law of the family by finding a best solution applicable across the board, thanks to the universal value of individual rights, as opposed to the previous conception depicting the family as intensely local (hierarchical, and organic.)[110]

If an objection can be made to the Commission, it is thus the scarce contextualization of its inquiry, and the indifference to the larger set of values that permeate the legal treatment that families receive in each country.

A second drive behind uniformization rests on the now predominant neoliberal economic agenda that spread throughout the world thanks to international financial institutions.[111] This trend, however, does not touch, but marginally, the core of family law (what Kennedy calls FL1,) but only that set of laws that deal with family law benefits and privileges, *i.e.* the socio-economic projection of the family (FL2.) The undoubtable interest that these institutions have toward sex, reproduction, and the family as fundamental components of the global legal order triggered in turn a renowned interest toward family law.[112] Their ability to supply human beings through reproduction, influence the economy through consumption, and reliance on welfare, makes the family contiguous to the market and hence a privileged focus of global governance.[113]

Critical Legal Studies offer alternative arguments to collapsing the market/family dichotomy. The pioneering work of Professor Kennedy shows that widespread legal conceptions about individualism and technicalities-based nature of contract law were not accurate.[114] For instance, he argued that contract law is informed by two conflicting paradigms, namely individualism and altruism (while the former vulgate depicted altruism as only informing family law.)[115] Likewise, Professor Halley stressed that marriage oscillates from status to contract, placing herself against the

[110] Nicola, *supra* note 94, at 809.
[111] Marella, *supra* note 15, at 745.
[112] Halley and Rittich, *supra* note 67, at 755.
[113] Prof. Marella provides the example of the World Bank, in whose work the contiguity of the family with the market was especially evident. Marella, *supra* note 15, at 746. *See* WORLD BANK, ENGENDERING DEVELOPMENT THOUGH GENDER EQUALITY IN RIGHTS, RESOURCES AND VOICE (2001), http://documents.worldbank.org/curated/en/512911468327401785/pdf/multi-page.pdf (last visited Oct 23, 2018).
[114] Duncan Kennedy*, The Political Stakes in the "Merely Technical" Issues of Contract Law*, 1 EUR. REV. PRIVATE L. 7, 13 (2001).
[115] Marella, *supra* note 15, at 733.

tide of scholars arguing that family law is exclusively based on status.[116] By the same token, Professor Marella sharply opposed the view that Member States to the Union should maintain an exclusive competence over family matters, as involving essential political choices that belong to national states, and could only externalize the competence over market laws and freedoms.[117]

Marella is also skeptical about the possibility of finding the better law among alternative regimes by attempting to pin the most progressive legal systems (which she argued is usually associated with Scandinavian countries.) She supports her thesis by explaining how the goal of the formal equality of spouses, integral to the progressive agenda, has been achieved across countries through a variety of "strategies," and stresses the difficulty in finding which strategy is the most progressive one.[118] She then immediately shifts the focus from the best legal system to the best legal strategies, which in principle are not the same thing. She then argues for the need to account for the different distributive consequences of each legal regime as the proper way to identify the progressive character of such regime.[119] This analysis of the impact that the law yields over the bargaining power of different groups is to be carried though a formant analysis and an investigation over cryptotypes, which sheds light on the reasons for potential dissonances amongst formants.[120]

I believe that the critique pivoting on analyzing different formants is on point, since one cannot fully understand the genealogy and implementation of a reform without accounting for the interpretation of judges and legal scholars. I share the view that functionalist analysis aimed at finding the most progressive approach should not be easily dismissed but integrated. I, however, contend that "progressive" should not be understood as a stereotype but as an adjective connoting reforms that promote family legal pluralism, and thereby family pluralism, autonomy, and self-authorship in personal decisions. This is the set of values that support my judgment over the progressive nature of a regime.

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[116] Janet Halley, *Note sulla Costruzione del Sistema delle Relazioni di Coppia: Un Saggio di Realismo Giuridico*, in 27 RIVISTA CRITICA DEL DIRITTO PRIVATO 515 (2009).
[117] Maria Rosaria Marella, *The NON-Subversive Function of European Private Law: The Case of Harmonization of Family Law*, 12 EURO. L. J. 78 (2006).
[118] Marella, *supra* note 15, at 749.
[119] *Id*, at 749.
[120] *Id*, at 749-53.

Furthermore, I believe that constitutional law has a special place in accounting for formants. Constitutional law lies at the crossroads of each formant. This is especially true in common law countries, where constitutional law is largely shaped by judicial courts. Also, in countries such as the United States the influence that legal scholarship yields over the concrete shaping of the subject is all the more apparent. This is also true in civil law countries, such as the European states addressed in Chapter VI. The judicial formant has also deeply contributed to the development of constitutional law in European states with a civil law system. Ultimately, constitutional law is informed by a complex set of values that merge at the highest point of the hierarchy of norms. These values, while shared in different measure within each formant, all merge into the constitutional document and its interpretation, thereby lending credit to the view that if one want to understand a legal system she cannot omit an in-depth study of domestic constitutional law.

This is to say that the method I intend to adopt is one that:

(i) starts from a fundamental premise of the functionalist method, that is the confidence in the possibility to find a legal reform (not system) that is more progressive than others;

(ii) overcomes the flows associated with a de-contextualized inquiry over the law (in the books) in force in a specific country, by way of analyzing the constitutional law of such country, and the underlying conceptions that guided family law reforms in that legal systems at the sub-constitutional level; I thus reject abstract legal solutions applicable to all the contexts under examination, and propose a country-specific solution for each of these contexts;[121] and

(iii) overcomes the flows associated with an inquiry indifferent to the distributive outcomes of legal reforms, in the sense that the focus of the inquiry is precisely what Kennedy calls FL2, or the treatment of the family in the socio-economic realm (by way of analyzing the benefits, rights and obligations conferred upon it.)

This approach is what I shall call functionalist-plus approach. Such an approach, while sharing the fundamental premise of functionalism, aims at enriching the analysis through a constitutional and context-based analysis that supplies the

[121] *See supra* Figure 1.

underlying culture and set of values backing family law regimes, and an analysis of the distributive consequences of these regimes.

3. Definitional section: What is "family"?

This section ventures into a definition of the "new" family whose lack of protection is the object of this dissertation.[122] To begin, I have made a methodological choice to include both non-conjugal relationships (where a sexual component is absent, such as siblings) and non-normative conjugal units (which include an unconventional sexual component, such as polyamorous relationships). By contrast, incestuous families are not included as they seem to be the only real taboo which our societies are rather unlikely to overcome. Now, The AHA defines family as "two or more people who share resources, share responsibility for decisions, share values and goals, and have commitments to one another over time."[123] I believe this definition needs to be supplemented. Three additional criteria are germane to identifying who is a family:

(1) A free decision to enter into the relationship, made by consenting adults.[124]

(2) A commitment to taking responsibility for the person.[125]

(3) That the relationship be of some duration.[126]

The first criterion refers to a "free" decision to enter into the relationship by consenting adults, and therefore marks out the realm of horizontal relationships. It thus prevents a party from entering into a formal, intimate relationship with a

[122] This section largely draws on a previous script of mine. Nausica Palazzo, *The Strange Pairing: Building Alliances Between Queer Activists and Conservative Groups to Recognize New Families* (University of Michigan Public Law Research Paper No. 615, 2018).

[123] POLIKOFF, *supra* note 11, at 33. When it comes to decision as to whether parties are economically interdependent I share the view of the Alberta Law Reform Institute, stressing that the criterion should rely on a presumption to avoid costly and cumbersome inquiries over personal aspects of the relationship. *See* ALBERTA LAW REFORM INSTITUTE, PROPERTY DIVISION: COMMON LAW COUPLES AND ADULTS INTERDEPENDENT PARTNERS, Final Report 112, June 2018, at par. 179 ("Legislated eligibility criteria should instead rely on presumptions. If the relationship between two individuals meets certain observable criteria, it should be presumed that they have formed an economic partnership or that they intend to share property.").

[124] As it will be explained further below, minors are not eligible to enter a caregiving relationship, under the proposed approach.

[125] U.S. courts usually adopt similar requirements in determining whether a common law marriage exists. In addition to the foregoing, courts consider also whether the members' welfare is prioritized above that of others, *see* Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COL. L. REV. 293, 304-05 (2015).

[126] I hesitate to include a timeline for qualification, but any legal scheme will likely require one year or more.

minor[127] (so-called vertical relationship) under the proposed scheme. Also, the condition is not met where there is a legal duty of support. For instance, parents, who owe a duty of care to their children that come of age[128] cannot be considered parties in a horizontal relationship.[129]

The second criterion requires investigation into whether the relationship is maintained upon a willful decision to take responsibility for the other person(s). Taking responsibility is no synonym with "coverture" (or joint legal responsibility for acts committed by another person.) It merely points to the intention to commit and take care of the other parties to the relationship. In this way, the second criterion distinguishes new families from parties merely engaging in sexual or relational behavior, without commitment. Legal reforms in this field should sort out those relationships that are based on a decision, rather than presumption (as would be the case with marriage,) to take responsibility for one or more other persons. Such a functional inquiry will help identify those relationships that deserve material benefits.

The third criterion is self-explanatory. It is necessary that the relationship be of some duration to ensure that the parties are emotionally and economically committed. While the creation of such commitment and the amount of time necessary to form it is highly subjective, a legal regime will necessarily require a fixed duration.[130] A

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[127] The legal definition of "minor" for purposes of the proposed scheme is left to the relevant authority, usually the state or other delegated authority. It is thus not necessarily synonym with "person under the age of 18," since the state could allow persons above the age of 16 or below to enter the scheme, under certain conditions (*e.g.* parental consent.)

[128] As well-known, in the context of separation child support does not end when children turn 18, especially when they pursue post-secondary education. *See e.g.,* THE COMMONWEALTH OF MASSACHUSETTS - MASSACHUSETTS TRIAL COURT OF BOSTON, CHILD SUPPORT GUIDELINES (July 18, 2017), <https://www.mass.gov/info-details/child-support-guidelines#2017-guidelines,-forms,-and-information-> (last visited Aug 10, 2018).

[129] One could wonder whether a lack of consent occurs whenever a party feels pressured into the relationship due to moral or social reasons. Putting it differently, sometimes the factual conditions render the care due. An example might be the case of an old tetraplegic aunt, who has no relatives left alive but her young nephew. In this case, the nephew will be socially and intimately persuaded that his aunt needs care, and will thus take on the burden of caring for her. In such a case, no legal duty to support can be traced, but still the factual context generates a social and moral duty which is to some extent tantamount to a legal one. The factual situation exerts such pressure on the nephew that no genuine and spontaneous horizontal relationship can be deemed present. However, I conclude that this case is no exception to the notion of consent and that the nephew, if willing to enter a formal relationship with the aunt, should be allowed to do so.

[130] Heather Conway & Philip Girard, *'No Place Like Home': The Search for a Legal Framework for Cohabitants and the Family Home in Canada and Britain*, 30 QUEEN'S L. J. 715, 730 (2005) ("at some necessarily arbitrary point, one can infer that the 'trial' period of a relationship has passed, such that it is reasonable to consider a commitment to exist.").

more objective criterion requiring the relationship to be of some duration is useful in distinguishing extemporaneous relationships from more "solid" ones. I believe that a durational requirement below one year would pose problems in terms of administrability, as it would be complicated for the administration to verify that the relationship is enduring.[131]

The definition provided above, however, is of general applicability. The answer to the question "what kind of caregiving is relevant for purposes of this dissertation?" is context-specific and depends on the model of recognition for new families – whether registration, ascription, or contracts. The general definition needs thus to be adjusted to fit the model for recognition of choice. In a nutshell, the contractual model allows parties to structure their relationship through contracts and wills. Ascription refers to the attachment of legal consequences to cohabiting partners by the state. Registration is a formal model for recognition through which the registering parties gain formal status and the rights, duties, and benefits attached to it.

Some models, such as registration schemes and contractual models, restrict themselves to establishing the eligibility criteria.[132] Parties who meet the eligibility criteria have the possibility of self-designating their beneficiary. Thus, for these two models, policymakers only need to fix the formal eligibility criteria, such as the number of persons able to formalize the relationship, and the type of qualifying relationship (whether it applies to relatives and/or friends, conjugal and/or non-conjugal families, etc.).

In any such case, an instrumental choice when it comes to drafting eligibility criteria regards the formal versus functional inquiry that they command: while an example of

[131] Ultimately, there is another criterion that could be helpful in distinguishing caregiving relationship deserving being subsidized from non-deserving relationships: the absence of a unilateral direction in care. The criterion means that a virtual symmetry in providing caregiving duties must exist. Dependency is a different basis on which relationships can unfold and deserves a specific legal framework, for that type of care needs to be rewarded in special ways (*e.g.*, through disability benefits and/or compensation for private care): MARTHA A. FINEMAN, AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004); *id*, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES (1995); *id*, *Contract and Care*, 76 CHI.-KENT L. REV. 1403 (2001); *id*, *Why marriage?*, 9 VA. J. SOC. POL'Y & L. 239, 240 (2001); *id*, *The Vulnerable Subject and the Responsive State,* 60 EMORY L. J. 251 (2010-2011). I decided to omit this criterion because its inclusion would have had a discriminatory impact on people with disabilities. Whenever a disability affects the ability of the party to fully consent to a relationship, the bar would be a lack of consent itself, not the need for the person to be cared for most of the time. By contrast, when the disability does not vitiate one's consent, there is no valid reason for preventing a person, however vulnerable, from entering into the relationship.

[132] *See* Part I, chap. III.

the former is any two unmarried people, consenting adults, of sound mind,[133] an example of the latter would be any two unmarried individuals in a committed relationship[134] or in a mutually caregiving relationship.[135] These examples are drawn from registration statutes currently in force in the United States. Functional definitions – which pivot on the commitment or amount of care between the parties – require a profound intrusion in the private sphere of the family unit and are difficult and costly to administer. By contrast, formal criteria are easier to verify and are beneficial in terms of autonomy in that they leave space for self-designation.

Thus, in the context of contracts or registration, the criteria under (1), (2), referring to the horizontal nature of the relationship and to the willful decision to take responsibility, should assist the decision-maker in defining eligibility criteria for the scheme.[136] By contrast, the criterion under (3), requiring that the relationship be of some duration can be set aside, as these models rest on "self-authorship:" Any individual can thereby decide to designate someone as a beneficiary and/or to acquire a status, without having to demonstrate that the relationship is of some duration (as much as two people marrying have not to demonstrate it.)

Unlike registration and contracts, an ascriptive system ascribes a status to parties who meet the eligibility criteria, regardless of the will (and action) of such parties. Therefore, it is necessary to define what should be the theoretical conditions for ascription. The sub criterion (2) is incompatible with this model, unless the administration engages in a complex inquiry over the existence of an actual, rather than presumptive, decision to take responsibility for the person. While sub criteria (1) and (3) are relevant.

Now, legal scholarship employs several terms to refer to new family relationships, partly because this field of scholarship is still a work in progress and there is intrinsic difficulty in employing analytical linguistic categories. Being aware of the "symbolic

[133] COLO. REV. STAT. § 15-22-105(1) (2016).
[134] D.C. CODE § 32–701-710 (1992).
[135] MD. SB 785 (2009), which refers to "[t]wo cohabiting individuals of any gender in a mutually caring relationship."
[136] The criterion under (2) is implied in all formal schemes, requiring parties to take affirmative steps to formalize their union. *See infra* Part I, chap. III.

power of legal kinship terminology,"[137] here more than elsewhere one needs to choose with the utmost care the lexicon, so as to avoid the risks of regulation, normalization, and exclusion inherent in ordinary linguistic labels.

For the purposes of this dissertation, phrases such as "aspiring novel families," "non-normative relationships," "adult horizontal relationships," "new kinship unions," and "unmarried family units" will all be used, but not synonymously. Although they refer to the same object – the new, unconventional family – they stress different elements of the relationship, such as the lack of benefits or recognition, the lack of characteristics consistent with the ideal family, or the horizontality of the relationship. By contrast, terms like "families," "family units," and "relationships" are used interchangeably.

(i) Aspiring novel family units: This is a broad conception of the family that includes any group of people, related or unrelated, who engage in caregiving but whose relationship is not yet legally recognized. The term emphasizes the political agency of new family groups and their quest for legal recognition.

(ii) Non-normative relationships: This term refers to relationships that do not comply with the norm of the ideal marital couple, as accepted in the Western socio-legal culture – the nuclear, romantic, dyadic, heterosexual family. "Non-normative" need not mean "unregulated." Non-normative family formations have historically slipped under the radar of the law, as in the case of non-conjugal relationships in Alberta, and my prediction is that they will continue to do so.

(iii) Adult horizontal relationships (or adult-adult relationships): This term refers to a relationship that two or more consenting adults enter into, regardless of children. I used the phrase to underline the distinction between the asymmetrical "vertical" relationship between children and parents, and the symmetrical "horizontal" relationship of consenting adults.[138]

(iv) Non-marital family units: This is a broad phrase that encompasses all families developed outside of wedlock. The term places emphasis on the divide between

[137] Frederik Swennen & Mariano Croce, *The Symbolic Power of Legal Kinship Terminology: An Analysis of 'Co-motherhood' and 'Duo-motherhood' in Belgium and the Netherlands*, 25 SOC. & LEGAL STUD. 181 (2016).

[138] Note that the symmetry is just potential. All adult-adult relationships involve some form of asymmetry at some point, as one of the components may experience special problems or vulnerability and require additional support.

marital couples and new families, and reminds the reader that new families are excluded from the package of marital benefits, like tax breaks, evidentiary privileges, etc. Marriage is still, much to the distaste of many, the "reigning proxy" for relationships deserving of special status.[139] The "unmarried unit" is thus a viable linguistic option because it captures the nuanced landscape of families who do not take on marital status.

(v) New kinship unions/networks: This term draws on the semantic richness of "kinship"[140] to refer to new families. For example, the translation of "kinship" into Italian, my native language, results in either *parentela*, which means "relative," or *affinità*, which means "friendship" or "affinity." This beautiful polysemous term thus contains both the sense of mutual affinity and the shared consciousness of belonging to a family, which are foundational aspects of new family formations. Hence, this term can be used as a catch-all.

A final clarification concerns the legal consequences attached to the regimes. Namely, "rights and obligations," "benefits," "prerogatives," and "status."

The locution "rights and obligations" usually refers to the private law consequences of a regime, which can include property rights, succession rights, health-related rights (or prerogatives) such as the right to make decision vis-à-vis human remains or anatomical gifts, and support obligations (throughout the relationship or upon breakdown.)

The term "benefit" can be used in two ways: (i) as a catch-all term to refer to material benefits (under both private and public law) and immaterial benefits (as the dignity that recognition can confer upon recognized families); (ii) and as a term referring to the sole legal consequences under public law, *i.e.* government benefits as: social security, welfare benefits, tax allowances, etc. When employed alongside "rights and obligations," it is a synonym with public law benefits – meaning under (ii).

[139] CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 108 (2010); MARY LYNDON SHANLEY, JOSHUA COHEN & DEBORAH CHASMAN, JUST MARRIAGE (2004).

[140] I here intend to adopt a broad and inclusive definition of kinship, encompassing both blood ties and interpersonal affinity. *See* Jane E. Cross, Nan Palmer & Charlene L. Smith, *Kinship Groups that Deserve Benefits*, 78 MISS. L. J. 791, 797 (2009).

The term "prerogative" can be used as a synonym for public and private law "benefits." It is especially suited to referring to health-related rights, such as visitation or medical decision-making.

Ultimately, "status" refers to the official position of the parties in a relationship in society and before the law.[141] If the parties acquire the status they are no longer seen as "single" before the law, but as "civil partners," "domestic partners," and the like. It should be noted that ascriptive regimes do not confer a unitary status (unmarried parties continue to be single, despite being treated like married couples for purposes of a specific laws.) The general rule is that registration schemes do confer a status. However, this is not a necessary condition.[142]

The next chapters will now move to expound the problem, the potential solutions, and the legal arguments that could be pleaded in the three selected jurisdictions.

[141] There are alternative definitions of status, which I do not adopt. For instance, Nancy F. Cott defines "status" as a "legal standing fixed by a public authority, attaching certain rights or limitations to those in a defined group or class." This definition thus contrasts the variability in the substance and extent of contracts with the relative fixity of statuses; it also contrasts the source of regulation, being this source private parties in contracts and the state in statuses. Nancy F. Cott, *The Public Stake*, in MARY SHANLEY, COHEN & CHASMAN, *supra* note 139, at 33.

[142] The "pacte civil de solidarité" (PaCS) is a contractual partnership whereby two persons in France can regulate some aspects of their relationship. At the outset, the contract did not confer a status, and thus parties remained officially single. In 2006, the law was amended to the effect that the contract now confers a status (the parties become "paces(e)s.") *See* Joelle Godard, *PACS Seven Years On: Is It Moving Towards Marriage,* 21 INT'L J. L. POL'Y & FAM. 317 (2007). I do not intend to linger on the question of whether PaCS belong to the contractual or registration model. The fact that now they do confer a status, along with the fact that legal consequences arise upon its registration, make me believe that they should be ascribed under the registration model.

PART I: GENERAL PART

WHAT IS THE PROBLEM? WHAT THE POTENTIAL SOLUTIONS?

CHAPTER II

THE INVISIBILITY OF NEW FAMILIES

A PRAGMATIC, FINANCIALLY-DRIVEN APPROACH

Introduction

The opening chapter of the General Part addresses the question "what is the problem?" from a legal perspective. It also addresses the problem from the perspective of new families. Recognition can also be analyzed from the perspective of the state, which could object to it through arguments with both moral and financial overtones. The perspective of the state will be examined in the Special Part, where, in an attempt to build arguments to recognize new families, the counterarguments of the state are accounted for.

The legal question addressed in this chapter can be broken up into two questions. It asks in turn whether new families actually receive a worse treatment compared to married couples, and whether married couples actually receive a better treatment upon recognition.

When parsing out marital benefits, the implicit contention is that, if new families are equated with marital couples, this is the mixed treatment that they will receive. Therefore, the purpose of the chapter is double-barred and consists in showing the current invisibility of new families, and the potential treatment they would receive if equated to spouses in terms of material benefits (since marriage triggers the larger set of family law protections.) This chapter will show that recognition often comes with a cost for new families, and thus that one is to prefer a financially-driven pragmatic approach over a more ideological one, seeking recognition "at all costs."

I adopted to this end is a case-study approach. The case study is the United States, and particularly the plethora of entitlements and rights, especially at the federal level, that the U.S. government confers upon the family. I believe that the United States is an emblematic example since there has been a heated debate over the issue of the marital privilege, *i.e.* the privileged position of marital couples compared to other families, and over the marriage penalty married couples suffer in specific areas of law, especially tax. This case study is thus emblematic of the complexity of the problem, which cannot be merely assumed but rather demonstrated through a thorough review of current entitlements.

In so doing, the implicit assumption is that the problem receives similar responses in the other systems of the Special Part. Particularly, the applicability of the findings in this chapter to Canada is warranted by the fact that a very similar debate has taken hold. Such findings should also apply to Europe, where the account of the marital privilege is also a mixed one and where new families enjoy a spotty and insufficient recognition.

The analysis begins by outlining the methodology adopted to assess this complex array of entitlements. It then offers a primer on the legal treatment of married families, with a view to understanding whether they actually enjoy a better treatment than unmarried units. Such a treatment is expounded by parsing out the definition of "family" within six areas of law, namely: social security and welfare law, tax law, rules of evidence, employment benefits law, compensation for wrongful death, and recovery for negligent infliction of emotional distress.

1. Methodology

The notion of public benefit here adopted is a broad one in the sense that it can encompass all the benefits, privileges, and rights *conferred by a public authority*. Therefore, evidentiary privileges and wrongful death statutes will also be considered in that they can in the first case result in a material benefit for the party (that of avoiding conviction,) and in economic relief in the second case. The notion of benefit here adopted is thus not synonymous with public subsidy.

Provided that the relevant definition focuses on "who" is directly conferring the benefit (the government,) the analysis will not include employment benefits in the private sector (since private actors are usually free to determine the eligibility of their own entitlement programs.) The analysis will primarily examine federal-level legislation. But it will also refer to state laws deemed representative of a general trend in states' policies in areas reserved to the states, for illustrative purposes.

A premise in this regard is necessary. In the United States, marriage and associated welfare fall squarely within the competences of the states, acting in the police power capacity reserved to them by the Tenth Amendment of the Constitution. As a consequence, definitions of family as a "status" change across state jurisdictions within the U.S. Besides marriage, some states will allow domestic partnerships, civil unions, or designated beneficiaries' schemes; others might provide for covenant marriage or might still recognize common law marriage.

In addition to having differences depending on how status is framed at the state level, (private and public) family law programs are enacted both at the federal and state level. Each of them adopt an autonomous definition of "family." As a consequence, there is no uniform definition within tax law, social security law, workers' compensation benefits, private law neither at the federal nor state level. Not only does one find multiple definitions across the statutes constituting these broad areas of law, one can also notice different definitions *within* the same statute governing a given area.

This patchwork of definitions risks hindering any attempt to generalize. Some definitions will be narrow and confined to the nuclear family made up of wife and husband (and biological children.) Sometimes blood and legal ties will also be accounted for. In a handful of cases a very broad definition of family will be adopted, so as to include, for instance, mere cohabitants. Sometimes marriage will not convey social or tax bonuses but indeed a penalty. This occurs for instance in the case of a high-income, two-earners, married family filing a joint tax return (*see infra* par. 2.5.1.) A low-income family might also lose Medicaid enrollment as a result of marriage. This contingent feature of the tax and social security system will give an illusion that arguments cut both ways and that it is hard, perhaps impossible to generalize. Upon closer examination, however, the marriage penalty is outweighed

by the broad array of benefits (both material and immaterial) attached to the status of marriage.[1] U.S. legal scholarship calls this marital privilege, to stress the privileged position that spouses enjoy with respect to other families.

Detecting a marital privilege will require a two-step analysis and will depend on (1) whether being married pays off instead of carrying a marriage penalty; (2) whether non-marital relationships fall within the scope of the law, and, if so, whether they are fully equated to marriage or granted a worst treatment (*see infra* Figure 1). While the first criterion requires a static assessment of whether a married couple is advantaged or disadvantaged as a consequence of marriage, the second criterion inquires whether unmarried families fall within the purview of the scheme, along with married couples, and the extent to which they are protected.

The existence of a marital privilege is thus a dynamic inquiry requiring a combined assessment of the two mentioned variables, which, acting in tandem with each other, will lead to expounding the extent to which marriage is privileged over other family forms. An inquiry revealing a marriage penalty *in each and every case* within an area of law would not require moving to step two. Since such a conclusion cannot be reached in any of the cases under consideration, step two will lead to a conclusion that the marital privilege is entrenched whenever other family forms are not eligible to receive the benefit or receive a worse treatment in comparison to married couples. If, by contrast, a broader notion of family encompassing new families has been introduced by the legislature, and it is endowed with equal treatment before the law, the marital privilege will be attenuated or erased.

Based on the analysis of the legal framework here offered, the existence of a marital privilege can be inferred confidently, in the sense that ultimately being married pays off. Even scholars defending the public stake in regulating marriage, acknowledge this privilege and merely contend it should be maintained.[2]

A rational agent must only be careful in very specific instances, where being married might entail the loss of a benefit which is central to the sustenance of the family (the cases of the income tax penalty, Medicaid divorce, and Supplemental Security Income are again the main example for this.) Moreover, even when this is the case,

[1] CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 108 (2010).
[2] *See generally* MARY LYNDON SHANLEY, JOSHUA COHEN & DEBORAH CHASMAN, JUST MARRIAGE (2004).

one still fails to appreciate the myriad of benefits that marriage carries with it, such as protection in pathological situations where the partner loses the job, or gets injured (or even dies,) default rules such as those concerning health-related choices, community property, etc. Furthermore, irrational agents, which have neither the time, money, nor the knowledge to make such decision advisedly, would fare well most of the time if they were to marry.

As anticipated, in the attempt to offer a descriptive analysis of the main benefits enjoyed by the family, the chapter will explore how family is defined in six main areas: evidentiary privileges, worker compensation benefits, wrongful death statutes, tax benefits, social benefits, and negligent infliction of emotional distress.

The order in which the previous benefits are presented is no coincidence. Their order of appearance depends on two key variables examined above: the overall favorable treatment of the married family and the extent to which protections are extended to unmarried partners, alongside married partners.[3] These major benefits are described in order of which offers the most favorable treatment to married couples. At the opposite end of the spectrum one finds laws offering a less favorable treatment to married couples (either as a result of a marriage penalty or as a result of an extension of beneficiaries, or both.)

[3] There is no such thing as a world where some protections are offered to unmarried partners, without being at the same time given to married partners.

FIGURE 1.

Scale of privileges associated with marriage (from the most pronounced to the least pronounced)

Type of material benefit	**Privilege instead of penalty**	**Non-marital families**	**Relational privilege**
Evidentiary privileges	Yes	Domestic partners, if mentioned in rules of evidence	Same treatment of domestic partners
Worker compensation benefits	Yes, either constant or reduced in the few states asking the spouse to prove dependency	Kinship family	Worst treatment of non-married couples
Wrongful death statutes	Yes, either constant or reduced in the few states asking the spouse to prove dependency	Kinship family	Worst treatment of non-married couples
Tax benefits	Yes, but with limited exceptions (income tax penalty)	Unmarried partner and other relatives	Slightly worst treatment of non-married couples
Social security and welfare benefits*	Yes, but with exceptions (Medicaid divorce)	Common law marriage and same-sex NMLR	Same treatment of common law marriage and NMLR
Negligent infliction of emotional distress	N.A.	Functional family	Same treatment of functional families

** The category only includes Social security benefits and Medicaid*

Evidentiary privileges are placed on top of the list because they offer the narrowest definition of family (that is the married family.) They can be extended to domestic partners, where recognized by state rules of evidence, which is not often the case (*see, e.g*. the District of Columbia,) or when their constitutive statute expressly confers the privilege.

Worker compensation benefits and wrongful death statutes offer a similar account of what constitutes family for purposes of compensating someone for the loss of an economic provider. They come as second (and third) because: (1) they always pay off; and (2) the notion of family can in these cases happen to be very broad, despite being still based on blood or legal ties. However, legal standing is usually conditioned on proof of actual dependency and often depends on the absence of primary beneficiaries (the spouse and the children.) These requirements curtail the possibility for parties to a non-marital relationship to recover damages.

Tax law seems to retain a marital privilege. Marital status no longer carries a serious penalty if the couple is an equal-earners one. Also, tax law occasionally offers some benefits to extended families (such as to the cohabiting partner, that is even beyond legal or blood ties,) an example being the possibility of using deductions and filing lower brackets under Head of the Household filing status. This is why this area is listed as fourth on this scale.

Social security and welfare benefits, especially benefits under Title II and Medicaid enrollment, come as fifth. Such privileges can be reduced in specific instances (*e.g.*, Medicaid divorce,) which, depending on how crucial to the sustenance of the family they are, might push against the decision to marry. Furthermore, Title II benefits and Medicaid enrollment are now extended to same-sex NMLR (domestic or civil partners, parties to a civil union, designated beneficiaries) with inheritance rights under the state scheme (*see infra* par. 2.4.1.)

Finally, one finds tort actions for negligent infliction of emotional distress, which in many jurisdictions are adopting a functional notion of family, thereby zeroing the marital privilege.

2. A journey into the world of material benefits for the family

2.1. Evidentiary privileges

The spouse can enjoy evidentiary privileges. These benefits are *lato sensu* material, in the sense that they provide the practical advantage of not being convicted if the sole incriminating evidence is the spouse's testimony.

Marital couples in the United States are granted two types of evidentiary privilege:

(a) Spousal testimony privilege;

(b) Marital communication privilege.[4]

They are genuinely "spousal" in the sense that they only extend to spouses. They usually do not even extend to children or relatives. These privileges largely rest on reasons of humanity, such as protecting the sacred precincts of marriage and of the marital bedroom, thereby enhancing personal autonomy and privacy. Instrumental justifications, by contrast, fell into disuse,[5] as they were unrealistically assuming that spouses would not communicate, absent such an immunity.

"Spousal immunity" refers to the prohibition of compelling anyone to testify against his or her spouse in a criminal proceeding. It is essentially aimed at divesting a wife or husband from a catch 22 choice of sending a spouse to prison or being sent himself or herself to prison for refusing to testify.[6]

The second one ("privilege for confidential marital communications") is rather self-evident and refers to the impossibility to compel a spouse to disclose the content of confidential communications with his or her spouse. The communications are covered if made *while they were married,* regardless of whether they are now married, and if the intent of the spouse was that of keeping the information confidential.

A shift has been registered from a mandatory rule imposing an absolute bar to testifying against the spouse to a default rule that can be overridden when one of the two spouses intends to waive it.

Only a handful of states recognize a parent-child privilege at the statutory level: Idaho, Massachusetts, Minnesota, Connecticut, and Washington. Some states, including New York and Nevada, recognize a right to refuse to disclose confidential information revealed to a child.

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[4] *See* FED. R. EVID. 501. Courts are entrusted to develop the law of privilege, in line with general common law principles, unless the Constitution, federal statutes or a Supreme Court rule otherwise provide. However, even in federal cases, the matter is largely governed by state law on privileges, as it applies whenever a defense *or* claim rests upon state law.

[5] CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5572 (1989), quoted in JOHN HENRY WIGMORE, EDWARD J. IMWINKELRIED & RICHARD D. FRIEDMAN, THE NEW WIGMORE: A TREATISE ON EVIDENCE 506-09 (2nd ed. 2009).

[6] 2-501 FEDERAL RULES OF EVIDENCE MANUAL § 501.02 (2017).

If included in the rules of evidence, domestic partners can also claim the privilege. However, to my knowledge, no such privilege is conferred to individuals in a common law marriage, even when recognized within the state.

Despite some relevant differences existing on the configuration of the spousal privilege (concerning *e.g.*, whether the spouse can waive his immunity from testifying or otherwise,) nowhere is such a privilege extended to non-marital families.

2.2. Workers' death compensation benefits

Worker's death compensation benefits a major social security measure. They are designed to compensate someone for the loss of an economic provider – a worker who lost her life on the job, due to a work-related injury or illness. At the federal level, the Social Security Administration stipulates that one can apply for death benefits if he or she is the worker's widow or widower; the worker's surviving divorced spouse; the worker's minor or disabled child; or the worker's parent.[7]

Since the ultimate aim of such schemes is to compensate for the loss of financial support that the deceased was providing to the household, the schemes should not necessarily pivot on a marital relationship. Rather, economic dependency should matter the most. However, the majority of the states provide a conclusive presumption of dependency in favor of the spouse and young children living in the household.

California, starting from a pioneering decision in 1989, has shifted its focus on dependence, thereby recognizing the eligibility for a dependent same-sex partner to seek compensation after the partner's injury.[8] Today, pursuant to the state compensation law, death benefits are payed to a spouse, children, or other dependents. The minor or disabled children, along with a spouse earning less than $30,000 in the year preceding the death, are presumptively considered dependents.

[7] More information on how to qualify for a survivor are available on the website of the Social Security Administration, SURVIVORS PLANNER: IF YOU ARE THE SURVIVOR, https://www.ssa.gov/planners/survivors/ifyou.html (last visited Jan 23, 2018).

[8] Donovan v. Workers' Comp. Appeals Bd., 138 Cal. App. 3d 323, 187 Cal. Rptr. 869 (1982).

Other individuals may qualify as dependents, upon showing full or partial reliance on the worker's financial support. The criteria introduced in *Moore Shipbuilding Corp. v. Indus. Accident Comm'n* [9] in 1921 are still valid. Pursuant to the decision, in addition to proving "actual" dependency, a claimant must show her status as a member of the deceased's family or household. Such status is narrowly defined under California Labor Code §3503. A person, to be considered family or part of the household, must hold kinship to the deceased.[10] The types of kinship relevant for purposes of the statute are: husband or wife, child, posthumous child, adopted child or stepchild, grandchild, father or mother, father-in-law or mother-in-law, grandfather or grandmother, brother or sister, uncle or aunt, brother-in-law or sister-in-law, and nephew or niece. It is easy to notice an emphasis on blood or legal ties. In the end, eligibility is usually recognized to members of the worker's household or those related to him or her by blood, marriage, or adoption. California thus links the benefit to being a member of the same household holding kinship and financially dependent on the deceased. However, dependency is presumed for the spouse, while other individuals (as siblings) must establish that they were dependent on the deceased.

Likewise, Arizona presumes dependency of the primary beneficiaries, spouses and children, and require proof from parents and siblings. In a similar vein, New Jersey sets out a conclusive presumption on surviving spouse, civil union partner or children, and requires proof of dependency from secondary beneficiaries (allowed to claim the benefits when no primary beneficiary is living in the deceased's household.) Unlike the foregoing, in Minnesota only the spouse enjoys the presumption, and children, and parents must show dependency.[11]

Only a handful of states, such as Ohio,[12] and Georgia,[13] Colorado,[14] demand that *all* beneficiaries show economic dependency.

Being married thus pays off, not only in the sense that it will always entail a financial earning, but also in a relational sense: the spouse is more often than not endowed

[9] Moore Shipbuilding Corp. v. Indus. Acci. Com., 185 Cal. 200, 196 P. 257, 258 (1921).
[10] Maya Mouawad, *California's Worker'' Compensation Death Benefits: Leaving the Unmarried and Childless Behind*, 42 W. ST. U. L. REV. 87, 101 (2014).
[11] MINN. STAT. § 176.111 (2017).
[12] Eligibility is given to the dependent the spouse, lineal descendant, ancestor or sibling.
[13] Eligibility is given to any person capable of showing dependency on the deceased employee.
[14] Eligibility is given to any person capable of showing dependency on the deceased employee.

with a conclusive presumption of dependency, and thus regardless of whether she is actually dependent on the injured or deceased worker she would be able to seek these benefits.

The notion of functional family is, by contrast, confined to the kinship family, with the exception of Colorado and Georgia, including all dependents in the scheme. The functional family member, however, not only should prove dependency, but, in many cases, is entitled to claim the benefits only absent primary beneficiaries (usually the spouse and children.) The foregoing consideration suggests for ranking the scheme as second in Figure 1.

2.3. Wrongful death statutes

Wrongful death statutes allow family members to recover damages for the death of a person resulting from negligence or misconduct. The victim's family can recover loss of support and/or income, funeral expenses, out-of-pocket expenses, and noneconomic damages. Legal standing for bringing these lawsuits is established at the state level. These statutes vary greatly from state to state both as to the notion of "decedent's survivors" and the criteria for the distribution (*e.g.*, by a court decision, jury verdict or based on a statutory share.) Based on these two criteria, the paper will offer a general overview of the relevant provisions at the state level.

Wrongful death statutes heavily rely on the notions of spouse and marital relationship. From time to time the legal standing to bring a lawsuit extends to other family members. Examples of other family members entitled to claim damages usually include children, domestic partner/designated beneficiary,[15] grandchildren, parents, siblings,[16] other next-of kin (usually) living with the decedent,[17]

[15] The states entitling either a domestic partner or designated beneficiary to sue are Wisconsin, California, Colorado, Hawaii, D.C.

[16] Missouri entitles siblings only if there is no spouse, children or parents; New Mexico only if there is no spouse, children or parents; Arizona, Arkansas, and Connecticut, only if no spouse, children or parents; Delaware and Idaho, entitles siblings if they are dependents.

[17] The states entitling next-of kin (usually) living with the decedent to sue are: Vermont, Virginia, D.C., Georgia. Illinois, Indiana, and Massachusetts only if there is no spouse or children. Minnesota, and Ohio must show dependency. Oklahoma only confined to pecuniary loss or mental pain. Rhode Island, South Dakota, and Tennessee only if no spouse or children.

dependents,[18] or those entitled to inherit.[19] Usually, however, other family members are entitled to recover where no spouse, children, or parents are present, which clearly reduces the odds of recovering damages.

In addition to having functional family members recognized regardless of status in wrongful death statutes, some alternative schemes to marriage, called reciprocal or designated beneficiary schemes, extend this privilege to non-conjugal families (such as siblings or relatives or friends.) This is the case of designated beneficiary schemes in Colorado and Hawaii, which are open to non-conjugal partners, and which include in the array of benefits conferred, *inter alia,* standing to sue for wrongful death on behalf of the other designated beneficiary.[20]

Turning now to the issue of dependency, actual proof is usually required for the next-of kin living in the household or (obviously) other dependents. Idaho provides a presumption of dependency for the spouse, children, stepchildren, and parents, but requires proof for "blood relatives and adoptive brothers and sisters."[21] Hawaii requires such a showing from entitled parties other than the surviving spouse, reciprocal beneficiary, children, father, and mother.[22] Indiana presumes the dependency of the spouse and places the burden of proving dependency on the children and next-of-kin.[23] Maryland places such burden only on secondary beneficiaries (siblings, cousins, or nieces), which can file a lawsuit in the absence of primary beneficiaries (spouse, children, or parents).[24]

As to the spouse, some states will award damages without proof of dependency (*e.g.*, Virginia), some others will require proof of dependency (*e.g.*, Michigan, Illinois, and Maryland). California adopted a mixed system whereby dependency is presumed if the surviving spouse earned less than $30,000 in the year preceding death.[25]

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[18] The states entitling dependents to sue are: New Jersey, Virginia, Wyoming, and California if residing in the deceased's dwelling.

[19] In Maine, Montana, Nevada, Oregon, Utah, Virginia, Wisconsin, Alabama, and Alaska dependency must be proven also by spouses and children. In Idaho, proof is required only in the case of relatives or siblings.

[20] COLO. REV. STAT. § 15-22-105 (1)(k) (2017); HAW. REV. STAT. ANN. § 572-1 (2008).

[21] IDAHO CODE § 5-311 (1984).

[22] HAW. REV. STAT. ANN. § 663-3.

[23] IND. CODE ANN. § 34-23-1-1 (1998).

[24] MD. CODE ANN., CTS. & JUD. PROC. § 3-904 (2008).

[25] NANCY POLIKOFF, BEYOND STRAIGHT AND GAY MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 198 (2008).

In the case of non-married family members, unless otherwise provided by the law, a relationship alone is not sufficient and dependency must be shown. In any such cases, the fact-finder shall not look to the abstract relationship with the deceased, but look instead to the emotional and financial relationship between the latter and the next of kin.

2.4. Tax law and the family

There is no such thing as a single notion of family in tax law at the federal level. In the Internal Revenue Code one can find a multitude of instances where a tax treatment is bestowed or prohibited based on whether the parties are married or not, and on whether or not they have "dependents." Qualified dependents are individuals whom a couple is housing or supporting (children, relatives, and sometimes even certain people lacking blood or legal ties.)[26] The major tax consequences of being married come from the personal exemptions and credits in the context of income tax. They also come from estate tax law, and from other areas, briefly mentioned in par. 2.5.3.

2.4.1. Income tax: filing status and personal exemptions

Tax law has a complicated relationship with the family. At the federal level, the story has been a complex one since the adoption of the Sixteenth Amendment on March 1, 1913.[27] At that time, only individuals could file tax returns. The notion of a single "marital tax entity"[28] developed over the time. It first appeared in 1921, and then became an "orthodoxy"[29] in 1948, when Congress introduced an income-splitting scheme in common law states. The scheme was intended to remedy unequal

[26] *See* 26 U.S.C.S § 152 (d)(2)(H) (Lexis Nexis, approved Oct. 3, 2018).
[27] Boris Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1399 (1975).
[28] Patricia Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 822 (2008).
[29] Lily Kahng, *Innocent Spouses: A Critique of the New Tax Laws Governing Joint and Several Tax Liability*, 49 VILL. L. REV. 261 (2004).

treatment between spouses residing in community property states and those living in states that did not allow it.[30]

The first step in the fiscal jungle is to select a "filing status," on the basis of self-assessment.[31] Although there are four statuses available, each with a corresponding rate schedule, taxpayers' options are limited by their marital status. For single people, the options are "Single" or "Head of Household."[32] Married people can choose between "Married Filing Separately" or "Married Filing Jointly."[33] Under Section 7703 ("Determination of marital status"), married means… married. A couple is considered married until a decree of divorce or of separate maintenance. Also, legally married people living apart are permitted to file as Heads of the Household if some conditions are met.[34] Hence, the options for married people are actually three.

The filing status affects the tax rates ultimately applied to the taxable income, the deductions that can be taken, and the credits which can be subtracted from the final tax liability, such as the Earned Income Tax Credit (EITC)[35] and the child credit. For instance, the EITC is applicable to both the unmarried parent and the married couples. In the latter case, however, spouses ought to file jointly.[36] There is no special reason for that, and it seems that married parents are penalized when deciding to file separately, by having this important credit taken away.

The tax brackets long provided higher rates for those filing as single.[37] Under a third option, Head of Household, one can file under lower rates, considering that she has dependents in her house (either children or relatives.) These dependents are defined broadly, but mainly consist of people bearing a relationship with the taxpayer based

[30] The issue reached a peak of attention upon the decision in United States v. Davis, 370 U.S. 65, 82 S. Ct. 1190 (1962), now overruled. In that case, the court deemed that transfers of appreciated property to the wife upon divorce were taxable, in that the state did not recognize any right toward marital property. The decision triggered the reaction of many stakeholders and led the IRS to equate the fiscal treatment of divorce transfers in community and non-community states. *See* REV. RUL. 81-292, 1981-2 C.B. 158 (1981).

[31] Kahng, *supra* note 29.

[32] The eligibility to file under Head of the Household is laid out in 26 U.S.C. § 2 (b).

[33] *See* 26 U.S.C.S. § 6103.

[34] 26 U.S.C.S. § 7703 (b)(1),(2),(3).

[35] Kerry A. Ryan, *EITC As Income (In)Stability?,* 15 FLA. TAX REV. 583 (2014).

[36] 26 U.S.C.S. § 32.

[37] Lily Kahng, *One Is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 HASTINGS L. J. 651, 668 (2010). The recent tax reform attempted to reduce the marriage penalty by putting joint filer brackets at twice the single individual brackets, thereby reducing the marriage penalty.

on blood or legal ties. The subsidized family thus coincides with the married family and, to a lesser extent, the so-called kinship family.[38] The only exception to the foregoing is Section 152 (d)(2). Pursuant to this clause, one can be considered a qualified relative (therefore triggering the lower rates under the Head of the Household filing status) if she is an unmarried person living in the house for which the taxpayer provides at least one-half of her financial support.[39]

Both the filing status as Head of Household and the extension of the notion of dependent were introduced to mitigate the disparate treatment accorded to some non-traditional families. In this sense, a family where a relative or unmarried person can show dependency, in the sense above specified, can enjoy a better treatment than that reserved to single taxpayers. Then, what is the problem?

The problem is two-fold: first, "relatives" are not entitled to the credits (and particularly to the EITC, which is *the* big deal;) they merely trigger some deductions. Second, there are some barriers concerning the burden of proof. Unlike the child tax credit, where it is sufficient to show that the child, if working, is not earning more than half of her financial support, in this case one has to show that the taxpayer is providing for at least half of her financial support. This means that the complicated recordkeeping, including receipts of food, clothes, shelter, etc., associated with meeting this requirement constitutes a barrier to showing dependency.

The married couple usually enjoys a more convenient fiscal treatment. More often than not, married couples filing jointly receive a bonus: they pay less than the sum of their taxes due if each had filed separately.[40] Only occasionally, their joint filing is

[38] *See* 26 U.S.C.S. § 152 (d)(2). Pursuant to the rule, a relationship is relevant when the person is:
(A) A child or a descendant of a child.
(B) A brother, sister, stepbrother, or stepsister.
(C) The father or mother, or an ancestor of either.
(D) A stepfather or stepmother.
(E) A son or daughter of a brother or sister of the taxpayer.
(F) A brother or sister of the father or mother of the taxpayer.
(G) A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law."

[39] 26 U.S.C.S. § 152 (d)(2)(H) reads as follows: "(H) An individual (other than an individual who at any time during the taxable year was the spouse, determined without regard to section 7703, of the taxpayer) who, for the taxable year of the taxpayer, has the same principal place of abode as the taxpayer and is a member of the taxpayer's household."

[40] *Marriage penalties and bonuses*, TAX POLICY CENTER, http://www.taxpolicycenter.org/topic/individual-taxes/marriage-penalties-and-bonuses (last visited Jan 24, 2018).

more than the sum of the respective bills. This is known as the "marriage penalty."[41] It occurs only when the married couple is composed of two income earners, and only in the "extreme" situations where the double-earner family is low-income or has a high income.[42] The reason behind that lies in the notion of family adopted by the legislature at the time of the enactment of the joint return filing status. At that time, Congress had essentially in mind a traditional, single-earner family, with segregated roles, consisting in the male being a breadwinner and the female being a caregiver and housekeeper.

The incentives toward the formation of this type of family union are embedded in the law. For instance, when low-income families are at stake, the scheme pushes them toward single earner households, in so far as the secondary earner will face much higher marginal tax rates than the principal earner.[43] The increase in the aggregated income, were the secondary earner to accept the job, is also likely to result in a reduction of the EITC.[44]

However, the recent Trump's fiscal reform moved to strongly attenuate the marriage penalty by setting the joint filer brackets at twice the single filer brackets.[45] This reduces the convenience of filing as single compared to filing as married in the case of a double-earner marital family. In addition to this, the reform increased twice as much the standard deduction for married couples filing jointly compared to the increase for single taxpayers.[46]

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[41] Lily Kahng, *The Not-So-Merry Wives of Windsor: The Taxation of Women in Same-Sex Marriages*, 101 CORNELL L. REV. 325, 364 (2016) ("This left only one group to pay disproportionately high taxes: single taxpayers, whose taxes ranged from 20% to 40% higher than that of an equivalent joint filing couple. In 1969, Congress cut their taxes, too, by capping their taxes at 20% higher than the taxes paid by equivalent joint filing couples. The effect of these changes was to create a mix of marriage bonuses and penalties that we see today. Prior to 1969, married couples never paid more than a comparable unmarried couple, and sometimes paid less. However, the 1969 law, when it ameliorated the tax burden on single filers, for the first time imposed a higher tax on a married couple than on an unmarried couple with the same combined income. Thus, after 1969, a married couple sometimes paid less, or sometimes paid more, than an unmarried couple with comparable income-the creation of marriage bonuses or penalties.").

[42] Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983 (1992-1993).

[43] *Id*.

[44] *See* Kahng, *supra* note 41, at 356.

[45] Davis Polk, *GOP Tax Cuts and Jobs Act: Preview of the New Tax Regime*, Client Memorandum, December 20, 2017, 1, available at https://www.davispolk.com/files/2017-12-20_gop_tax_cuts_jobs_act_preview_new_tax_regime.pdf?fbclid=IwAR3JS7mEouvX3RZ-67-D9IiyGDAqJISSy4hHrmYQfEJF0ZlOdx4-mr0xgIw (last visited Oct. 30, 2018).

[46] *Id*, at 2.

A second type of marriage penalty may occur in the case of the taxation of social security. One spouse might for instance receive tax-free social security benefits. However, when her income is aggregated with the income of her spouse, she might no longer be eligible for this tax exemption, as she can find herself over the income maximum limit.[47]

2.4.2. Estate tax definitions

Estate tax rules (or wealth transfer taxation) also heavily relies on marriage and accords it preferential treatment.

At the federal level, the most well-known example is the rule permitting spouses to transfer by means of *inter vivos* gifts or, upon death, assets free of any gift tax or estate tax (so called marital deduction.)[48] In these cases, unless the other spouse is not a citizen of the United States (in which case non-taxable gifts would encounter a cap,)[49] neither spouse will pay taxes on gifts made to each other. Another major spousal privilege is the gift splitting. Each spouse is granted an annual exception, $14,000, as of 2017, to make tax free gifts to third parties. The privilege consists in allowing spouses to make a gift to third parties which is considered as being made one-half from each spouse, thereby doubling the amount of the exception.[50]

In addition to that, interspousal transfers are also tax free for income tax purposes.[51]

The marital deduction also applies to "qualified terminable interest property" (QTIP) trusts, on which the surviving spouse keeps a life income interest. The marital deduction is here aimed at postponing the tax until such time the surviving spouse sells the property.[52]

Estate tax rules tend to be organized around the traditional nuclear (married) family, with some small exceptions allowing for some variation. For instance, the family under §2023A of the Internal Revenue Code comprises the surviving spouses, a

[47] Patricia A. Cain, *Legal Guidance for Same-Sex Couples Considering Marriage*, 35 ABA TAX TIMES 1-3 (2016).
[48] 26 U.S.C.S. §§ 2056(a), 2523(a).
[49] The cap for non-citizen spouses is $149.000 in 2017.
[50] Diane S.C. Zeydel, *Gift-Splitting: A Boondoggle or a Bad Idea? A Comprehensive Look at the Rules*, 106 J. TAX'N 334, 338-43 (2007).
[51] *See* Kahng, *supra* note 41, at n.61 (commenting on 26 U.S.C. §§ 1041).
[52] 26 U.S.C.S. §§ 2056(b)(7). *See* Joseph M. Dodge, *A Feminist Perspective on the QTIP Trust and the Unlimited Marital Deduction*, 76 N. C. L. REV. 1729, 1731-32 (1998).

linear descendent of (a) the decedent, (b) the spouse, (c) the decedent's parents (that is siblings); and (d) a spouse of such linear descendent.[53] This notion is, for example, applied in the context of a family-owned business. While § 2036(b)(2)'s definition of a controlled corporation, for purposes of retained life estate on property, is a bit narrower in that it does not include siblings.

Federal estate tax law also fails to account for registration schemes, such as domestic partnerships. Therefore, those who are domestic partner under state law, are not able to enjoy a plethora of fiscal benefits when it comes to estates and gifts to which federal law applies.

2.4.3. Other tax benefits

This section will briefly mention what Patricia Cain, a leading expert in this field, defines the additional key tax benefits of being married: (a) the higher maximum limitation to enjoy the exclusion of gain from sale of principal residence; (b) tax-free health care coverage provided by the spouse's employer; and (c) "ability to shift the tax burden on alimony at divorce."[54]

As to the benefit under (a), the Internal Revenue Code exempts the gains from the sale of a principal residence from being taxed, insofar as this gain does not exceed $ 250,000.[55] Married couples filing jointly, however, enjoy a higher limitation amounting to $500,000.

2.4.4. Summary

By way of concluding this short analysis on tax law, it is possible to see how the married family receives a dystonic treatment. The bulk of tax law, consisting of income taxation, once showed a very attenuated marital privilege in the case of low-income or high income double earners families. In such cases, the marital family was nudged toward having only one member of the family working. After the Trump's

[53] 26 U.S.C.S. § 2023A (e)(2).
[54] Cain, *supra* note 47.
[55] 26 U.S.C.S. § 121.

fiscal reform this is no longer the case, as parties are much less likely to pay more of the amount that would be due, had they filed separately.

As to the second prong of the analysis, family pluralism is accounted for only for the very limited purpose of having non-traditional families comprised of dependent relatives or unmarried partners enjoying some deductions. Therefore, not only is the protection limited in scope as compared to the married family (which enjoys the EITC and a presumption of resource pooling, with no need to show dependency,) but also the definition of family is anchored to the sole family comprised of relatives or unmarried conjugal partners. The scheme thus does not account for committed friends living together. The account is also a mixed one in the sense that in other areas of tax law the marital privilege is quite solid and allows for a plethora of tax exemptions in making gifts to each other, gift splitting, sale the principal property, etc. For purposes of including a section on tax law in Figure 1, it is necessary to consider that marriage does not pay off under some circumstances, and that the broader notion of family adopted for purposes of the income tax, including unmarried partners and relatives, still confers some benefits to non-marital families. Tax law comes thus as fifth at the bottom of the list, in that it shows the most attenuated marital privilege.

2.5. Social benefits and the family

Social security benefits are anchored to a notion of family which is quite broad. It extends not only to spouses, but also to common law partners and in many instances to same-sex civil or domestic partners or designated beneficiaries, whenever they are conferred inheritance rights under state law. In the wake of same-sex couples' struggle for recognition, achieved upon the *Windsor*[56] decision striking down DOMA and then the *Obergefell*[57] decision recognizing same-sex marriage nationwide, the

[56] United States v. Windsor, 570 U.S. 744, 133 S. Ct. 2675 (2013). The Supreme court thereto found that §3 of the Defense of Marriage Act (DOMA) was unconstitutional. The majority of the court condemned the harm it inflicted on same-sex couples and their children, as being contrary to the Fourteenth Amendment. However, it never ruled on the constitutionality of state bans on same-sex marriage. The issue of state bans was then addressed in *Obergefell*. After *Obergefell,* the President instructed the Cabinet to review over 1,000 federal statutes. But the decision exerted a profound impact also on the states, and on their domestic laws.

[57] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

Social Security Administration ("SSA") slowly started to widen the notion of family through interpretative guidance. Some hurdles still remain and will be outlined below. Unlike the SSA, federal agencies conferring benefits to public employees continue to anchor them to a narrow notion of family, which coincides with the marital family. For purposes of including this section in Figure 1, only Title II benefits and Medicaid enrollment will be considered, as they compose the "bulk" of the system.

2.5.1. Social security benefits and welfare benefits at the federal level

Social security benefits are based on work history and usually include retirement, survivor's and disability benefits. They are not a welfare program in that they are not subject to an income or asset test. Likewise, Medicare or unemployment benefits are programs which are not means-tested.

Unlike social security benefits, SSI, which stands for Supplemental Security Income, is a means-tested program and thus constitutes a main welfare program in the U.S. Medicaid, which is a federal and state social insurance program, *lato sensu* is a welfare program in that it helps low-income families to cover the cost of health care.

Social security benefits are conferred upon spouses, widows and widowers, and minor children.[58] The contours of the statuses are determined by laws of the states. As a consequence, beside married couples, whenever a state recognizes common law marriage, parties to it will be conferred social security benefits. Common law spouses can also gain the same benefits as married couples in states that do not recognize common law marriage. The "tricky" part in any such case would be that of meeting the requirement of a valid common law marriage, which include not only cohabitation and holding themselves out to the public as husband and wife, but also a written agreement to marry which usually shall meet very strict conditions (*e.g.*, being written in the present tense, stating that the relationship is an exclusive one, ruling out the possibility to end the relationship at will).

By contrast, civil unions and domestic partnerships were not equated to marriage for purposes of receiving these benefits, the exception being those partnerships and civil

[58] 42 U.S.C.S.. § 416(h)(1)(A)(i) (Lexis Nexis, approved Oct. 3, 2018).

unions automatically converted into marriage under state law, upon the state recognition of same-sex marriage.[59]

Effective from February 2016, social security employees processing claims, shall interpret the relevant law pursuant to an internal guidance called Program Operations Manual System (POMS). The applicable POMS rule, namely GN 00210.004 on "Same-Sex Relationships - Non-Marital Legal Relationships," extends social security benefits to same-sex non-marital legal relationships (civil union, domestic partnership, designated beneficiary, and reciprocal beneficiary) to whose parties state law confers inheritance rights.[60] The new rule allows alternative regimes to marriage to be relevant to the conferral of both Title II social security benefits (retirement, survivor's or disability insurance) and Medicare enrollments, when the domicile of the number holder (NH) would allow the claimant to inherit a spouse's share of the his/her personal property, should the NH die without leaving a will.[61] Suffice it to say that, according to the SSA's census, only four states recognizing an alternative scheme to marriage do not confer inheritance rights, and that thus same-sex families registered under state registration schemes will more often than not be able to claim social security benefits.

The rule for "Determining Marital Status" (GN 00305.005) traces a distinction between non-marital legal relationships for same-sex couples, and non-marital legal relationships for opposite-sex couples. While the former should follow the abovementioned procedures, the latter shall ask for a legal opinion, if no legal opinion is published. In skimming through published opinions, one can notice that they routinely refer to same-sex couples and thus, at present, the destiny of opposite sex non-marital relationships is still uncertain. Let me clarify a few aspects:

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[59] The states applying conversions from civil unions to marriages are: Connecticut, Delaware, New Jersey, New Hampshire, Rhode Island, and Vermont. The state of Washington has mandated the conversion of its domestic partnership regime into marriage.

[60] Social Security Act, 42 U.S.C.S. § 216(h)(1)(A)(ii); 20 C.F.R. § 404.345 (1979); SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM (POMS), GN 00210.004 - NON-MARITAL LEGAL RELATIONSHIPS (SUCH AS CIVIL UNIONS AND DOMESTIC PARTNERSHIPS) (2016), https://secure.ssa.gov/poms.nsf/lnx/0200210004 (last visited Jan 24, 2018) ("To determine if a claimant's NMLR is recognized for benefit purposes, you must determine that the NMLR: …qualifies as a marital relationship using the laws of the state of the NH's domicile or would allow the claimant to inherit a spouse's share of the NH's personal property should the NH have died without leaving a will.").

[61] 42 U.S.C.S. § 216(h)(1)(A)(ii); 20 C.F.R. § 404.345. As for the interpretative rule, *see* GN 00210.004 - NON-MARITAL LEGAL RELATIONSHIPS.

(i) State schemes, such as designated beneficiaries and domestic partnerships may, and often do allow non-conjugal couples to register, *i.e.* committed friends or siblings living together. This is for instance the case of Colorado, Hawaii, and Vermont. While the POMS refers to non-marital relationships in general, registered under state registration schemes, the rules specifying the application of the new policy constantly refer to same-sex relationships, as if the new rule were introduced to specifically address this problem.[62] They also mandate a different procedure allowing same-sex couples to request social security benefits under a standardized procedure,[63] and other couples to merely request a legal opinion on their eligibility. While potentially accounted for, it is not certain that non-conjugal couples will thus fall under the purview of the law and be granted social security benefits.

(ii) A second clue points to the intention to include only conjugal relationship: non-traditional formations including a transsexual or an intersex individual, shall be subsumed either under the label of same-sex relationship or opposite-sex relationship.[64] Hence, in any possible case, the first step for an employee of the SSA is to determine whether the relationship falls under the umbrella of a same-sex or opposite-sex conjugal relationship, thereby supporting the intuition that non-conjugal couples where not intended to be covered, albeit registered under state law (and endowed with inheritance rights.)

A quick overview of the main benefits is now offered. As to retirement benefits, they are conferred upon a worker. By contrast, spousal benefits are conferred upon the worker's spouse (common law partner or partner in a NMLR,) and correspond to 50 percent of the retirement benefit of the spouse. Assume that a wife retires. She will get her own retirement benefits, amounting to *e.g.* $1,000. In addition, her husband

[62] Please consider that the *Obergefell* decision mandating the recognition of same-sex marriage was delivered in June 2016, hence a few months after the effective date of the POMS rule.

[63] SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM (POMS), GN 00210.100 SAME-SEX RELATIONSHIPS – SPOUSE'S BENEFITS (2016), https://secure.ssa.gov/poms.nsf/lnx/0200210100 (last visited Jan 24, 2018); SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM (POMS), GN 00210.002 - SAME-SEX MARRIAGE - DETERMINING MARITAL STATUS FOR TITLE II AND MEDICARE BENEFITS (2017), https://secure.ssa.gov/poms.nsf/lnx/0200210002 (last visited Jan 24, 2018); SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM (POMS), GN 00210.006 - SAME-SEX MARRIAGES AND SAME-SEX NON-MARITAL LEGAL RELATIONSHIPS CELEBRATED OR ESTABLISHED IN FOREIGN JURISDICTIONS (2016), https://secure.ssa.gov/poms.nsf/lnx/0200210006 (last visited Jan 24, 2018).

[64] GN 00210.002 - SAME-SEX MARRIAGE - DETERMINING MARITAL STATUS FOR TITLE II AND MEDICARE BENEFITS.

too will be entitled to collect spousal benefits, in the amount of 50 percent of the wife's benefits (in our example, $500), regardless of whether he has ever paid into the system.[65] Upon death of his retired wife, he will get the benefit in the same amount as she did (in our example the now widowed husband would get $1,000.)[66]

Clearly, this system will not always pay out. Two earners, each virtually entitled to the entire amount of the retirement benefit, will not always find it convenient to request a spousal benefit (since spousal and retirement benefits are mutually exclusive.) As it might seem obvious, this situation occurs when the amount of the retirement benefit exceeds the amount of the spousal benefit. For instance, if each spouse is entitled to retirement benefits equal to $1400, since they are both working, no rational agent will opt to get spousal benefits (so that both spouses will receive $1,400, for a total of $2,800, instead of spouse A receiving $1,400 and spouse B receiving $700, for a total of $2,1000.) The system is therefore an indispensable measure for single-earner or unequal earner families. This aspect shall not confound the central claim of this chapter. The fact that the scheme is beneficial in some circumstances, and the very fact that married couples get to choose whether to receive it or not, endows them with an obvious privilege.

The spouse (partner in a common law marriage or NMLR) is moreover entitled to keep the benefit in the same amount upon divorce. After divorce, the former spouse could still be eligible for the benefit, provided that he or she does not remarry before age 60 (of 50 if he or she is disabled.)[67]

The spouse (partner in a common law marriage or NMLR) will also receive disability benefits if the working spouse becomes disabled. While the disabled spouse is alive, she will generally receive 50 percent of the disabled spouse primary insurance amount (however, the benefit can be reduced if the child is also receiving disability benefits.)

Turning to welfare laws, under chapter 21 of the Social Security Handbook, one finds the criteria to determine eligibility for purposes of the SSI. Interestingly, the

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[65] Nancy Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 548 (2009).
[66] *Id*, at 548.
[67] Michael J. Brien, Stacy Dickert-Conlin & David A. Weaver, *Widows Waiting to Wed? (Re)Marriage and Economic Incentives in Social Security Widow Benefits*, 39 J. HUM. RESOURCES 585 (2004).

administration seems to allot a worse treatment for marital relationships and common law marriages. Couples are considered eligible whenever they are married or they hold themselves out as a couple to the community in which they live (a classic requirement for singling out common law spouses.)[68] Eligibility in turn entails an income and resource limit for conferring the benefits that is less than twice the limit they would have if considered individually. Therefore, being married or common law spouses does not pay off in case of an equal earners family. Whenever a couple holding out as a married couple wants to preserve the full amount of SSI, the only option is that of ceasing cohabitation and living apart, or otherwise show that they are not common law spouses.[69]

A second example of marriage penalty in the field of welfare benefits is Medicaid, the federal health benefit program designed to assist indigent people. Since the program is means-tested, it will require that the couple demonstrate financial need. Given that upon marriage both spouses are considered to determine eligibility, this occurrence might often cause the couple to lose this important benefit (if the partner has income and assets due to which one finds herself above the threshold to qualify.)

A second example leads to the so-called Medicaid divorce. A couple will consider divorce when the costs of medical treatment of one spouse will lead the couple to deplete its assets, leaving the "well spouse" impoverished.[70]

A fundamental safeguard against financial difficulty caused by job termination is provided by the Consolidated Omnibus Budget Reconciliation Act (COBRA.) Upon termination, a married worker can continue enjoying medical insurance coverage, for a given period of time, under certain circumstances ("voluntary or involuntary job loss, reduction in the hours worked, transition between jobs, death, divorce, and other life events.")[71] This usually gives families the chance to temporarily extend their

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[68] SOC. SEC. ADMIN., MARRIAGE SSA HANDBOOK § 2122 (2017), https://www.ssa.gov/OP_Home/handbook/handbook.21/handbook-2122.html (last visited Jan 24, 2018).

[69] *Id*, at §2123.

[70] Hillary St. Pierre, *I Considered A "Medicaid Divorce" When Cancer Began Bankrupting Me*, HUFFINGTON POST, January 31, 2011, http://www.huffingtonpost.com/hillary-st-pierre/iconsidered- a-medicaid-d_b_816668.html (last visited Jan 24, 2018) ("Being unmarried, I would be destitute and have the option of Medicaid. My husband would keep the assets. Our life wouldn't change. We'd remove a legal label. No hospital or insurance company could ever take our home.").

[71] U.S. DEP'T LAB, HEALTH PLANS & BENEFITS: CONTINUATION OF HEALTH COVERAGE - COBRA (2018), https://www.dol.gov/general/topic/health-plans/cobra (last visited Jan 24, 2018).

health coverage in case of an event, such as death, that terminates the employment relationship.

Marriage triggers a series of additional employers' benefits plans under the Employee Retirement Income Security Act (ERISA.) These include: Dependent Care Flexible, Spending Accounts (FSA,) Health Reimbursement Arrangements, Health Savings Account (HSA,) and all the retirement and pension plans.[72] Finally, there a major rights and privileges vis-à-vis immigration, the most famous of which would be the ability to obtain a green card for non-citizen spouses.[73]

2.5.2. Benefits for federal employees

Federal employees enjoy many spousal benefits as well. The following benefits flow automatically from marital status in case of a federal employee: Federal Retirement Thrift Savings Plan (FRTSP,) Federal Employees Health Benefits Program (FEHB,) Federal Employees Group Life Insurance (FEGLI,) Federal Employees Dental and Vision Program (FEDVIP,) Federal Long-Term Care (FLTCIP,) Federal Flexible Spending Account (FSAFEDS.)[74]

There are multiple benefits the military personnel enjoys due to marriage, such as retirement and medical spousal benefits, family separation allowance when the spouse is on duty, and a host of "perks" such as shopping privileges at the commissary. Similarly, there are many veteran benefits conferred upon spouses, such as spousal benefits in case of death or disability, healthcare, home loan assistance, and educational benefits.[75] The spouse is also entitled to a gratuity of $100,000 in case of death of active-duty personnel, and only where there is no surviving spouse will the gratuity be conferred to the next-of-kin (which could be a parent or a sibling.)

[72] SCOTT E. SQUILLACE, WHETHER TO WED: A LEGAL AND TAX GUIDE FOR GAY AND LESBIAN COUPLES 48 (2014).
[73] It is to be noted that the U.S. Citizenship and Immigration Services does not recognizes polygamous marriages validly contracted abroad, for immigration purposes.
[74] SQUILLACE, *supra* note 72, at 55.
[75] *Id*, at 58.

Exceptions to the narrow reading of family as married couple can only be found in a handful of federal agencies. The main administration extending some benefits to civil partners is the federal Office of Personnel Management (OPM.)[76]

2.5.3. Summary

Social security benefits and welfare regimes offer a mixed account of the marital privilege. The marital couple is endowed with a privilege in the case of COBRA, immigration and a plethora of federal agencies' programs. Yet, the bulk of the system, consisting in Title II benefits and Medicaid enrollment shows a marriage penalty, in the case of Medicaid divorce, and the likelihood of declining spousal retirement benefits whenever the couple would earn more by receiving separate retirement benefits (which is not *stricto sensu* a penalty in that the couple is merely not accepting an additional benefit, to preserve higher revenue.) As to family pluralism, the enthusiasm for having NMLR recognized is curtailed by the implementing rules which account only for same-sex couples. As a consequence, Title II benefits (social security benefits) and Medicaid only extend to common law marriages, under narrow circumstances, and NMLR if the relationship is a conjugal and same-sex one, and if the state confers inheritance rights under a given scheme.
For purposes of including this section in Figure 1 one should thus consider the cases in which marriage carries a penalty, as in the case of tax law. The section is however listed as fourth, before tax law, in that the notion of family is still confined to a marital-like relationship, including only common law marriages and parties to a same-sex conjugal relationship, which has been registered under state law (and conferred inheritance rights.) It seems thus understandable that in this case marital-like relationships receive the *same* treatment of married couples (unlike under tax law, where non-marital families receive only some exemptions, and the tax bracket is not as high as that of married couples.)

[76] For instance, pursuant to the internal rules of the Office of Personnel Management: (1) domestic partners may qualify as relatives for Federal employees and annuitants under the Federal Long Term Care Insurance Program regulations; (2) Employees can elect an insurable interest survivor annuity for a domestic partner upon retirement, if some conditions are met; (3) employees enjoy leave programs if in a domestic partnership (*e.g.*, sick leave and funeral leave). *See* OFF. PERSONNEL MGMT., FAQS (2018), https://www.opm.gov/faqs/topic/benefitsforlgbt/index.aspx (last visited Oct 24, 2018).

2.6. Negligent infliction of emotional distress

The area showing the lowest emphasis on the marital couple concerns tort recovery and especially damages for infliction of emotional distress. Starting from the pioneering case *Graves v. Estabrook*,[77] New Hampshire courts adopted a functional notion of family in defining the third requirement of the foreseeability test. Along with a showing that the party seeking to recover damages was near the scene of the accident, and that shock resulted from direct observance of such accident, the third condition requires that the party be "closely related." In grappling with the condition, the court thereto rejected the "bright-line" rule[78] put forward by the defendant. In doing so it adopted a "flexible approach designed to account for factual nuances." The approach called for the court to find that regardless of labels the parties were in a "stable, enduring, substantial, and mutually supportive" relationship:

> "[T]o foreclose [an unmarried cohabitant] from making a claim based upon emotional harm because her relationship with the injured person does not carry a particular label is to work a potential injustice … where the emotional injury is genuine and substantial and is based upon a relationship of significant duration that … is deep, lasting and genuinely intimate."[79]

The approach has been accepted in many jurisdictions, such as Hawaii,[80] Nebraska,[81] Ohio,[82] Tennessee,[83] West Virginia,[84] Pennsylvania,[85] and to a more limited extent

[77] Graves v. Estabrook, 149 N.H. 202, 818 A.2d 1255 (2003).
[78] Elden v. Sheldon, 46 Cal. 3d 267, 250 Cal. Rptr. 254, 758 P.2d 582 (1988) (arguing that "closely related" shall be construed as meaning two individuals related by blood or marriage).
[79] *Graves,* 818 A.2d, at par. 210, quoting Dunphy v. Gregor, 136 N.J. 99, 642 A.2d 372 (1994).
[80] Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974) (permitting a stepgrandmother to recover for NIED); *but see* Milberger v. KBHL, LLC, 486 F. Supp. 2d 1156 (D. Haw. 2007) (where a federal district court for the District of Hawaii did not permit a fiancée to recover for NIED).
[81] James v. Lieb, 221 Neb. 47, 375 N.W.2d 109 (1985).
[82] Paugh v. Hanks, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983).
[83] Thurmon v. Sellers, 62 S.W.3d 145 (Tenn. Ct. App. 2001).
[84] Heldreth v. Marrs, 188 W. Va. 481, 425 S.E.2d 157 (1992).
[85] Sinn v. Burd*,* 486 Pa. 146, 404 A.2d 672 (1979).

New Jersey.[86] The remaining jurisdictions adopting a foreseeability test, by contrast, confine the third requirement to relationships characterized by blood or legal ties.
However, since a trend toward an expansion of the relevant notion of family is clearly traceable, it is possible to list the tort actions for negligent infliction of emotional distress as the area showing the less marked marital privilege.

3. "Other" benefits and conclusion

There are some privileges which lie at the boundaries of material and immaterial benefits. In the previous sections, I was trying to "do the math" and to understand whether there is a marriage bonus or rather a marriage penalty, to understand the potential cost of recognition. As to specific benefits, under specific circumstances, a marriage penalty could be traced. This does not mean that findings cut both ways. If you look at the whole package it is more convenient to be married.
My conclusion on the convenience of marriage pivots on other kinds of benefits as well. For one thing, there is a wide array of indirect material benefits. The main privilege of marital status is that it is there. It exists. This saves a lot of time and money in that it provides a default regime, the broadest one, both under public and private law. Put differently, the transaction costs of not being married are extremely high in terms of time, energy, and money parties ought to spend to protect themselves through contracts, power of attorney, and other legal tools. By the same token, marriage is an easy-to-administer rule, which operates presumptions as to mutual trust (in the context of evidentiary privileges,) income pooling (in the field of tax law), and mutual support (social benefits.)
As to the expressive benefits, the involvement of the state has different implications as it profoundly affects people's civil and political standing. Despite no special scrutiny applying in sanctioning marriage, as any two people, regardless of their conduct or intentions, are able to get married, this sanction conveys the message that the state is expressing approval toward the relationship. This point emerges in a script by Martha Nussbaum, questioning the necessity of this type of sanction:

[86] *Dunphy*, 642 A.2d (permitting a cohabitating partner to recover for NIED).

> "The expressive dimension of marriage raises two distinct questions. First, assuming that granting a marriage license expresses a type of public approval, should the state be in the business of expressing favor for, or dignifying, some unions rather than others? In other words, are there any good public reasons for the state to be in the marriage business at all, rather than the civil union business?"[87]

All the things considered above, marriage is still a privileged status. It conveys both material and immaterial benefits. Non-marital couples are often completely invisible, as in the case of evidentiary privileges. Social security still confers benefits to the marital family, whether by marital we intend the narrow notion of spouses of the broader notion of conjugal couples in common law marriages or same-sex NMLR. In the few instances where non-marital couples other than common law spouses and same-sex NMLR are recognized, the equation is only partial in the sense that such couples will encounter hurdles in gaining the benefits (as in tax law, workers' compensation benefits, and wrongful death statutes, that require proof of dependency and, in the two latter cases, condition the possibility of recovering damages to the absence of a spouse or children.) In some instances, even when recognized, the treatment of non-marital families would be worse, as is the case in tax law when filing under Head of Household. Given this broad premise, I contend that: (i) albeit recognition of spouses often comes with a cost, a marital privilege can be confidently inferred; (ii) current new families are insufficiently accounted for by the law. When sporadically recognized, they are granted a worst treatment as compared to married couples.

Of course, one should avoid broad generalizations. The adverse financial impact that could result from recognition, might trigger different reactions from new families, depending on the mechanism for recognition.

Formal mechanisms are those requiring the parties to take affirmative steps to have the relationship recognized (contracts, and registration systems.) Functional mechanisms are those that ascribe legal consequences to relationships that are

[87] Martha Nussbaum, *A Right to Marry?*, 98 CAL. L. REV. 667, 671-72 (2010).

functionally equivalent to those legal statuses that are already in force, such as survivorship benefits that come to couples in common law marriages.[88]

One is thus to distinguish two situations: the first one with people making a deliberate choice to gain the status and the rights and obligations thereof, and the second one with people unaware that status will be ascribed (albeit for a specific benefit.) In this sense, when recognition is the result of a deliberate choice, it might well be the case that parties are ready to lose a benefit, while acquiring many more, because they might believe they will be better-off in the end. They might, for instance, consider that the cost of losing a welfare benefit is offset by the broad array of advantages that flow from status-based recognition: namely, the time and money saved by having a default regime and the possibility of triggering of the presumptions that the status carries with it.

By contrast, the loss associated with recognition is especially unwelcomed when parties do not decide to take on the status, but are rather ascribed the status (as in the case of ascription.) This issue paves the way to the next chapter, which will deal with the different models for recognizing new families.

[88] This is the case, *e.g.*, with common law couples in countries such as Canada, where the status is ascribed by government agencies seeking to combat welfare frauds. *See infra* Chap. V.

CHAPTER III
MODELS TO PROTECT NEW FAMILIES[*]

Introduction

This chapter provides a primer on the models for recognizing relationships other than marriage. It provides the reader with the background knowledge necessary to understand and systematize the schemes in force in Canada, the United States, and Europe that will be cited to in the Special Part[1] (to demonstrate an increase in family legal pluralism in these countries.) It also provides the reader with the background knowledge necessary to understand the legal remedies proposed in each of the selected jurisdictions.

The chapter does not adopt a pure case-study approach, since the principal aim is that of providing abstract models for recognition. These models are drawn both from concrete schemes enacted at the statutory level in the selected jurisdictions and from legal scholarship's proposals.

Before moving to analyzing each model, I will attempt to anticipate potential criticisms to legal recognition. The previous chapter shows that recognition often comes with a cost. To this effect, such chapter has posited that an analysis of the extent to which new families are in fact excluded from benefits must precede any legal reform. A proper (*i.e.,* empirically-informed) analysis, should then assess whether recognition could entail a financial penalty rather than bonus (by analyzing the legal treatment of the "most privileged" family, the marital family.) Only then, one could move to the phase where solutions to the problem are sought.

However, there could be additional objections to recognizing new families. The first one centers around the "metaphorical" costs of recognition, *i.e.,* the cost of

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[*] Several selected parts of this chapter have been published in my previous script: Nausica Palazzo, *The Strange Pairing: Building Alliances Between Queer Activists and Conservative Groups to Recognize New Families* (University of Michigan Public Law Research Paper No. 615, 2018).

[1] *See infra* Chapters IV, V, VI.

assimilation into the existing regime; a second one refers to the adverse-selection problem and the risk of fraud; a third one on the child's best interest. These potential objections analyzed, I attempt to reject them.

Thereafter, I expound the abstract models of recognition. These are: the contractual model, ascription, registration, and various combinations of the three. Formal recognition refers to the automatic legal consequences attached to a status, such as automatic tax benefits that come with marriage, civil partnership, or parentage.[2] By contrast, functional recognition will attach some legal consequences to relationships that are *functionally equivalent* to those legal statuses that are already in force, such as survivorship benefits that come to couples in common law marriages.[3]

Based on this classification, registration of a partnership is a formal mechanism in that it confers a status. Conversely, ascription is a functional mechanism for recognition because it attaches specific consequences to couples that are deemed to resemble formally recognized relationships.[4]

1. Anticipating criticisms to recognition

1.1. The assimilation conundrum

Recognition of "new" families is problematic for its normalizing power, deriving from the assimilation of same-sex couples into marriage. I use the Foucault's notion of "normalization" as the provisional ordering of various fields around a distinction, such as "married/unmarried," or a set of distinctions.[5] As a consequence of this new ordering the choice to not get married becomes more "abnormal" and can go the detriment of unmarried couples. This is what it usually meant by "normalization."

Normalization, as said, stems from assimilation. An officially recognized non-normative relationship risks being drawn into the sphere of influence of the

[2] Robert Leckey, *Families in the Eyes of the Law: Contemporary Challenges and the Grip of the Past*, 15 IRPP CHOICES 1, 3 (2009).

[3] This is the case, *e.g.*, with common law couples in countries such as Canada, where the status is ascribed by government agencies seeking to combat welfare frauds.

[4] Leckey, *supra* note 2, at 13.

[5] Janet Halley, *Recognition, Rights, Regulation, Normalization: Rhetorics of Justification of the Same-Sex Marriage Debate*, in ROBERT WINTEMUTE & MADS ANDENAS (EDS.), THE LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW n.7 (2001).

heterosexual marriage. While this claim has been made over and over with regard to same-sex couples seeking access to marriage,[6] it is not yet clear that recognition through a marriage alternative would yield similar normalizing effects. I believe that it would, albeit to a much lesser extent.

Non-conjugal relationships, such as cohabiting relatives, provide an illustrative example in this respect. While these relationships suffer from invisibility in the legal space, in the few cases where they have gained official recognition, they had to comply with marriage-like criteria.[7] Consider Alberta's Adult Interdependent Relationships Act of 2003, which permits any two people to be recognized as Adult Interdependent Partners (AIPs) through an agreement or ascription.[8] As outlined in the previous chapter, for a couple to be recognized as an AIP, they must bear the following characteristics:

"(i) share one another's lives,

(ii) [be] emotionally committed to one another, and

(iii) function as an economic and domestic unit,"[9] which includes a conjugal relationship and a "degree of exclusivity."[10]

Of course, under the holistic approach of the Alberta family courts, a lack of marital-like features such as conjugality or fidelity should not prevent formal recognition where other relevant criteria are present.[11] However, the inclusion of these factors, along with the mandatory dyadic structure – that an AIR can only be commenced between two people – suggests that the Legislature can hardly do without the traditional features of marital relationships.[12] Likewise, the inclusion of these factors might have discouraged relatives from litigating spousal support or other benefits under the Act, This contention is buttressed by the fact that they never feature as claimants in Alberta's courts where AIRA's entitlements are litigated.

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[6] *See especially* Brenda Cossman, *Family Inside/Out*, 44 U. TORONTO L. J. 1 (1994) ("The radical pluralist position argues that our relationships do not fit the model of the heterosexual family. Gay and lesbian relationships are not functionally equivalent to heterosexual relationships - they are not necessarily based on sexual monogamy or emotional exclusivity").

[7] This is especially evident in the case of the Alberta's scheme: ADULT INTERDEPENDENT RELATIONSHIPS ACT, Statutes of Alberta 2002, c. A-4.5 [AIRA].

[8] AIRA § 1.

[9] AIRA § 1(1)(f).

[10] AIRA § 1(2).

[11] Kiernan v Stach Estate, 2009 ABQB 150 (CanLII), 3 Alta LR (5th) 117, at par. 42.

[12] Two examples of traditional features of marital relationships are conjugality and exclusivity.

The AIRA is an example of a progressive law with a normative undertow. From it we can conclude that a danger of assimilation into the marital norm is always present. In response, lawmakers should craft legal remedies with the utmost care, particularly by avoiding functional criteria that need not apply to families, such as conjugality and exclusivity.

1.2. The adverse-selection problem

Recognition of new families could also be vulnerable to fraud. It might lead parties to self-identify as a family to claim government or employment benefits, or else to refuse to self-identify as a family when recognition could impose obligations.[13]

This problem has been acknowledged in determining social assistance eligibility for unmarried conjugal couples in Canada.[14] The likelihood of fraud, however, can be more or less extreme depending on the model of protection adopted. Canada's model is ascriptive.[15] An ascriptive model nudges parties into adverse selection because under this model, they are not recognized as a couple permanently, but on a case-by-case basis, depending on the conditions of eligibility for each government benefit.[16] The limitations of an ascriptive model could thus be overcome by a formal model of recognition, whether based on registration or contracts. Once parties have been recognized through a comprehensive approach, they cannot escape their associated obligations.

The potential for fraud is offset by the acceptance of the whole package of rights and obligation flowing from status recognition, including the private law obligations of support. By contrast, any area-specific approach, that attaches status for one purpose

[13] Nicholas Bala, *Controversy Over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships* 104, n.140 (Queen's University Law Research Paper series no. 41, 2003).

[14] *Id*. ("The adverse selection issue is already a problem with informal (i.e. non-marital) conjugal relationships, for example in determining social assistance (in)eligibility, though there will generally be more indicia and records available to help make this determination than for non-conjugal relationships.").

[15] Christine Davies, *The Extension of Martial Rights and Obligations to the Unmarried: Registered Domestic Partnerships and Other Methods*, 17 CAN. FAM. L. Q. 248, 256 (1999).

[16] Bala, *supra* note 13, at 104.

only (*e.g.* post-breakdown support obligations) like the current ascriptive regime at the federal level in Canada, presents a risk of fraud that should be avoided.[17]

1.3. The "child's best interest"

Finally, scholars have argued that recognition is harmful to children's best interests,[18] although I contend that the vertical and horizontal dimension of familyhood ought to be kept distinct from a legal perspective. Professor Nicholas Bala has expressed the concern that children can be reared only in a normative, conjugal environment:

> "[W]hile society can no longer equate conjugality with procreation, there is still a strong relationship between conjugality and children. Conjugality is relevant to both psychological and biological parenthood, and there are few people who would consider (as a first choice) raising a child with a partner who was not in a conjugal relationship with them. The commitment inherent in a conjugal relationship is also desirable in establishing an environment in which to raise children."[19]

However, again, Canada demonstrates how this misconception stems from a more general prejudice against same-sex couples. In February 2017, an Ontario court issued a declaration of parentage to Lynda Collins, best friend and colleague of Natasha Bakht, regarding Bakht's biological son, Elaan, a profoundly disabled boy with spastic quadriplegia.[20] Collins had supported Elaan both financially and emotionally since his birth, accompanying him to medical visits and making crucial decisions about his health, welfare, and education with his biological mother.[21] The court was thus satisfied that it was in the child's best interest to recognize Collins as a "mother" and issued a declaration of parentage (vertical dimension), regardless of

[17] *Id*.
[18] *Id*, at 107.
[19] *Id*.
[20] Julie Ireton, *Raising Elaan: Profoundly disabled boy's 'co-mommas' make legal history*, CBCNEWS, Feb. 21, 2017, http://www.cbc.ca/news/canada/ottawa/multimedia/raising-elaan-profoundly-disabled-boy-s-co-mommas-make-legal-history-1.3988464 (last visited Aug 1, 2018).
[21] Collins and Bakht's application for a declaration of parentage, Superior Court of Justice, Family Court (ON), file no. FC-16-862-0.

whether Collins and Bakht are or were partners (horizontal dimension).[22] The case is profoundly instructive on how conjugality is not an inherent feature of childrearing, and is an early example of how courts can disentangle conjugality from the vertical dimension of familyhood.

That leads us to a second counterargument, which also centers on the need to separate the vertical and horizontal dimensions of familyhood. The socially-accepted, state-subsidized notion of the nuclear family has, among other things, effectively linked the worthiness of the family to the adults' willingness to raise children.[23] It is not even accurate to speak of "willingness," since it is the very definition of marriage that is inherently child-centered. [24] This is what families are made for, the thinking goes, and hence the will to raise children becomes a clue to the stability and commitment of the (conjugal) family bond. While the link between marriage and childrearing has changed shape thanks to the same-sex marriage struggle, which stressed the functional and intentional attributes of parenthood over those rooted in biology, [25] one could hardly submit that such link between marriage and childrearing weakened.[26] Justice Roberts' view in *Obergefell*, that "[m]arriage is a socially

[22] Ireton, *supra* note 20, at 382.

[23] COUNCIL ON FAM. L., THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA 13 (2005). *See also* Bala, *supra* note 13, at 107 ("Further, while society can no longer equate conjugality with procreation, there is still a strong relationship between conjugality and children. Conjugality is relevant to both psychological and biological parenthood, and there are few people who would consider (as a first choice) raising a child with a partner who was not in a conjugal relationship with them.").

[24] Nora Markard, *Dropping the Other Shoe: Obergefell and the Inevitability of the Constitutional Right to Equal Marriage*, 17 GERMAN L. J. 509 (2017) at 513 (discussing *Obergefell* the Author argues the following: "For Justice Kennedy, marriage stands for much more than merely taking responsibility for another adult. Marriage also means familial stability. The legal recognition and structure it provides "allows children 'to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives'... Marriage also affords the permanency and stability important to children's best interests."").

[25] Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185 (2016), at 1236-37, 1241.

[26] Same-sex couples fighting for the right to marry argued that they had the same capacity to love and raise children as opposite-sex couples, and that children could thrive where love, not just heterosexuality, exists. *See Id*, 1241. To this effect, they did not challenge the assumption that marriage is inherently child-centered. This is surprising if one considers a fairly recent survey of the Pew Center on the US context. This research shows that LGBT respondents are far less likely to say that "having a child" is an important reason for getting married (28%), as compared to non-LGBT respondents (41%). This is to say that LGBT partners are significantly less interested in getting married for the specific purpose of raising children. *See* PEW RESEARCH CTR., A SURVEY OF LGBT AMERICANS: ATTITUDES, EXPERIENCES AND VALUES IN CHANGING TIMES 68-69 (2013), http://www.pewsocialtrends.org/wp-content/uploads/sites/3/2013/06/SDT_LGBT-Americans_06-2013.pdf (last visited Sept 20, 2018).

arranged solution for the problem of getting the people to stay together and care for children…"[27] still holds its grip on society and collective consciousness.

But many unmarried families do not intend to raise children. They are primarily concerned about mutual support and caregiving. Hence, the unwillingness to raise children should not represent an ideological hurdle to protecting the committed adult-adult horizontal relationship.

The rationale for protecting families with dependent children is wholly different from the rationale for protecting adult-adult horizontal relationships.[28] The two dimensions ought to be separated. I would thus discard all objections based on childrearing and procreation as off-topics that deserve special and separate consideration.

I thus believe that many objections are illustrative of the risks of recognition but could be overcome by accurately crafting remedies. I now move to canvass the abstract models for recognition.

2. Contractual model

The contractual model allows parties to structure their relationship through contracts and wills, regardless of formal recognition or lack thereof.[29] Through contracts, such as cohabitation or caregiving arrangements, parties may opt for a property regime similar to that applicable to married couples or take on marriage-like obligations.[30] Through wills, a party has a designated beneficiary to inherit property, as if they were married.[31] The contractual model will thus include aspects pertaining to both contracts and wills.

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[27] Obergefell v. Hodges, 135 S. Ct. 2584 (2015), at 2613 (Roberts J dissenting op.), quoting JAMES Q. WILSON, THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES 41 (2002).

[28] *See e.g.* NANCY POLIKOFF, BEYOND STRAIGHT AND GAY MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 142-43 (2008) (proposing an approach that assesses the program's purpose and giving an example of the different rationale that can justify benefits to a retired worker: if the rationale is to compensate for the care that the wife has performed toward the dependent child, then the benefit should not go to childless spouses; if it is one that acknowledges the adults' financial interdependence then it should go to the interdependent partner).

[29] L. COMMISSION CAN., BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE ADULT RELATIONSHIPS 115 (2001), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1720747&rec=1&srcabs=1524246&alg=7&pos=3 (last visited Oct. 20, 2018).

[30] *Id*.

[31] *Id*.

At present, individuals can achieve some of the flexibility required by family pluralism through private contracts like prenuptial agreements or health care proxies.[32] However, not all of the legal protections of marriage can be assigned by contract. For instance, in the U.S. a person cannot freely assign Social Security benefits, health insurance benefits, or rights under the Family and Medical Leave Act.[33] In Québec, one of Canada's civil law provinces, although public law government programs recognize unmarried couples on a functional basis, such couples are always legal strangers when it comes to private family law.[34] Thus, a pure contractual model (where all family-related matters are dealt with by contract) would require that current laws and regulations be amended to allow for designating a new family member as beneficiary of a broader array of benefits.

The contractual model is characterized by a high degree of flexibility, since it allows parties to create the bundle of rights and obligations that they deem appropriate.[35] By contrast, marriage and registration systems usually provide for a standard set of rights and obligations that automatically accrue through those statuses, with some minor deviations.[36] The contract's tailor-made nature is just a surface advantage; its most valuable asset is its ability to enhance personal autonomy. It enables the parties to articulate their own expectations – to "forge one's own contractual regime and negotiate the terms of one's commitment [is] a valued tool in a free society."[37]

The contractual model's benefits are also its shortcomings. This model works best when parties participate on equal footing with each other in the drafting of the agreement, share a relatively similar knowledge, and have balanced bargaining

[32] Laura A. Rosenbury, *Friends with Benefits*, 106 MICH. L. REV. 189, 231 (2007).
[33] *Id*.
[34] Leckey, *supra* note 2, at 14. Also, although the "droit à une réserve héréditaire" (right to a reserved portion of an estate) has not been included in the Civil Code (and thus not been extended to married couples), as a compromise on the annexation of the Province to Canada, *de facto* couples continue being excluded from all the remaining prerogatives in the field of succession. Unmarried partners can inherit only by will and cannot make gifts of future property. Brigitte Lefebvre, *Récents développements en droit des successions: Le droit Québécois*, 14 ELECTRONIC J. COMP. L. 1 (2010), at 3.
[35] L. COMMISSION CAN., *supra* note 29, at 115.
[36] There are core provisions which cannot be waived. By contrast, there is a trend pointing to the customization of the relationship deriving from the increasing possibility for marital couples to depart from non-core legal baselines so as to tailor the relationship to their actual needs. *See* William N. Eskridge, *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L. J. 1881, 1884 (2012).
[37] L. COMMISSION CAN., *supra* note 29, at 115.

powers.[38] When this is not the case, the vulnerability of one party is a concern.[39] This factor alone may outweigh the benefits of autonomy and contractual freedom.[40]

Additionally, private contractual law is cumbersome because it requires that parties invest a lot of time and effort in reaching an agreement. The cost of agreement includes both direct costs – the legal fees required to enter into the contract – and indirect costs – spending time, effort and energy entering into a mutually beneficial contract.[41] Contracting also has an emotional cost to the parties for a few reasons. First, parties must articulate their expectations for the relationship – even if the time is not ripe for articulating them. It also leads parties to develop an adversarial mentality that might result in negative feelings surrounding the negotiations.[42]

Agreements also suffer from an optimism bias, and parties may not articulate their expectations because of positive illusions of the length of the relationship and the capacity of parties to privately resolve potential controversies.[43] It is unrealistic to think that parties will articulate all of the relevant aspects of the relationship because of cognitive bias and the relative time and cost of predicting all potentially relevant aspects of the relationship (financial cost of bargaining).

Furthermore, there is one key limit in this model that hinders any further analysis: contracts are binding on parties, not on the government. The consequence is that such arrangements are technically "invisible" in the eyes of the state and irrelevant for its social law apparatus.[44] Through contracts they can only regulate areas at free disposition of parties, such as property and financial aspects of cohabitation. Public benefits do not fall within this area. Thus, many families using contracts to overcome this invisibility find themselves in a position where they can only achieve a very limited array of benefits/rights.

Is this always the case? Currently, yes. Will this always be the case? Not necessarily. Conservative bills in Alabama, and Missouri are testing grounds of publicly-binding

[38] Leckey, *supra* note 2, at 14.
[39] TAMARA METZ, UNTYING THE KNOT: MARRIAGE, THE STATE, AND THE CASE FOR THEIR DIVORCE 126 (2010) (arguing that caregiving itself creates vulnerability).
[40] *Id*.
[41] *See* Helen Reece, *Leaping without looking*, in ROBERT LECKEY (ED.), AFTER LEGAL EQUALITY: FAMILY, SEX, KINSHIP 119 (2015).
[42] *Id*. at 120.
[43] *See* Anne Barlow, *Legal rationality and family property* in JOANNA K. MILES & REBECCA PROBERT (EDS.), SHARING LIVES, DIVIDING ASSETS: AN INTERDISCIPLINARY STUDY 34 (2009).
[44] Leckey, *supra* note 2, at 14.

contracts.[45] These conservative bills were proposed to oppose the U.S. Supreme Court's decision in *Obergefell v. Hodges*, which mandated the legal recognition of same-sex marriage in the U.S.[46] Oklahoma proposed to replace marriage licenses with common law marriage affidavits. Missouri aimed at replacing marriage with civil union contracts. Ultimately, Alabama original proposal would have replaced marriage licenses with civil contracts for everyone.

Especially, under the Missouri and 2016 version of the Alabama's bills married couples acquire their status upon stipulation of the contract.[47] The model proposed in Alabama squarely falls within a contractual model, since it is the contract alone that triggers the legal consequences of the "being married."[48] Likewise, the bill in Missouri can be ascribed to a contractual model[49] in that in this model: (i) the contract is valid the date is executed;[50] (ii) the contract of domestic union is registered for mere notification purposes, and thus is not the registration but the validity of the contract that triggers legal effects.[51]

As a consequence, the signing of the contract triggers the marital status, with all the benefits and obligations thereof.

In this way, these bills essentially overcome the invisibility problem. The private law instruments used to enter into the relationship *bind* the government and third parties,

[45] All the information regarding the Oklahoma bill can be found on the website of the Oklahoma Legislature: http://www.oklegislature.gov/BillInfo.aspx?Bill=HB1125 (last visited Jun 15, 2018); all the information regarding the 2018 version of the Alabama bill can be found on the website LegiScan: https://legiscan.com/AL/bill/SB13/2018 (last visited Jun 15, 2018); all the information regarding the 2017 version of the Alabama bill can be found here: https://legiscan.com/AL/bill/SB20/2017 (last visited Jun 15, 2017); all the information regarding the first version of the Missouri bill, proposed in 2017, can be found on the website LegiScan: <https://legiscan.com/MO/text/HB62/2017> (last visited Jan 15, 2018); while all the information regarding the 2018 version of the Missouri bill, which emulated the former version, can be found on the website LegiScan: < https://legiscan.com/MO/bill/HB1434/2018> (last visited Jul 15, 2018).

[46] *Obergefell,* 576 U.S. On the ruling of the decision *see* Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CAL. L. REV. 1207 (2016); Kenji Yoshino, *The Supreme Court, 2014 Term – Comment: A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 162–79 (2015).

[47] *See* Robin Fretwell Wilson, *Divorcing Marriage and the State Post-Obergefell*, in *ID*, THE CONTESTED PLACE OF RELIGION IN FAMILY LAW 415, 419 (2018).

[48] Another bill squarely falling within a contractual model is the one proposed in Indiana, HB 1163, 120th Gen. Assemb., 2nd Reg. Sess. (Ind. 2017). *See Id*.

[49] Wilson, *supra* note 47, at 431.

[50] *Missouri Bill Would Eliminate Marriage Licenses, Nullify Federal Control in Practice*, TENTH AMENDMENT CENTER, Dec. 8, 2017, https://blog.tenthamendmentcenter.com/2017/12/missouri-bill-would-eliminate-marriage-licenses-nullify-federal-control-in-practice/ (last visited Jun 15, 2017).

[51] H.R. 62, 99th Gen. Assem., 1st Reg. Sess., at 451.125(5) (Mo. 2017).

since it is the state that confers upon the parties the power to acquire with *erga omnes* effects the status of "married couple."[52]

According to the Law Reform Commission of Canada (the Commission), a body advising the Canadian government on family law, besides the lack of "official or public aspect" of private agreements, there are two more problems associated with the contractual model:[53]

1. Lack of "certainty." The Commission does not clearly articulate what it is implying when it suggests that contracts lack certainty ("Throughout our consultations, it became clear that simply allowing people the option to enter into private contracts… was insufficient because … it [did not] offer sufficient guarantee of *certainty*.")[54] One reason for uncertainty is the creation of non-uniform legal regimes amongst families, which is administratively difficult to manage. Any relationship would have different contractual terms, forcing the administration to check all the time whether a unit counts as a family for purposes of a specific law, unlike with default regimes.

By contrast, the unpredictability of all potentially relevant aspects of the relationship (*e.g.*, rules to share property, support upon breakdown of the relationship, etc.) can be read from the perspective of parties (not the administration). I share this concern. It is unrealistic to think that the contract will articulate all of the parties' expectations. This is a shortcoming that needs to be taken into account in choosing among different models.

2. "Lack of official record of those private agreements." The lack of a formal record would, in the words of the Commission, prevent the "efficient administration of laws and programs where relationships could be relevant."[55] But this is not an intrinsic feature of the model. Recently proposed legislation in Missouri and Alabama show that the state could start recording common contracts through its clerks without many

[52] By contrast, a pure private law model does not bind the government or third parties. *See* Leckey, *supra* note 2, at 12.

[53] L. COMMISSION CAN., *supra* note 29, at 114 ("Throughout our consultations, it became clear that simply allowing people the option to enter into private contracts, such as cohabitation agreements or caregiving arrangements, was insufficient because it did not always have the *official or public aspect* that was needed, nor did it offer sufficient guarantee of *certainty.* In addition, the *lack of official record* of such private arrangements prevents the efficient administration of laws and programs where relationships could be relevant") (emphasis added).

[54] *Id*, at 114.

[55] *Id*, at 114.

additional administrative costs. The state could keep track of those entering into a family contract.[56] The Commission's concern can therefore be addressed through a system that sets forth the eligibility conditions to enter the contract, and asks the administration to merely check that such conditions are met.

3. Ascription

Ascription refers to the attachment of legal consequences to cohabiting partners, whether they seek it or not.[57] Ascriptive regimes do not confer a bundle of rights and obligations, but merely operate with regard to specific benefits, as post-breakdown support.

Ascription consists of a legal tool through which unmarried partners are conferred with marital-like rights and obligations.[58] It is based on the assumption that there is little difference between marriage and cohabitation. Ascription is a functional, rather than formal, system of recognition, in the sense that it inquires whether the parties "have functioned similarly to the members of formally recognized family relationships" such as marriage.[59]

Under the ascription model, marriage-related rights and obligations automatically attach to non-marital (usually conjugal) relationships.[60] This model is already implemented in many common law jurisdictions as "common law marriage." This could extend to non-normative relationships – with some caveats. This is currently the case in Alberta, Canada, where *any* two persons (including friends, but excluding relatives) acquire the Adult Interdependent Partners' status if they live in a three-year, interdependent relationship or a relationship "of some permanence" where there is a child.[61]

Unlike the contractual model, which demands an articulation of the parties' expectations and then crystallizes them in a contract, ascription operates when there

[56] *See, e.g.*, page 3 of the engrossed version of Oklahoma Bill no. 1125, available at http://webserver1.lsb.state.ok.us/cf_pdf/2015-16%20ENGR/hB/HB1125%20ENGR.PDF (last visited Jun 15, 2017).
[57] Leckey, *supra* note 2, at 12.
[58] L. COMMISSION CAN., *supra* note 29, at 116.
[59] Leckey, *supra* note 2, at 3.
[60] Winifred Holland, *Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation*, 17 CAN. J. FAM. L. 114, 151 (2000).
[61] *See infra* Chap. V, par. 6.4.1.

is no previously verbalized set of expectations. In this sense, the model can remedy inequalities and unarticulated desires – especially for women, who are more likely to be the vulnerable party.[62] The system purports to prevent exploitation and impose obligations that correspond to the expectations of the majority of couples. While there are some families who choose not to marry, many partners "drift into" cohabitation and can overlook the consequences of the new arrangement.[63] Ascription is intended to this problem.

Generally, the legal consequences flowing from ascription fall within the scope of private law (reciprocal rights and obligations) or public law (a package of social benefits and tax exemptions.)[64] The regime differs from marriage and registration in that it does not ascribe status to parties – only rights and benefits.[65] This is beneficial as long as parties are only interested in accessing specific social and tax benefits or in extending support obligations, and not interested in gaining formal status.

My view is that this system cannot truly apply to aspiring family formations. Parties to these new relationships must attempt to articulate their desires because they are "new" and non-normative. By definition, they bear characteristics – about who they love and how – which are unique. The category of "new" family is too heterogeneous to expect the state to make a great effort in categorizing them all, or according the appropriate benefits to all of them. By articulating their desires and expectations, "new" families also avoid the risk of assimilating into a hegemonic norm, as would be the case with state categorization.[66]

Additionally, ascription can infringe on personal autonomy.[67] Parties in committed relationships might not intend to bind themselves in a marriage-like arrangement – especially the wealthier party. Family members not only fail to consent to the regime, but might also lack awareness that consequences have attached at all.[68] Raising consciousness about ascription regimes, when enacted, is vital for reducing the risk of surprising people with unintended legal consequences, which would be an affront

[62] Martha A. Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403 (2001).
[63] Holland, *supra* note 60, at 151-67.
[64] Leckey, *supra* note 2, at 12.
[65] *Id*.
[66] MICHAEL FOUCAULT, THE ARCHEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE (1982).
[67] L. COMMISSION CAN., *supra* note 29, at 116.
[68] *Id*. ("[a]lthough people may opt out of certain statutory provisions governing their relationships, they are not always aware of this possibility.").

to their personal autonomy. Even so, the autonomy conundrum might be a difficult problem to overcome: some scholarship has aptly referred to ascription as "conscription,"[69] emphasizing the compulsory nature of the regime.

A serious shortcoming of the ascription model also lies in its over-inclusive nature. This danger is clear in the case of conjugal relationships, such as common law couples. Once statutory conditions are met, all couples are treated alike, regardless of their levels of actual attributes.[70] The same over-inclusion might arise in the case of non-conjugal relationships. This shortcoming could be further accentuated if one considers that, absent a sexual component within the relationship, two roommates or friends who do not wish to bind themselves could become "family" in the eyes of the law if the eligibility requirements are easy enough to meet (*e.g.*, a mere one year cohabitation). There is not a bright line that separates a friend from an interdependent life partner. Given the difficulty in determining the economic and emotional link between these parties, any ascriptive mechanism is likely to be fraught with error.

There are different means of implementing an ascription model. When attachment of the legal consequences of a relationship is forcible – it does not occur at the request of any of the parties – it is called "pure ascription."[71] Conversely, when recognition comes at a partner's request, it is called "partial ascription."[72]

3.1. Purely ascriptive recognition

One example of "pure ascription" is financial aid for university students in the U.S. Financial aid awards from public lenders can be reduced if such lender learns that the student's unmarried parents are in a marriage-like relationship.[73] For example, if the

[69] Marsha Garrison, *Reviving Marriage: Could We? Should We?*, 10 J. L. & FAM. STUD. 279, 296 (2008).
[70] L. COMMISSION CAN., *supra* note 29, at 116. *See also* Chapter I, par. 3 ("Definitional section.")
[71] Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276 (2014), at 1313.
[72] An account of the difference between pure and partial ascription is provided in *id*, at 1313-33. Legal scholarship does not always distinguish between these two types of ascription. However, cases triggering pure and partial ascription are qualitatively different, and deserve an *ad hoc* analysis.
[73] Rebecca Klein, *FAFSA Changes to Recognize Same-Sex Parents by 201*4, HUFFINGTON POST, Apr. 30, 2013, http://www.huffingtonpost.com/2013/04/30/fafsa-changessame-sex-parents-2014_n_3185755.html (last visited Jun. 30, 2017); Erez Aloni, *Relationship Recognition Madness*, HUFFINGTON POST, June 12, 2013, http://www.huffingtonpost.com/erez-aloni/relationship-recognition-madness_b_3422346.html?utm_hp_ref=college&ir=College#es_share_ended (last visited Jun 30, 2017).

school learns that the student's unmarried parents meet some requirements (such as one year of cohabitation), they can infer that the parents are in a marriage-like relationship, and accordingly reduce the amount of the award *independent of a request by the student or her parents.*

Recognition is more problematic when neither party seeks it. In a pure ascriptive regime, state recognition might result in economic injustice and maldistribution of resources,[74] since ascriptive regimes do not confer a bundle of rights and obligations, but merely operate with regard to specific benefits.[75]

This holds especially true if one considers that the state often uses pure ascription to terminate some benefits. This phenomenon is called "deprivative recognition."[76] The state is particularly active in ascribing a status in the welfare context.[77] For example, having an unmarried adult male in the house results in termination or reduction of the Temporary Assistance for Needy Families (TANF) – a federal welfare program that helps needy children and their families – in California, Oklahoma, and Kansas.[78] In the welfare context, deprivative recognition is a regulatory tool for states to counteract the economic gains a family can derive from non-recognition, such as receiving federal assistance despite having income above the threshold due to the financial assistance of an unmarried cohabiting partner.[79]

However, it often brings about economic maldistribution in that it deprives parties of the benefits of singlehood, but does not simultaneously confer the privileges of a

[74] Aloni, *supra* note 71, at 1313.
[75] *Id*, at 1315 ("deprivative recognition is markedly different that common law marriage because, in the latter, the couple is recognized as married for all purposes. In deprivative recognition, on the other hand, the partners are recognized ad hoc, for an immediate purpose only.").
[76] *Id*.
[77] Kieran Tranter, Lyndal Sleep & John Stannard, *The Cohabitation Rule: Indeterminacy and Oppression in Australian Social Security Law*, 32 MELB. U. L. REV. 698-738 (2008); Leckey, *supra* note 2, at 31. *See contra* Aloni, *supra* note 71, at 1320.
[78] Aloni, *supra* note 71, at 1321-22. For California *see* CAL. WELF. & INST. CODE §11351.5 (West 2001); Russell v. Carleson, 36 Cal. App. 3d 334, 111 Cal. Rptr. 497 (1973) (finding the compatibility with the constitution of the foregoing law). The reason only three states have this rule, despite being a federal program, is that each state defines the relevant "family unit" for purposes of the program.
[79] Shelley A.M. Gavigan & E. Chunn Dorothy, *From Mothers' Allowance to Mothers Need Not Apply: Canadian Welfare Law as Liberal and Neo-Liberal Reforms,* 45 OSGOODE HALL L. J. 733-71 (2007).

family status (such as tax exemptions).[80] It is thus an asymmetrical system which results in deprivation and economic injustice, to the detriment of new families.

3.2. Partially ascriptive recognition

"Partial ascription" models demand that at least one party initiates any action. For example, an unmarried party can bring a claim for "maintenance" upon dissolution of the relationship. The court will inquire into the nature of the relationship and consider the parties as spouses if certain functional attributes are met, such as a certain duration of the cohabitation.[81]

Partial ascription is somewhat less problematic than pure ascription, as the recognition of rights or duties has the potential to surprise just one member of a relationship, instead of both.[82]

Some excerpts from the factual background of the Canadian case *Ross v. Reaney*[83] can be illuminating in this regard. Ross and Reaney were same-sex partners for 18 years who had lived apart for several years due to Reaney's job.[84]

> "[2] Ross is now 46 years old and is self-employed for approximately 6 months a year as a personal trainer. His disclosed income is approximately $19,000.00 USD[85] annually. . .
>
> [3] Reaney is 47 years old and is self-employed in Ontario as a consultant. His disclosed annual income is $126,000.00 [CAD]."[86]

[80] Garrison, *supra* note 69, at 296 ("Because cohabitation typically does not produce the same income-pooling benefits as marriage, a policy based on the assumption of income-pooling by cohabitants is counterfactual and might produce serious inequity.").
[81] Aloni, *supra* note 71, at 1313.
[82] *Id*.
[83] Ross v. Reaney, 2003 CanLII 1929, paras 4-5 (Can. Ont. Super. Ct.).
[84] *Id*.
[85] The amount of the property is in USD as it was generated in Florida, where Mr. Ross, the claimant, works. *Id*. at par. 1.
[86] *Id,* at pars. 2-3.

This background information reflects the economic asymmetry the couple experienced, which prompted Ross to seek financial support.

> "[3] … Ross alleges that the parties were in a *committed* same sex relationship for approximately 18 years…
> [4] Ross alleges that during the course of their relationship, the couple made joint decisions with respect to all aspects of their lives and shared their lives including joint participation in financial decisions, social life, and management of their domestic lives. Ross says that their relationship was sexually intimate. They vacationed together. They purchased property together. They maintained principal and other residences together and cared for each other during times of illness. They gave gifts to each other and celebrated holidays and special events together. They held themselves out as partners to their families and friends…"[87]

The passage shows Ross's attempt to support his claim for interim support.[88] He emphasizes that the couple was in a "committed" relationship[89] to trigger partial ascription of benefits.

> [6] Reaney *denies that the parties were in a committed same sex relationship* for 18 years. He claims that the relationship existed for 3 years from 1985 to 1988 at which time Reaney moved to Harvard to complete a 1-year Masters Program. In 1988, Reaney learned that Ross was HIV positive which, according to Reaney, led to dramatic changes in the nature of their relationship … Reaney denies that they were sexually intimate after the diagnosis …
> [7] Reaney *denies that there was any emotional commitment to Ross other than as friends* ….[90]

Here, Reaney is acting *pro domo sua* (in his favor). He asserts that they were not in a committed relationship and that they were just bound by friendship.[91]

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[87] *Id*, at pars. 3-4 (emphasis added).
[88] *Id.*
[89] *Id*.
[90] *Id*, at pars. 6-7 (emphasis added).
[91] *Id*.

> "[9] … In December 1995, Reaney was paying Ross $3,000 per month. Between June 2002 and August 2002 Reaney unilaterally reduced the payments to $1,500 per month. In August 2002, the payments were terminated. At this time Reaney was openly and ultimately involved with another partner. Ross says that this ended his relationship with Reaney.
> [10] Ross alleges that Reaney began paying the salary after Ross began suffering from chronic fatigue … The salary was a method of providing Reaney with a means of splitting income for income tax purposes."[92]

In order to gain an advantage in the lawsuit, each party reported the other's fraudulent conduct, as when Reaney alluded to the income-splitting technique, and even resorted to disclosing details of their sexual life.[93] While Ross glorified their story of true love and firm commitment, Reaney referred to Ross as no more than a friend and rejected all of Ross's factual claims.[94]

The important takeaway of the case is that ascription places a great burden on members of a family who might not want the commitment. One should ask whether redistribution of property from Reaney to Ross is fair. Let us assume that Reaney did not want to commit to a long-term partnership with Ross. He is thus left with the sole option of ending their cohabitation early to avoid legal ascription. Reaney must also refrain from transferring money to Ross, even if Reaney's financial situation permits it, even if Ross's health is compromised, and even if Reaney would like to do so.

Partial ascription also creates a barrier to the formation of new supportive networks. It ultimately triggers an intrusive inquiry into partners' lifestyles and sexual and emotional intimacy, as the case analyzed above shows.[95] The same goes for non-conjugal partners. Professor Aloni points out that "[i]n the welfare context . . . having an unrelated adult in one's apartment almost immediately invites questions from social workers and could easily deter people from living together."[96] This kind of

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[92] *Id,* at pars. 9-10.
[93] *Id*.
[94] *Id*, at par. 7.
[95] *Id*.
[96] Aloni, *supra* note 71, at 1329. The Author also gives a powerful example of the potential barrier suffered by non-conjugal adults. He recalled case involving a separation agreement that included a cohabitation-termination provision ("Support payments shall terminate upon the Wife's remarriage or if the Wife takes up residency with another man to whom she is not married.") The ex-wife's job was as his housekeeper and caregiver. The ex-husband claimed that the separation agreement said that

public probing might impair the flourishing of new kinship unions in another respect; it could require people to define their relationship once and for all, before they otherwise can or wish to do so.

Ultimately, the cons outweigh the pros. Involuntary and compulsory recognition might more costly than complete unrecognition.[97]

4. Registration

Registration is a formal remedy through which parties gain a status, as well as rights and benefits. Examples of this system include civil unions, designated beneficiary schemes, and domestic partnerships.

Like marriage, it has automatic legal consequences.[98] And as with previous systems, such consequences might fall within the scope of private law, public law, or both. Registration-related rights, duties, and benefits might mirror those attached to marriage or not.[99] When registration schemes offer the same benefits as marriage, as with civil unions, the main drafting technique is to add a line of text (*e.g.*, "and civil unions") to existing marriage-related statutes. Alternately, registration might be a separate regime altogether, which attaches a different package of legal consequences.[100] This segregated regime is achieved by creating *ex novo* a set of rights, duties, and benefits, which are usually less extensive than those associated with marriage.[101]

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termination of alimony would take place upon her residing with another man, regardless of the type of relationship. The court, quite angry about the injustice and absurdity of the claim, rejected the husband's suit and obliged him to pay attorney's fees. But this case shows the harm to the creation of networks of support: When someone needs to fear a termination of alimony when moving in for work (as it is often the case with professional caregivers), this is a real hurdle to the development of new living arrangements. This is of course an extreme case and one that was initiated from an act of private ordering, but there is no reason to believe that cohabitation-termination rules would not function the same way. *See* Sypek v. Sypek, 130 Misc. 2d 796, 497 N.Y.S.2d 850 (Sup. Ct. 1986).

[97] Aloni, *supra* note 71, at 1329.

[98] L. COMMISSION CAN., *supra* note 29, at 117.

[99] Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573 (2013).

[100] *Id*.

[101] For instance, in Italy, same-sex and opposite-sex couples can enter a civil partnership through registration, which, notwithstanding a clause equating their status to that of married couples, does not confer a duty of fidelity, nor a right to adopt children. There are also material differences between marriage and civil partnerships at the time of separation; in a civil union, a separation can be achieved through a mere unilateral act of will. *See* Artt. 20 e 24, LEGGE 20 MAGGIO 2016, n. 76, "Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze."

Registration saves time and effort that the cumbersome contractual activity requires, because it typically is achieved by opting into a default regime.[102] Like the contractual model and marriage, it is a "formal" model for determining parties' rights and duties.[103] It is also respectful of personal autonomy in that it requires parties to take affirmative steps to publicly express their commitment and articulate their expectations, unlike functional regimes that ascribe a status regardless of the will of the parties.[104]

I argue that there are two forms of registration – what I will call registration by default, where given benefits are automatically attached to the legal status, and what I will call registration by design, where parties designate the beneficiaries of their benefits (with each benefit potentially conferred upon different beneficiaries).[105]

4.1. Registration by default

The most common form of a registration scheme is one where predetermined benefits are automatically attached to a given status. Examples of registration by default schemes in comparative perspective are many and range from domestic partnerships to civil unions.[106] The most significant examples for purposes of the present dissertation are the reciprocal beneficiary schemes in the U.S., as will be discussed in Chapter IV. These schemes are comprehensive in the sense that once registered, some pre-determined consequences attach to the status.

A second significant example of comprehensive registration scheme for new families is the *cohabitation legale* law in Belgium. Under the Belgian scheme, any two persons having made a formal declaration of common life can register,[107] regardless of the nature of their relationship (thus it covers same-sex and opposite-sex conjugal couples alike, friends and relatives, included those in the first degree of the

[102] L. COMMISSION CAN., *supra* note 29, at 117.
[103] Leckey, *supra* note 2, at 12.
[104] L. COMMISSION CAN., *supra* note 29, at 117.
[105] The selected terminology echoes the privacy by default/privacy by design dichotomy, coined by the Canadian Privacy Commissioner of Ontario in the 1990s. It by no means intends to refer to the legal meaning acquired by these locutions in the field of privacy. It merely recalls its *prima facie* meaning, which seems applicable to registration models as well.
[106] For Europe *see*: JENS M. SCHERPE, EUROPEAN FAMILY LAW. VOLUME III: FAMILY LAW IN A EUROPEAN PERSPECTIVE (2016).
[107] Article 1475,§1of the Civil Code.

descending or collateral line, with exception of minors.)[108] However, it only offers a very limited list of rules governing the common life. This system will be dealt with in Chapter VI.

The opposite of comprehensive regimes are those that operate with respect to specific benefits. These can still be ascribed to a registration-by-default model, however the pre-determined consequences of registration concern only the specific benefits that a government agency administers. This system is in force in two Canadian Provinces, Manitoba and Nova Scotia, and allows non-married conjugal couples to register with the government agency to gain a few marital benefits, such as property division rules.[109]

Many innovative proposals for protecting new kinship unions are comprehensive registration-by-default schemes. One example is the "intimate caregiving union" (ICGU) scheme proposed by Tamara Metz.[110] She suggests introducing a new legal framework in the U.S. whereby marriage is replaced with an ICGU status.[111] The newly created status would merely recognize all intimate caregiving units by conferring a bundle of privileges and rights, such as joint ownership rights.[112] She also contends that marriage should be disestablished:

> "Against suggestions that the state's legitimate welfare concerns with respect to intimate associational life are best treated by reforming marriage or replacing it with a system of private contract, an intimate caregiving union status, narrowly and carefully tailored to recognize, protect, and support intimate caregiving in its many forms, would most effectively balance liberal commitments to liberty, equality, and stability."[113]

Metz's account is premised on the assumption that recognition of caregiving units through status, as opposed to contract, is the only viable way to remedy social

[108] Article 1475,§2, 2° of the Civil Code.
[109] Family Property Act, CCSM c F25.
[110] Professor Metz provides a lucid account of acceptable goals vis-à-vis marriage within the context of a liberal state. Provided that the state cannot perform duties as an ethical authority, it must limit its action to promote social goals not driven by ethics, such as public health. In order to limit the ethical role of states in this field, the preferred option is that of separating marriage from the state. *See* METZ, *supra* note 39, at 14.
[111] *Id*.
[112] *Id*.
[113] *Id*, at 34, 120.

injustice and protect these unions. In a passage that evinces her strongly status-based approach, she roundly criticizes Martha Fineman, a prominent feminist theorist, for brushing aside horizontal relationships and focusing only on the vertical dimension of caregiving (toward dependent children, ill, disabled, and elderly persons).[114] According to Metz, adult-adult intimate caregiving relationships need "the special recognition and protection that only a status can afford."[115]

Defining when a union constitutes a "caregiving" union is of the utmost importance. Yet, Metz stops short of doing this. She only acknowledges that possible definitions carving out the notion of "caregiving" will be less controversial than any definition surrounding marriage.[116] In her view, the debate would be free of all unspoken, morally-driven assumptions and "hidden agendas" which currently characterize both sides of the debate over marriage.[117] Under her proposed scheme, caregiving unions would be endowed only with the benefits they "actually need."[118] However, it seems that the question of what those benefits are or should be is left open.

4.2. Registration by design

The chief critique of the registration model is that it is excessively rigid, particularly as far as public law benefits are concerned.[119] Registration essentially confers a bundle of benefits to replicate the traditional means of allocating social goods through marriage. A default regime could, under this line of reasoning, fail to account for all the possible forms that adult relationships might take, and could end up being both under-inclusive or over-inclusive.[120] This regime might be going too far if it were to ascribe the same benefits as marriage, regardless of an inquiry into

[114] Please note that I here stipulate a different definition of vertical caregiving, as including caregiving activities directed to children and ill people, toward which parties owe a legal obligation to support and care. When caregiving is directed to elderly and ill persons, the units might still be relevant for my analysis, as long as they are based on potential mutuality and the spontaneity of the bond (that is where no previous legal obligation of support exists).
[115] METZ, *supra* note 39, at 140.
[116] *Id*, at 136.
[117] *Id*.
[118] *Id*.
[119] *See* the review of the book TAMARA METZ, UNTYING THE KNOT (2010) by Elizabeth Brake, 30 PHIL. REV. 420 (2010), https://journals.uvic.ca/index.php/pir/article/viewFile/5375/1882 (last visited Jul 20, 2017).
[120] *Id*, at 420.

whether the parties are economically interdependent (as it should be the case with, *e.g.*, Social Security survivor benefits).[121] It could be under-inclusive if it were to confer just a limited array of benefits.

Before examining the relevant scholarship in this field, it is useful to offer a brief overview of the main advantage and disadvantage of a registration-by-design system. As to the former, the system prizes personal autonomy. Registration by design differs from by-default registration in that parties can, after registering their relationship, freely choose the beneficiary (or beneficiaries) upon whom they wish to confer benefits. Each benefit need not be assigned to the same beneficiary. Put differently, parties can "customize" the allocation of their subsidies and designate different beneficiaries. But the system does not excel in clarity and simplicity, as the proposal parsed out below shows. A registration-by-design system creates additional administrative burdens because there are no default rules, as with marriage and registration by default.

A number of scholars have developed interesting proposals for registration by design schemes. I examine here a proposal from Professor Laura A. Rosenbury, a prominent U.S. family law scholar.

In her famous piece "Friends with Benefits," she analyzes the care provided outside of the home, particularly that performed among friends.[122] She starts from the fundamental premise that people can perform multiple caregiving functions over time, and fluidity is inherent in family formations (other than marital or marital-like relationships.)[123] In order to protect and reflect these shifting networks of reciprocal care, she argues, family law has to introduce a mechanism that permits a person to assign some or all of the benefits traditionally attached to marriage to individuals of their choice: while a project to extend all marital benefits would be difficult to implement, a good starting point could be that to allow persons to designate friends as to specific benefits.[124] For example, a person could decide that joint health insurance benefits be shared with a sibling, that family and medical leave be given to a grandmother, and that hospital visitation rights be assigned to a friend.

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[121] Aloni, *supra* note 99, at 610.
[122] Rosenbury, *supra* note 32.
[123] *Id*, at 229-30.
[124] *Id.*

The main benefit of such an approach is that there need not be a comprehensive bundle of benefits and obligations that parties must accept as such, allocable to only one partner.[125] Rosenbury also requires that the allocation of the benefit(s) be done on a mutual basis, such that one receives caregiving benefits only as long as he or she accepts caregiving responsibilities.[126] This clearly makes the system more workable.

The benefits of self-designation are undoubtedly from an autonomy perspective. A registration by design (or similar system allowing for multiple, symmetrical designations that do not come in the form of registration) would be beneficial to the flourishing of queer formations that are nomadic and hardly find legal categories to reflect their complexity.[127] A flexible model could allow parties to this type of assemblage become more aware that their relationship is not a happenstance. Many new families are not aware that they are precisely a "family." The legal scholarship has explored at length the dynamic interplay between social facts and legal categories.[128] A thus-framed model would provide parties to queer assemblies with terms and concepts to frame their relationship.

Furthermore, registration by design or other similar approaches aimed at allowing multiple designations, would also eliminate legal definitions of "family" as long as they are no longer necessary for conferring rights. In this sense, the system could solve the risk of assimilation inherent in legal definitions.[129]

Similarly, legal scholar Erez Aloni, in laying out his proposal, named "registered contractual relationships" (RCRs,)[130] alluded to the fact that the ideal RCR should allow multiple legal designations. To this end he hints at the possibility that future information technology will facilitate the introduction of a system with multiple legal

[125] *Id*, at 231.
[126] Rosenbury, *supra* note 32, at 232.
[127] Frederik Swennen & Mariano Croce, *Family (Law) Assemblages: New Modes of Being (Legal),* 44 J. LAW & SOC'Y 532 (2017).
[128] *Id*.
[129] *See e.g.,* Frederik Swennen & Mariano Croce, *The Symbolic Power of Legal Kinship Terminology: An Analysis of 'Co-motherhood' and 'Duo-motherhood' in Belgium and the Netherlands*, 25 SOC. & LEGAL STUD. 181 (2016)*;* Lauren Berlant & Micheal Warner, *Sex in Public*, in ROBERT J. CORBER & STEPHEN VALOCCHI (EDS.), QUEER STUDIES: AN INTERDISCIPLINARY READER 170 (2003); Stacey Young*, Dichotomy and Displacement: Bisexuality in Queer Theory and Politics*, in SHANE PHELAN (ED.), PLAYING WITH FIRE: QUEER POLITICS, QUEER THEORIES 51-74 (1997).
[130] I included a reference to this proposal, notwithstanding its alleged "contractual" nature, since the Author refers to the possibility of registering based either on a contract or on a form prearranged by the administration. In the latter case, the system would not differ from the Colorado's scheme, COLO. REV. STAT. § 15-22-105 (2016), and could thus be subsumed under a registration, rather than contractual, model. Aloni, *supra* note 99, at 608.

designations because it will enhance the administration's ability to check who has been designated and for what purpose (thereby overcoming the main shortcoming of designation by design systems— the scarce administrability.)[131]

In both cases questions are left open as to how to design a workable proposal. How should beneficiaries be designated? Would the appeal of any such proposal be limited for administrability reasons? What would be a viable way for designating different beneficiaries for different benefits and for the administration to check who is the one that has been conferred *that specific benefit*? Should parties still be allowed to have multiple beneficiaries as to the *same benefit* and to what extent?[132] If so, while viable for non-costly benefits, such as hospital visitation, major concerns could surely be raised for costly programs, such as survivor pensions or health care benefits, which advise against considering this option.

I believe that the registration-by-design model is underdeveloped because current proposals fell short of answering the questions above. While the model is appealing for its emphasis on flexibility and personal autonomy, it requires further research.

4.3. A tertium genus?

If one thinks of registration by default and registration by design as two Manichean opposites it makes sense to inquire into whether a third option exists within the macro-category "registration." However, I suggest thinking of the registration-by-default and registration-by-design models as the two extremes of a continuum. An ideal system could come with default rules that are supplemented by a robust opt-out regime. It could allow parties to choose which *benefits* to confer, despite allowing the designation of only one beneficiary. This system, despite being closer to a registration-by-default model shares some valuable characteristics of registration-by-design models, especially the flexibility of the assigned benefits.

[131] Aloni, *supra* note 99, at 608.

[132] Note that the main objection to polygamy is that there are financial constraints that prevent the possibility of conferring the same benefit to *several* people. Giving different benefits to different people, as long as you give them just to one person at a time, is a different situation which does not entail this problem.

An example of this category is the Designated Beneficiary Act in Colorado[133] that will be discussed further in Chapter IV. While the Designated Beneficiary Act does not allow the two parties to designate multiple beneficiaries, it nonetheless allows them to tailor the partnership agreement by choosing which benefits to confer.[134] This intermediate category strikes a reasonable balance between flexibility and administrability.

5. Mixed systems

Another way to recognize aspiring family units is to merge two general models into a hybrid one. This section will first address a system, developed in legal scholarship, that is based on registration and transformative redistribution through ascription. It will then briefly discuss the scheme currently in force in Alberta, which is also based on a hybrid of registration and ascription.[135] It allows parties to designate their beneficiary, but in the alternative also looks at the concrete features the relationship to ascribe the status, where the conditions are met. Both systems thus adopt both a formal and a functional approach to legal recognition.

The first proposal for providing benefits to "new" families is a system that draws on both registration and redistribution through ascription, which comes from Professor Nancy Polikoff. Like Professor Rosenbury,[136] Polikoff first asserts that people who want to formalize their relationship must be able to do so outside the narrow boundaries of marriage and conjugality.[137]

Under Polikoff's "valuing all families" approach, someone without a spouse or domestic partner could still register for benefits and indicate a "designated family member" recipient.[138] Her registration scheme, however, does not confer onto "new" families the same rights, obligations, and benefits that flow from marriage.[139] Polikoff identifies Vermont's law protecting "reciprocal beneficiaries" – a scheme

[133] COLO. REV. STAT. § 15-22-105.
[134] COLO. REV. STAT. § 15-22-105 (3) ("A designated beneficiary agreement shall entitle the parties to exercise the following rights and enjoy the following protections, unless specifically excluded from the designated beneficiary agreement: …").
[135] ADULT INTERDEPENDENT RELATIONSHIPS ACT, Statutes of Alberta 2002, c. A-4.5 [AIRA].
[136] Rosenbury, *supra* note 32.
[137] POLIKOFF, *supra* note 28, at 134.
[138] *Id*.
[139] *Id*.

that will be considered in Chapter IV – as the one that most resembles her approach (although she replaces the Vermont regime's a structural limitation of the eligibility for sole relatives to register).[140] Accordingly, registration benefits would be limited to health-related rights and abuse prevention.[141] Unlike the Vermont law, Polikoff also adds that when someone dies intestate, his/her "new" family member can inherit his/her estate, just the same as if the person were a spouse.[142] If a person dies without having designated a family member, she asserts that the government should investigate which beneficiary the person *would* have designated, had she envisaged the possibility of doing so.[143] This is a positive, rather than deprivative, example of pure ascription.

Another example concerns wrongful death statutes. Under Polikoff's plan, U.S.' wrongful death statutes should be based on the actual dependency of the deceased worker.[144] Polikoff's approach provides the example of the scheme currently in force in California where beneficiaries need to prove dependency of a stepchild or a minor who lived with the deceased for the 180 days preceding death.[145] The law calls for an inquiry into the actual dependency of the claimants (although with respect to a limited number of categories).[146] Polikoff asserts that under a "valuing-all-families" approach all possible family members (included parties to non-normative families) could show dependency.[147] Her proposal has not yet been implemented.

A second example of a hybrid system comes from a law in Alberta, Canada called the Adult Interdependent Relationships Act.[148] The system is a mixed one based on both a contractual and ascriptive model. It will be further analyzed in Chapter V. In brief, the law sets forth two different models for recognition: Parties can either sign a

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[140] VT. STAT. ANN. § 1301. Under her proposal, a person could register, regardless of blood-ties. POLIKOFF, *supra* note 27, at 135.
[141] *See* VT. STAT. ANN. tit. 15, §§ 1301-1306. Repealed. 2013, No. 164 (Adj. Sess.), § 2(b).
[142] POLIKOFF, *supra* note 28, at 134-135.
[143] *Id*.
[144] *Id*, at 195. Proof dependency refers to the need to provide proof that the claimant was financially dependent upon the deceased worker. It thus differs from the presumption of dependency that often attaches to spouses and children in such statutes, including the California statute (Cal. Civ. Proc. Code§ 377.60 (b) and (c) (2007)).
[145] *Id*. Under the California law, only these two categories are able to prove that at least half of their support derived from the deceased worker and recover damages for death.
[146] *Id*, at 206.
[147] *Id*, at 5.
[148] AIRA, *supra* note 154.

written agreement (contractual model), [149] or they can acquire legal status as a family if they either: (1) live in a three-year long interdependent relationship; or (2) are in a relationship "of some permanence," if there is a child (ascription).[150] Under Section (3)(2) of AIRA, however, persons related to each other by blood or adoption are not eligible for ascription and may only become adult interdependent partners by entering into a written agreement.[151]

The Consultation Report on the reform voiced concerns that an ascriptive system applying across the board would impinge on the freedom of choice of two cohabiting relatives or friends unwilling to commit.[152] However, contrary to the recommendations of the Consultation Report on the reform, Section (3)(2) of AIRA, setting out a duty to enter an agreement to become an AIP, only concerns relatives.[153] As a result, close friends and roommates who meet the eligibility criteria can have legal status ascribed.[154] Once again the downside of ascription is the limitation on personal freedom to decide whether to formalize a relationship. Policy-makers are now cognizant of this problem and, consequently, tend to limit the incidence of ascriptive systems.[155]

With these various models in mind, the dissertation now moves to select the most appropriate model for each jurisdiction and to formulate arguments to introduce it.

[149] AIRA § 3(1)(b).
[150] AIRA § 3(1)(a).
[151] Since these partnerships are formalized through a private contract, there are no statistics on the number of contracted AIPs since the enactment of the law.
[152] Anu Nijhawan, *Alberta's New Adult Interdependent Relationships Act*, 22 EST. TR. & PENSIONS J. 157, 171 (2003).
[153] *Id*.
[154] *Id*.
[155] *See* the "Alberta Family Law Reform stakeholder consultation Report", quoted in *id*, at 167-167.

PART II: SPECIAL PART

THE WAY FORWARD: BUILDING ARGUMENTS TO RECOGNIZE NEW FAMILIES

CHAPTER IV
UNITED STATES

Introduction

Notions of "family" are evolving at a fast pace in the United States. Yet, as chapter II shows, both private and public family law in the U.S. continue preserving marriage as the central institution to (i) identify the fundamental family unit in society, and (ii) allocate material and immaterial benefits.

This attitude is surprising in light of the radical changes that family arrangements have undergone in the last few decades. On the one side, is the "crisis" that marriage is experiencing. Not only are the rates of marital couples falling,[1] but marriage as a legal regime has also undergone profound transformations in the country, often labeled as "contractualization." The term, however, only partially reflects the shift that has occurred. Once marriage was a heteronormative institution, fully policed by the state and central to preserving social stability. It is much less so today: the regime is now informed by utilitarian ideals pursuant to which the parties are free to customize and terminate the relationship at will. While it is unrealistic to say that the public stake in marriage is eliminated, it is accurate to say that it is reduced and that nowadays marriage primarily serves the interest of the parties rather than that of the state.

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[1] *See* MARVIN B. SUSSMAN, SUZANNE K. STEINMETZ & GARY W. PETERSON (EDS.), HANDBOOK OF MARRIAGE AND THE FAMILY 528 (2013). This trend is not unique to the United States. The rates of marriage are falling on a global scale in Western countries. As to Canada, *see* JULIEN D. PAYNE & MARILYN A. PAYNE, CANADIAN FAMILY LAW 2 ff (6th ed., 2015); as to England and Wales, *see* C. Miller, *Number of people getting married is falling - and here's the reason why*, THE MIRROR, April 27, 2016; as to Italy, *see* ISTAT, MATRIMONI, SEPARAZIONI E DIVORZI, RAPPORTO ISTAT 2015 (2016), http://www.istat.it/it/files/2016/11/matrimoni-separazioni-divorzi-2015.pdf?title=Matrimoni%2C+separazioni+e+divorzi+-+14%2Fnov%2F2016+-+Testo+integrale.pdf (last visited Jul 29, 2018).

On the other hand, is the flourishing of new family arrangements. These include, but are not limited to, siblings, friends, relatives, unmarried conjugal couples, queer assemblies, and polyamorous relationships, and many more unions in which parties are economically and emotionally interdependent. A few data can help understand to what extent marriage is decreasingly appealing as a form of intimate connection in the United States. Empirically, there is an ever-increasing number of non-married couples; more children are born out of wedlock, and single parenting is a wide-spread phenomenon. According to the most recent data, only 47.5% of the US population above age 15 is married,[2] and the choice not to marry is becoming quite popular.[3] As predictable, changes in patterns of intimate connections are labeled as a "breakdown" of the marital family, a label which is manipulative in the sense that it puts a black mark on those changes.[4]

However, empirical evidence tends to show there is no longer such thing as a dominant family form in the United States.[5] The number of children living in the marital family is declining at the same pace as the number of children living with cohabiting partners or single parents is increasing.[6] Not only does family diversity has skyrocketed, so as the fluidity of family,[7] with many people divorcing, remarrying, recoupling in cohabitation arrangements, etc.

Once the two trends are flagged, one is left to question: Why should we care? What should we do with the finding that new families are developing outside of marriage, either due to the inability or the unwillingness to tie the knot?

The possible answers include: (i) nothing; (ii) preserving the centrality of marriage by broadening to the extent possible access to marriage; (iii) decentralizing marriage

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[2] U.S. CENSUS BUREAU, SELECTED POPULATION PROFILE IN THE UNITED STATES, 2016 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES 2 (2016), https://factfinder.census.gov/rest/dnldController/deliver?_ts=558088462976 (last visited Oct 23, 2018).

[3] U.S. CENSUS BUREAU, HISTORICAL LIVING ARRANGEMENTS OF ADULTS (2017), https://www.census.gov/data/tables/time-series/demo/families/adults.html (last visited Oct 23, 2018).

[4] MARTHA A. FINEMAN, AUTONOMY MYTH: A THEORY OF DEPENDENCY 74 (2004).

[5] Brigid Schulte, *Unlike in the 1950s, there is no 'typical' U.S. family today*, THE WASHINGTON POST, Sept. 4, 2014, https://www.washingtonpost.com/news/local/wp/2014/09/04/for-the-first-time-since-the-1950s-there-is-no-typical-u-s-family/?utm_term=.281cf9b68890 (last visited Mar 12, 2018).

[6] PEW RESEARCH CTR., PARENTING IN AMERICA: OUTLOOK, WORRIES, ASPIRATIONS ARE STRONGLY LINKED TO FINANCIAL SITUATION 15-16 (2015) http://www.pewresearch.org/wp-content/uploads/sites/3/2015/12/2015-12-17_parenting-in-america_FINAL.pdf (last visited Mar 12, 2018).

[7] *Id,* at 16.

as it is through privatization, without more (levelling down); (iv) decentralizing marriage by way of keeping it as an institution and at the same time extending the benefits to new families (through vehicles other than marriage.)

The central claim of the dissertation is that government programs that single out married couples for special treatment are not properly tailored to demographics and thus that marriage ought not to be the only vehicle to confer these benefits. This claim applies with equal force to the United States.

The first approach assumes that the *status quo* should be preserved. However, I will offer reasons to demonstrate that non-interventionism is not a viable option, since under current categories new families are either excluded from marriage/benefits or are able to enter a fictious and precarious "marital" relationship.

The approach sub (ii) intends to contend that marriage is not a viable option either. After the marriage equality struggle, one could think that new families should follow the same path and gain recognition through marriage, if any. I will offer several reasons to explain why marriage is not the best option, nor an actual option for new families.

The levelling-down proposal (privatizing and reducing benefits accruing through marriage without more,) is a proposal unique to the United States. It has been put forward in scholarship since marriage had, until the *Obergefell* decision, an unstable place in constitutional doctrine. Some scholars thus capitalized on this uncertain status to maintain that the United States could simply do without marriage and privatize benefits accruing from it.

The preferred approach is that under (iv) whereby new families are given recognition and legal protections are levelled up instead of being levelled down (as it would be under (iii)).

The proposed approach is the most consistent with the current trend in family law toward contractualization. Under such an approach, the public stake in marriage will be reduced in two senses: the decision to marry will no longer be driven by the need to gain the default set of material benefits attaching to it, but merely by symbolic and expressive considerations. Secondly, parties will no longer have to marry to formalize their relationship, but could chose more flexible alternative options.

In the section devoted to building a constitutional argument, I will then argue that, while more aligned with constitutional values, the fourth approach is far from being mandated by the constitution. It will thus consider the weak arguments that can be plead to extend protections under the constitution.

The most promising way to gain recognition for new families in the U.S. is that of building convincing policy arguments. The rich section on policy arguments further expands on the fourth approach consisting in maintaining marriage and introducing protections to new families. Given the absence of compelling constitutional arguments to this effect, I explore at length the potential policy arguments to adjust the relevant notion of family in government programs. The policy reasons for shifting the focus of current laws from a static notion of marriage to a dynamic notion of functional family are many. They mainly center around the developments occurred within (contractualization) and outside marriage (suggesting a shift toward family legal pluralism,) and on empirical findings vis-à-vis caretaking duty and resource pooling suggesting that marriage can often end up being an underinclusive and overinclusive mechanism to allocate benefits and privileges.

1. Legal remedies

To recap, the possible solutions include: (i) non-intervention; (ii) preserving the centrality of marriage by broadening access to marriage; (iii) "privatizing" marriage and simultaneously reducing the material benefits thereto attached; (iv) decentralizing marriage by way of extending the benefits to new families (through means other than marriage).

In the next sections, I analyze each solution in turn.

1.1. Non-intervention

The first solution, which I named "non-interventionist," is wholly unsatisfactory. I reject it flatly in that I believe that we do have a problem, which can no longer be ignored. The vast array of benefits married couples receive (*see* Chapter II) is no longer appropriate in light of the dramatic evolutions that have occurred "inside" and

"outside" the institution of marriage. I will outline such evolutions at length in section 3. Suffice it to say that the main objections that can be raised against the extension of legal protections, and any reform in general, are the following:

(i) provided that some family units are able to marry, since they knowingly decided to avoid entering the institution, why should they be entitled to legal protections?

(ii) even in the case of family units legally prohibited from marrying, they could resort to ordinary remedies such as contracts, to govern important aspects of the relationship.

A reply to these arguments will stress that people falling under (i) (those able to marry) will often face annulment on grounds of fraud; while, families under (ii) (legally prevented from marrying) can only obtain a very limited array of legal protections, and, where a protection is available, procedures turn out to be costly and cumbersome.

(i) *Any two people able to marry*. Any two consenting adults of the opposite and now same-sex can enter a valid marriage in the United States. Two intimate partners unwilling to marry will always face the objection "well, if you were to get the benefits you would have married."

This means that when allocating material and immaterial benefits to married couples the state is nudging such people into the marital relationship, regardless of the attributes of their relationship.

Let's consider a borderline example, namely the case of two adult friends. Such individuals are consenting adults deciding in their late 40s that they want to permanently support each other economically and emotionally. These friends are not interested in entering into an intimate relationship, let alone marrying a friend. However, given their invisibility in the eye of the law they might find it convenient to get married. Not only is this option available, but when retaining marriage as the only legal mechanism to allocate most benefits, in my view, the state is nudging these two people to enter a sham marriage, albeit in a subtle, non-verbalized way.

Yet, one should be aware that these two friends could always have benefits denied or incur in criminal sanctions and civil penalties on grounds of marriage fraud. We here do not refer to the contract-based doctrine of marriage frauds,[8] which leads to the

[8] Kerry Abrams, *Marriage Fraud*, 100 CAL. L. REV. 5-6 (2012).

annulment of the marriage, but to the different doctrines vis-à-vis sham marriages developed in welfare law, social security law, immigration law, etc. in the Twentieth century, with a view to "policing" the receipt of public benefits.[9]

Courts have deemed couples to be into a fraudulent, spurious marriage when such marriage was not "entered into in good faith." While the doctrine is well-known for its application in the field of immigration law, not only does it apply in this context,[10] but also whenever two parties enter marriage exclusively to gain a privilege flowing from it, such as a spousal evidentiary privilege,[11] or housing allowance.[12]

In any such case, the "major test is whether the couple intended to live together as husband and wife."[13] Courts, however, recognize that many reasons may motivate a person's decision to marry, along with "romantic" ones, such as family approval or tax law, and that policing entry into marriage is a mission impossible.

After all, there is a long-lasting debate on how the U.S. welfare system impacts people's marital choices. [14] For instance, anecdotal findings suggest that the decision to get married versus the decision to be a mere cohabiting couple is affected by the income tax penalty associated with marriage (*see* Chapter II, section 2.5.1.) Professors Whittington and Alm, who have extensively worked on the issue, show that the larger the tax penalty on marriage, the less likely an unmarried couple is to marry and the more likely a married couple is to divorce.[15] By contrast, the

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[9] *See, e.g*. United States v. Bolden, 23 M.J. 852, 854 (A.F.C.M.R. 1987) ("If the spouses agree to a marriage only for the sake of representing it as such to the outside world, they have never really agreed to be married at all.").

[10] Lutwak v. United States, 344 U.S. 604, 73 S. Ct. 481 (1953) (denying the application of the evidentiary spousal privilege in the context of immigration).

[11] United States v. Apodaca, 522 F.2d 568 (10th Cir. 1975) (finding no error in compelling a defendant's wife to testify, owing to the fact that the marriage, contracted only three days before trial, was a fraud).

[12] United States v. Hall, 74 M.J. 525 (A.F. Ct. Crim. App. 2014) (finding that appellant entered into a sham marriage to claim basic allowance for housing (BAH)). The Airforce Court's test to assess whether a marriage is valid is the following: "It is not the absence of a perfect or ideal 'love, honor, and cherish' motivation of the parties that renders the consequences flowing from the appellant's actions in the case before us criminal; rather, it is the *affirmative presence of a singularly focused illicit one*—an intent to fraudulently acquire a government payment stream—that does so." *Id*, at 530.

[13] *Lutwak,* 344 U.S.

[14] *See*, *e.g.,* Leslie A. Whittington & James Alm, *The Effects of Public Policy on Marital Status in the United States*, in SHOSHANA A. GROSSBARD-SHECHTMAN (ED.), MARRIAGE AND THE ECONOMY 75-76 (2003) ("The U.S. welfare system has probably generated more controversy about how public policy affects human behavior than any other program.").

[15] *Iid*, *Does the Income Tax Affect Marital Decisions?*, 48 NAT'L TAX J. 565-72 (1995); *iid*, *Income Taxes and The Timing of Marital Decisions*, 64 J. PUB. ECON. 219-40 (1997); *iid*, *For Love or Money? The Impact of Income Taxes on marriage*, 66 ECONOMICA 297-316 (1999).

single-earner family will be incentivized to enter marriage to capitalize on social benefits accruing in favor of the economically weaker party.

Given that many reasons, including financial reasons, motivate the decision to marry, the appropriate test requires proof a *specific illicit purpose*:

> "It is not the absence of a perfect or ideal "love, honor, and cherish" motivation of the parties that renders the consequences flowing from the appellant's actions in the case before us criminal; rather, it is the affirmative presence of a singularly focused illicit one—an intent to fraudulently acquire a government payment stream—that does so."[16]

On these facts, the marriage of the two friends would be precarious since they would not have entered marriage *also* based on tax-related reasons, but mainly or exclusively based on that reason. Hence, they will need to demonstrate before courts that they did not have a "singularly focused illicit" purpose to fraudulently acquire government benefits. For this reason, I believe that their marriage is structurally precarious.

In the end, in the case of any two people able to marry the problem acquires special significance, and centers on the reasonableness of the state objective in nudging people into marriage and having them run the risk of annulment.

(ii) *Any family unit unable to marry*. The universe of the "unmarriable" units is vast. There are a host of relationships nowadays that, despite being founded on mutual financial and emotional support, are non-existent in the eyes of the law. At present in the United States, bigamy is a crime.[17] Incestuous marriage between siblings, and between relatives – although within different degrees of consanguinity varying from state to state[18] – is also prohibited under the law, regardless of whether there is a sexual relationship (which is clearly not the case with non-conjugal relationships made up of siblings/relatives.) Other assemblies comprised of more than two persons

[16] *Hall*, 74 M.J.

[17] *See* Brown v. Buhman, 947 F. Supp. 2d 1170 (D. Utah 2013) (upholding bigamy in the "literal sense" and striking down the cohabitation prong of the Utah criminal statute, as contrary to the free exercise of religion under the I amendment, and Due Process under the XIV amendment).

[18] *See, e.g.,* In re Estate of MAY, 305 N.Y. 486, 114 N.E.2d 4 (1953) (applying the "contrary to natural law" exception to the applicability of the *lex loci* to a marriage contracted in Rhode Island, and valid under the state law, between an uncle and a niece, then deceased in New York, where such marriage was incestuous).

which, unlike polyamorous units, are not intimate, are also precluded from marrying.[19]

When an unmarried unit wants to enjoy some benefits, it will have to undergo costly and cumbersome procedures to remedy to its invisibility before the law. A party to the relationship, aware that his or her partner(s) is(are) technically a stranger before the law, has to figure out how to shoehorn such partner(s) into an existing legal category.

For instance, one party could adopt one of the partners. In both civil law and common law countries there was a widespread trend consisting in adopting the same-sex partner, before civil unions or other default regimes where introduced. Of course, you cannot adopt your brother, and even if you were to adopt two intimate partners, the relationship would sacrifice some of its features (*e.g.*, it will not be triangular anymore, since a legal relationship can be only established between the adopting partner and adopted one.) This passage is crucial to showing that it is not even possible to accommodate all sort of expressions of family pluralism by twisting existing legal regimes.

Two siblings living together can exploit the potential decrease in tax liability through having one of them filing as head of the household. However, this protection is only incidental and depends upon the fact that they are relatives. That is a notion of family based on blood ties. There is no inquiry into the functional attributes of familyhood, but a mere formal reference to blood ties. This consideration thus shows that a comprehensive approach is much more desirable: only a handful of benefits can be acquired based on the happenstance of meeting formal eligibility requirements (blood ties in the example here provided.)

Some entitlements can also be obtained through contracts (*e.g.*, through prenuptial agreements, or health care proxies.)[20] The problem here is two-fold. On the one hand, one cannot allocate health insurance benefits, nor the rights under the Family and Medical Leave Act, or spousal privileges, or social security benefits, or worker compensation benefits. Put differently, one cannot allocate in this way any of the public benefits here analyzed.

[19] United States Dep't of Agric. v. Moreno, 413 U.S. 528, 93 S. Ct. 2821 (1973).
[20] Laura A. Rosenbury, *Friends with Benefits*, 106 MICH. L. REV. 189, 231 (2007).

On the other hand, the possibility of entering into a sort of cohabitation agreement to govern some aspects of cohabitation, such as if and how to share financial resources within the family, is still an unsatisfactory response.

As the chapter on the models to protect new families shows, private law is cumbersome in that it requires parties to invest a lot of time and effort in agreeing. The literal cost in agreeing refers to both direct cost and legal fees required to enter into the contract, and the indirect cost of spending time, effort and energy in doing so.[21] Agreeing also bears an emotional cost, since every agreement brings about an emotional impact on parties, which have to articulate expectations that might not be ripe enough and which develop an adversarial mentality that might result in negative emotional feelings surrounding negotiations.[22] Agreements also suffer from an optimism bias. Optimism bias is a cognitive bias creating positive illusions on the length of the relationship and the capacity of parties to privately resolve controversies, should they arise.[23]

Hence, in the case of unmarried units legally prohibited from marrying, the current legal framework is wholly unsatisfactory, in that it only allows parties to twist current legal arrangements to gain a limited array of protections under the law through cumbersome procedures. An argument, therefore, can be made that a scheme with default rules be introduced, and that non-intervention is not the solution to the problem.

1.2. The unsuitability of marriage as an option

The second solution assumes that the marriage equality movement can be replicated by new family forms. Under this approach, new families such as polyamorous relationships, should seek to extend access to marriage. For instance, this is the path that has been chosen by some polyamorous groups in the United States.[24]

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[21] *See* Helen Reece, *Leaping without looking*, in ROBERT LECKEY (ED.), AFTER LEGAL EQUALITY: FAMILY, SEX, KINSHIP 119 (2015).
[22] *Id*, at 120.
[23] Anne Barlow, *Legal rationality and family property*, in JOANNA K. MILES & REBECCA PROBERT (EDS.), SHARING LIVES, DIVIDING ASSETS: AN INTERDISCIPLINARY STUDY 450 (2009).
[24] The groups "Loving More," and "Practical Polyamory" are but two examples of movements raising awareness on polyamory. On this subject, *see also* Steven Nelson, *Polyamorous Rights Advocates See Marriage Equality Coming for Them*, U.S. NEWS, June 29, 2015,

However, I contend that new families should not seek to align their political action with the marriage equality movement. When dealing with potential remedies to protect non-normative family units, marriage is a potential, but quite unsuitable option.

Its extension would be difficult to achieve as many non-normative families are barred from entering marriage and the prohibition is policed through criminal sanctions. Again, both bigamy and incestuous marriage are a crime in the United States, and a reform to the effect of decriminalizing them would require quite a substantial mobilization of people and resources.

I argue that, even if a reform of eligibility requirements could be achieved, marriage is not the ideal solution. Marriage is too marred with a history of exclusion, discrimination, and internal asymmetry. There is extensive literature on the point.[25] It is now so uncontroversial that heterosexual couples themselves are moving away from marriage in Western countries for precisely this reason.

A recent example can be illuminating. An English opposite-sex committed couple sought access to the civil partnership scheme. Access is restricted to same-sex couples in the country. The parties were not claiming denial of benefits or privileges (*e.g.* a shorter statutory period of separation to obtain divorce, as the kissing cousin case in Austria.)[26] They merely objected to marriage as a historically discriminatory institution: "[the applicants] have deep-rooted and genuine ideological objections to marriage based upon what they consider to be its historically patriarchal nature." On this reasoning, the U.K. Supreme Court upheld their claim.[27]

Additionally, marriage does not really seem to be an actual option for aspiring family units. Not only because of the vexed history of exclusion and discrimination backing marriage, but also, and more prominently, due to a fundamental distinction between

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https://www.usnews.com/news/articles/2015/06/29/polyamorous-rights-advocates-see-marriage-equality-coming-for-them (accessed Sept 30, 2018).

[25] *See, e.g.,* TAMARA METZ, UNTYING THE KNOT: MARRIAGE, THE STATE, AND THE CASE FOR THEIR DIVORCE (2010); Suzanne B. Goldberg, *Why Marriage?*, in MARSHA GARRISON & ELIZABETH S. SCOTT (EDS.), MARRIAGE AT THE CROSSROADS: LAW, POLICY AND THE BRAVE NEW WORLD OF TWENTIFIRST CENTURY FAMILIES 224 (2012).

[26] In *Ratzenböck and Seydl* the applicants sought access to the civil partnership scheme in that it conferred a lighter package of rights and obligations and a shorter statutory period to obtain divorce, as compared to marriage (ECtHR 27 October 2017, Application no. 28475/12 (*Ratzenböck and Seydl v. Austria*)).

[27] R (on the application of Steinfeld and Keidan) v. Secretary of State for the International Development (in substitution for the Home Secretary and the Education Secretary), [2018] UKSC 32.

emerging relationships and relationships that sought recognition in the past. From an argumentative perspective, claims for recognition of same-sex unions were made under the umbrella of the constitutional equality clause or substantive due process clause. A fundamental flaw lies in the fact that both claims were grounded on a spoken desire to be assimilated into marriage through identity-based arguments.[28] Those who are acquainted with the U.S. Supreme Court decisions on the decriminalization of sodomy laws and on same-sex marriage, will be also familiar with this type of reasoning.[29]

While same-sex couples, and even *de facto* couples, may have been successful in their quest and affirmation of an identity that demarcates the group, identity-based arguments are likely to be unserviceable for the many new family units. Such units not only are extremely heterogeneous, but, even if one wants to break up the heterogeneous non-normative family category into smaller pieces, it is crystal-clear that many families, with the notable exception of polyamorous relationships, do not feel, at least at present, that they belong to an identifiable group. Nor do they aspire to do so in the near future.

This assertion is corroborated by the relative invisibility of non-normative families in the public arena, and by the absence of lobbying social movements to further their emerging needs. To my understanding, the debate, at present, is confined to academia. This doesn't change the fact that, following an academic debate, groups will emerge and even develop a sense of shared identity and common destiny,[30]

[28] SIMON THOMPSON, THE POLITICAL THEORY OF RECOGNITION: A CRITICAL INTRODUCTION (2006) (suggesting that recognition as a political claim emerged from the collapse of democratic consensus during the late 1960s and was replaced by political movements that embraced multicultural notions).

[29] Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472 (2003). As to Canada, *see* Re Carleton University and CUPE (1988), 35 L.A.C. (3d) 96 (Ont. Arb. Bd.) (where parties stated that "are each other's sole domestic and sexual partners; spend their holidays and vacations together, share the common necessities of life; share all household responsibilities; and are economically interdependent ... [they] hold themselves out to the community as each other's spouse and intend to continue to live as each other's spouse.").

[30] Robert Leckey, *Families in the Eyes of the Law: Contemporary Challenges and the Grip of the Past*, 15 IRPP CHOICES 1, 31 (2009) ("Other kinds of relationship potentially relevant to family policy — for example, people "living together apart," persons with disabilities and their caregivers — may have neither the group identity nor the desire to assimilate into existing categories."). *See generally* Nausica Palazzo, *Identity politics e il suo reciproco: riflessioni giuridico-politiche sull'attivismo queer*, in ANNALISA MURGIA & BARBARA POGGIO (EDS.), PROSPETTIVE INTERDISCIPLINARI SU FORMAZIONE, UNIVERSITÀ, LAVORO, POLITICHE E MOVIMENTI SOCIALI 625 (2017).

thereby essentializing their identity from an epistemological[31] and political[32] point of view. However, at present, this is not the case and, given the structural fluidity of (most) non-normative families, the prediction is that they will not develop identity-based claims in the near future.[33] Argumentative strategies employed in the marriage equality struggle are thus wholly inapplicable.

Along with the argumentative aspect, non-normative units present many structural peculiarities: they do not always yearn for asymptotic assimilation into the dual, romantic, heteronormative relationship.[34] Some might also be deliberately fluid and non-exclusive; when nonconjugal, units also present qualitative differences which are sharp-cutting in terms of commitment, and economic interdependency.[35] I therefore conclude that the problem cannot be addressed by stretching eligibility requirements to enter marriage.

As to polyamorous groups, I alluded that, unlike other non-traditional families, they are forming some identity-based groups in the U.S. Thus, the question arises as to whether polyamorous families should pattern their action after the marriage equality movement. If one wants to pay due respect to the value of pluralism, then the response is that they should add this plank to their group's platform if they wish to do so. Yet, one is to be alert that the risk of assimilation into the marital norm, that has been demonstrated with respect to same-sex families upon their accession to marriage, is just around the corner.

Furthermore, I am convinced that these families too present many peculiarities in terms of fluidity, and type of commitment. I was surprised by the number of

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[31] As to the feminist scholarship, *see* the pioneering work of Nancy Hartsock, *The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism*, in SANDRA HARDING & MERRILL B.P. HINTIKKA (EDS.), DISCOVERING REALITY: FEMINIST PERSPECTIVES IN EPISTEMOLOGY, METAPHYSICS, METHODOLOGY AND SCIENCE 283 (1983). *See also* ALESSANDRA TANESINI, AN INTRODUCTION TO FEMINIST EPISTEMOLOGIES chap. 6 (1999).

[32] Nancy J. Knauer*, Gender Matters: Making the Case for Trans Inclusion*, 6 PIERCE L. REV. 1, 9 (2007).

[33] *See also* Leckey, *supra* note 30, at 31.

[34] The ideal of the romantic, heteronormative, dyadic relationship has been central in the critiques of the feminist, queer and family law scholarship in the past decades. *See* TAMARA METZ, UNTYING THE KNOT: MARRIAGE, THE STATE, AND THE CASE FOR THEIR DIVORCE (2010); Goldberg*, supra* note 25, at 224.

[35] Brenda Cossman & Bruce Ryder, *The Legal Personal Regulation of Adult Personal Relationships: Evaluating Policy Objects and Legal Options in Federal Legislation* 194 (Osgoode Digital Commons, 2000), https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=https://www.google.it/&httpsredir=1&article=1168&context=reports (last visited 24 Oct 2018).

polyamorous relationships I had the opportunity to meet and talk to. And, believe me, the structure their arrangement can have is much more complex than one could possibly think. For instance, each person can have relationships with others, e.g. A, and B, which yet are not in a relationship amongst them. Furthermore, the structure of each person's relationship can develop under the guise of a "ray," with each person at the end of one ray having in turn "rayfied" relationships with others. Now, can marriage possibly capture and accommodate this richness? I leave this question unanswered. But I have grounds to fear that the question shall be answered in the negative.

1.3. The "privatization" approach

One possible approach is to get rid of marriage altogether. "Privatization" refers to a specific proposal hammered out by followers of libertarianism, a political philosophy which seeks to maximize personal freedom and autonomy, amongst the others, in intimate relationships. Lately, prominent economists and legal scholars, as David Friedman,[36] Cass Sunstein, David Boaz,[37] argued that marriage should become a private contract, resembling other commercial contracts. Parties to the contract would thereto stipulate all relevant aspects of their relationship, such as asset distribution, allocation of taxes, obligations to fulfill in case of divorce, etc.

The proposals falling under this label vary as to the type of benefits that parties should receive. What counts for purposes of the present analysis is that "privatization" often comes with a reduction of (public law) entitlements.

I contend that this solution is not viable under the current constitutional framework. Proponents will have to grapple with case law entrenching marriage as the traditional and privileged institution, that the state has a legitimate interest in furthering, let alone preserving. They will face challenges in overcoming the contention that

[36] David Friedman, *Gay Marriage: Both Sides are Wrong*, IDEAS BLOG, December 9, 2013, http://daviddfriedman.blogspot.it/2005/12/gay-marriage-both-sides-are-wrong.html (last visited May 26, 2018).

[37] David Boaz, *Privatize Marriage. A simple solution to the gay-marriage debate*, SLATE, April 25, 1997, www.slate.com/articles/briefing/articles/1997/04/privatize_marriage.html (last visited May 15, 2018).

marriage confers expressive benefits, amongst which is dignity and sense of self-worthiness that this institution and only this institution is supposed to convey.

The same-sex marriage advocacy has had an undoubtable central role in entrenching this view.[38] The most notable examples of case law embracing this line of reasoning were the California Supreme Court decision *In Re Marriage Cases*,[39] scrutinizing the constitutionality of the domestic partnerships regime, and the Connecticut Supreme Court decision in *Kerrigan v. Commissioner of Public Health*,[40] scrutinizing the constitutionality of the civil union regime. In both cases, the regimes were conferring same-sex couples the *same* incidents of marriage. Nonetheless the courts held that exclusion from marriage amounted to an impermissible violation of the applicants' human dignity. For instance, according to the Connecticut Supreme Court, "although marriage and civil unions do embody the same legal rights under our law, they are by no means equal… [T]he former is an institution of trascendent, historical, cultural and social significance, whereas the latter most surely is not."[41] If marriage is "an institution of trascendent, historical, cultural and social significance," as case law consistently stresses, there is no room for its abolition.

As to the preservation of the material and immaterial benefits, the marriage equality cases have also made clear that when both the leveling down and the leveling up options are available to comply with the equality mandate, the latter is the preferred approach.[42] As the California Supreme Court noted in *In re Marriage Cases*:[43]

> "In view of the lengthy history of the use of the term "marriage" to describe the family relationship here at issue … there can be no doubt that extending the designation of marriage to same-sex couples, rather than denying it to all couples, is the equal protection remedy that is most consistent with our state's general legislative policy and preference."

[38] Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Kerrigan v. Comm'r of Pub. Health, 289 Conn. 135, 957 A.2d 407 (2008).
[39] In re Marriage Cases, 43 Cal. 4th 757, 76 Cal. Rptr. 3d 683, 183 P.3d 384 (2008).
[40] *Kerrigan,* 957 A.2d.
[41] *Id*, at para. 152.
[42] Pamela Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2027-29 (1998).
[43] *In re Marriage Cases*, 183 P.3d.

Regardless, it is conventional wisdom among anti-discrimination lawyers that the "normal" response in a discrimination claim is to level up protections rather than denying them altogether for all the parties involved. Also, levelling-up would most assuredly be consistent with the constitution should the abolition of marriage be backed by discriminatory reasons, such as denying access to same-sex or other non-normative couples.

The case law concerning desegregation in schooling lends support to this conclusion.[44] Segregated schools of Southern states considered shutting down public schools altogether to eschew compliance with the *Brown* desegregation mandate. In *Griffin v. School Board*,[45] the Supreme Court made clear that shutting down public schools runs afoul the Constitution. In the wake of Virginia's abolition of compulsory schooling in 1959, Prince Edward County replaced the public system with private institutions (entirely funded through private contributions.) The majority opinion, delivered by Justice Black, fell intentionally short of declaring a constitutional right to the delivery of the service, given the absence of a constitutional foundation for affirmative rights. However, it struck down the reform by referring to the discriminatory justification behind it.

Consequently, if attempts to abolish marriage are backed by demonstrable discriminatory purposes, there is a very slim chance that they would pass constitutional muster. When the abolition is also coupled with a reduction in the benefits, constitutional doctrine likewise lends support to the view that levelling-down is not the appropriate response under the constitution. Ultimately, these proposals seem to ignore the special place that marriage has acquired under the constitution, starting from pivotal cases such as *Loving v. Virginia,* striking down the ban on inter-racial marriages. I thus consider this option untenable.

[44] The "comparability" of the desegregation cases is enhanced by the following similarities: i. they arise from state action; ii. state action is undertaken under the police power capacity conferred to states by the X Amendment, as for marriage; iii. they originated from a federal judicial demand to perform a service (education) pursuant to the XIV, as it would be the case with same-sex couples (and the mandate included in *Obergefell*) iv. state action is intended to shut down the whole public service (to replace it with privately run schools), as it would be the case with the privatization of marriage.

[45] Griffin v. Cty. Sch. Bd., 377 U.S. 218, 84 S. Ct. 1226 (1964).

1.4. Extending protections to new families (through an area-specific approach)

As argued in the previous section, the approach consisting in extending rather than withholding protections is the most consistent with the constitutional mandate of equality. "Consistent" is clearly not synonym with "constitutionally-mandated." Thus, I believe that new families only have weak constitutional arguments, if at all, to push for the introduction of legal protections. By contrast, I contend that more convincing policy reasons exist to pursue change. Such reasons will be analyzed in section 3. Amongst the possible remedies are area-specific solutions, whereby new families are recognized for purposes of specific entitlements, and registration schemes whereby they are recognized through a comprehensive approach.

The next section deals with the constitutional arguments that can be put forward. I decided to focus on the constitutional reasons for introducing a comprehensive registration scheme. This decision allows me to draw on the recent *Obergefell* decision, to see whether it has significantly changed the traditional negative liberty-oriented constitutional doctrine, and whether this could lead new families to pattern their constitutional arguments after same-sex couples' ones.

The section devoted to building policy-based arguments assumes that the best way to introduce protections is also a comprehensive scheme which is ideally a registration scheme. However, I will strategically adopt an area-specific approach. The reasons for this strategy are two-fold. First, I believe that I can draw on a larger set of case law if choosing to adopt an area-specific approach. Second, anytime a legislature is faced with the possibility of introducing a comprehensive model for recognition, such as a registration scheme, it will have to decide which benefits should be included in the scheme. Therefore, the analysis concerning the inclusion of a specific benefit will likely extend to the cases where the legislature is introducing a comprehensive scheme. For instance, when a registration scheme is introduced the question arises of which government benefits are to be included in the package.

Thus, one should navigate the next two sections by considering that each of them accounts for different legal remedies: a comprehensive scheme in the case of constitutional arguments, and an area-specific approach (extending entitlements on a

case-by-case basis) in the case of policy arguments (albeit instrumental to introducing a comprehensive regime.)

2. A weak constitutional argument

The likelihood of introducing alternative regimes through constitutional litigation is relatively low, and the limits in this approach cannot be overstated.

Preliminarily, the proper venue is not the federal level. Decisions involving the relevant definition of family for purposes of allocating public and private law entitlements are vested in the state.[46] Therefore, the "battle" cannot be fought at the federal level without impinging on the basic tenets of federalism and vertical separation of powers. The *Obergefell* decision, and the line of cases on the fundamental right to marry (such as *Loving,*[47] *Zablocki*,[48] and *Turner*[49]*,*) decided under the XIV amendment of the federal constitution, are of little help. At issue here is not the right to marry (as it would be the case under the marriage equality approach,) but a mere non-discrimination right whereby applicants seek the introduction of *alternative* regimes.

A claim based on the Equal Protection clause alone,[50] unable to be combined with the fundamental rights' prong of the substantive Due Process, will not "carry the day."

As to the reasons for the low likelihood of success of constitutional claims, first of all, when seeking to extend material benefits to new families, the very same case law entrenching marriage as the traditional and privileged institution will come into play.[51]

New families will thus face challenges in overcoming the contention that marriage occupies a privileged position in the legal system, as a matter of tradition and social

[46] United States v. Windsor, 570 U.S. 744, 133 S. Ct. 2675 (2013), slip op., at 16-17 ("[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States … [T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations.").
[47] Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817 (1967).
[48] Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673 (1978).
[49] Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254 (1987).
[50] As explained further below, there are reasons to believe that even mere Equal protection claims can hardly be made by new families, given that they do not fall within any of the protected classes.
[51] *See supra* par. 1.3.

structure. Ironically, the mentioned case law aimed at stricking down alternative regimes to include same-sex couples in the definition of marriage, is likely to entrench the discrimination towards all the remaining non-normative families. The point has been raised by queer legal scholars and by activists in LGBT movements holding a so-called liberationist stance.[52] The marriage equality movement has thus played a significant role in reducing the likelihood of introducing family legal pluralism through constitutional litigation, due to their "obsession" with marriage.

Second, constitutional litigation is not appropriate in light of the constitutional model of protection of the family. The United States adopt a family privacy model. Notwithstanding the late emersion of a fundamental right to marry, family law has long been aimed at protecting the privacy of the members of the family as such, *i.e.* as individuals. As solemnly stated by the Supreme court in *Eisenstadt v. Baird,*[53] "[t]he marital couple is not an independent entity with a mind and hearth of its own, but an association of two individuals."

The family privacy model, as opposed to the communitarian model embedded in the European legal tradition,[54] emerges in many leading judgments protecting the right to abortion, contraception, family relationships and childrearing. It is also exemplified in the approach undertaken in the *Lawrence*[55] decision, decriminalizing private sexual conduct of homosexuals along Due Process lines. This constitutional approach, paired with the trend toward contractualization, has fostered "a newer individualism in the law of marriage that has undermined the old two-into-one status."[56]

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[52] *See, e.g.*, MATTILDA BERNSTEIN SYCAMORE, THAT'S REVOLTING!: QUEER STRATEGIES FOR RESISTING ASSIMILATION (2008); Jessica R. Feinberg, *Avoiding Marriage Tunnel Vision*, 88 TUL. L. REV. 259 (2013); Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, reprinted in WILLIAM B. RUBENSTEIN, CARLOS A. BALL & JANE S. SCHACTER, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 678, 693 (3rd ed., 2008) ("to achieve marriage equality, members of the LGBT community would continually have to tout the similarity of their relationships to those of non-LGBT individuals, and the community would consequently lose its queer identity, an identity that involved challenging oppressive gender roles and "pushing the parameters of sex, sexuality, and family.")

[53] Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029 (1972).

[54] Paolo Barile, *Eguaglianza dei coniugi e unità della famiglia*, in SCRITTI DI DIRITTO COSTITUZIONALE 175 (1967); *but see* Jean B. D'Onorio, *La protection constitutionnelle du mariage et de la famille en Europe,* REVUE TRIMESTRIELLE DE DROIT CIVIL 1 ff (1988) (arguing that unlike many coutries in Europe, France adopts a family privacy model aligned with the model in force in the United States).

[55] *Lawrence,* 539 U.S.

[56] Anita Bernstein, *For and against Marriage: A Revision*, 102 MICH. L. REV. 129, 138 (2003).

As a consequence, claims aimed at gaining affirmative entitlements for the "community of individuals" forming the family encounter a double-barreled problem: the individualism of the underlying model, and the general non-justiciability of affirmative rights (*i.e.* requiring state intervention for them to be fulfilled) under the constitution.

The *Obergefell* decision, legalizing under the Equal Protection and Due Process clause same-sex marriage operates a deviation from the second aspect concerning affirmative rights, yet not the first, concerning the individualism as opposed to the communitarianism of the model. Under *Obergefell* the right to marry is cast in terms of a Due Process fundamental liberty which is consistent with the family privacy model to the extent that it furthers personal autonomy, self-fulfillment and fundamental precepts of liberty.

By contrast, the deviation from the second aspect is patent as the practical implication of the decision is that of conferring a status upon new partners, along with the package of benefits accruing through it. As is well-known, "there are three partners to every civil marriage: two willing spouses and an approving State."[57] The triangular relationship requires the state to affirmatively step into the realm of private relationships and design a scheme to confer upon the parties rights and obligations.

There is no such thing as a negative freedom to marry (or to enter another family status.) The state could not merely refrain from a certain conduct. Unlike *Lawrence*,[58] where the state had merely to refrain from intruding in the same-sex couples' bedroom, and for that purpose a criminal law had to be struck down, here the states are called upon to open up their marital regimes, by amending laws and regulations confining the enjoyment of the benefits[59] of marriage to traditional beneficiaries.[60] In line with this fundamental tenet of the constitutional system, courts fell short of arguing in the past that same-sex couples were endowed with a right to marry, on both textual and doctrinal grounds.[61]

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[57] Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 798 N.E.2d 941 (2003).
[58] *Lawrence,* 539 U.S.
[59] *Windsor*, 570 U.S.
[60] *Obergefell*, 135 S. Ct. (Roberts J diss. op.) at 17 ("Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit.").
[61] Lewis v. Harris, 188 N.J. 415, 908 A.2d 196 (2006).

This point of recognizing same-sex marriages and hence granting affirmative rights drew the criticism from the dissenting justices. Justice Roberts raised objections based on the consolidated constitutional doctrine refusing to "allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State."[62]

The distinction between negative and affirmative rights is of substance, and it is too well-established in constitutional doctrine to be overstated.[63] This suggests that the treatment of same-sex marriage must be seen as an exception rather than the norm in constitutional law. Therefore, whenever applicants seek to extend the relevant definition of family within government programs, they will be confronted with the constraints constitutional liberalism imposes on requests to uphold affirmative rights, since their claim cannot be even backed by the doctrine on the fundamental right to marry.

I intend now to turn to the applicability of the substantive Due Process and Equal Protection clause to new families. The Due Process prong is unserviceable for the extension of entitlements through alternative regimes. The clause is not applicable to new statuses, precisely because they are "new." Not if we accept an understanding of Due Process as summarized in the famous remarks from Justice Oliver Wendell Holmes: "The law can ask no better justification than the deepest instincts of men."[64] Namely, once you have enjoyed something for a long time, it takes root in your being and you cannot simply get rid of it.

There is, however, a wrinkle to this argument that calls for caution: If the Due Process clause is applied to the relationship at stake rather than to the institution, the protection of relatives would be warranted by the Constitution. Given that that the boundaries of substantive DP are drawn based on history, one should not forget that extended families were the predominant model in the pre-industrialization era. Aware of this, the Supreme Court decision in *Moore,*[65] in stricking down a zone ordinance excluding a grandmother and grandson living together from the relevant definition of "family," held that the nation's history and tradition suggest that notion

[62] *Obergefell,* 135 S. Ct. (Roberts J diss. op.), at 18; (Thomas J diss. op.) at 7.
[63] Deshaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 109 S. Ct. 998 (1989), at 196; San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 93 S. Ct. 1278 (1973), at 35–37.
[64] Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).
[65] Moore v. E. Cleveland, 431 U.S. 494, 97 S. Ct. 1932 (1977).

of family go beyond the nuclear family and extend to "uncles, aunts, cousins, and especially grandparents."[66]

As to the Equal Protection, I shall clarify the different standards it can trigger. There is a scale of protections associated with each ground.[67] Pursuant to the rational basis test, where a ground is not invoked, a mere rational connection between the allegedly discriminatory action and the legitimate aim is to be established.[68] This standard is highly deferential in that a presumption of rationality operates in favor of state action. Thus, challenged laws under this standard of scrutiny are unlikely to succeed.

Second, there is an intermediate scrutiny, usually for discriminations based on sex, that triggers a less demanding standard as compared to strict scrutiny.[69] Law setting distinctions based on gender, must be narrowly tailored to achieve a compelling government interest.

Ultimately, the strict scrutiny test, which can be triggered when the distinction is based on sensitive ground as race or national origins,[70] is more stringent in that the

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[66] *Id*.

[67] Peter S. Smith, *The Demise of Three-Tier Review: Has the United States Supreme Court Adopted a "Sliding Scale" Approach Toward Equal Protection Jurisprudence?,* 23 J. CONTEMP. L. 475 (1997); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 343-65 (1949).

[68] The reasons triggering this less demanding standard can be many. *See* Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841 (1986), at 194 ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 105 S. Ct. 3249 (1985), at 443 ("Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation."); *id*, at 445-46 ("[I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect … it would be difficult to find a principled way to distinguish a variety of other groups … One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm.").

[69] Craig v. Boren, 429 U.S. 190, 97 S. Ct. 451 (1976).

[70] The factors considered in the decision as to whether strict scrutiny should be triggered are many, and are recalled in R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 J. CONST. L. 225, n.20 (2002). These factors can be derived frfom several decisions*, e.g.,* Skinner v. Oklahoma, 316 U.S. 535, 62 S. Ct. 1110 (1942), at 541 ("Marriage and procreation are fundamental to the very existence and survival of the race … We advert to [these matters] merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential."); United States v. Carolene Prods. Co., 304 U.S. 144, 58 S. Ct. 778 (1938), at 152 n.4 (considering whether the statute is "directed at particular religious, or national, or racial minorities," or reflects "prejudice against discrete and insular minorities,"); Frontiero v. Richardson, 411 U.S. 677, 93 S. Ct. 1764 (1973), at 686 ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth … ."); *id*, at 684-85 ("There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination … [Our] statute books gradually became laden with gross, stereotyped distinctions between the sexes …"); Plyler v. Doe, 457 U.S. 202, 102 S. Ct. 2382 (1982), at 220 ("[I]mposing disabilities on the … child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual

aim must usually be a compelling one, and the law or policy must be narrowly tailored and result in the least restrictive means which can be adopted to further the public interest.[71]

Now, the underlying non-discrimination approach embedded in the Equal Protection clause requires a status to be already in place. Therefore, the non-discrimination principle would be unable to compel states to introduce new regimes.[72] While in theory it could be conducive to extending regimes already in place such as domestic partnerships, new families do not fall into any of the protected classes. They are not a suspect nor quasi-suspect class. Therefore, a ultra-deferential rational basis standard would be triggered, which makes it unlikely for their claim to be uphold. Furthermore, the family privacy model would still pose an unsurmountable hurdle to this extension for the reasons stated above, especially the skepticism with which justices approach questions regarding positive entitlements.

In the end, the overall constitutional framework in the United States suggests that the recognition of non-normative relationship be pursued through policy-based arguments rather than through the Constitution. The task of the next section is to build such an argument.

3. Policy arguments

This section builds a policy-based argument to support the fourth approach, pursuant to which new families should be given legal protections, while preserving marriage as an institution.

A policy-based argument would suggest shifting the focus away from the marital family in the allocation of social goods and resources, given the concomitant changes that have occurred inside and outside the institution of marriage. Particularly:

(i) Marriage has changed as a legal regime.

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responsibility or wrongdoing." (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 92 S. Ct. 1400 (1972), at 175).

[71] Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355 (2006); Anita K. Blair, *Constitutional Equal Protection, Strict Scrutiny, and the Politics of Marriage Law*, 47 CATH. U. L. REV. 1231 (1998); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 529 (1997) ("Under strict scrutiny a law is upheld if it is proven necessary to achieve a compelling government purpose.").

[72] The same limit of equal protection has been noted in Canada by Robert Leckey, *Family Law as Fundamental Private Law*, 86 LA REVUE DU BARREAU CANDIEN 69 (2007).

(ii) Family legal pluralism is on the rise: marriage is no longer the sole option available to formalize a relationship, since it stands along with other options (so-called alternative regimes to marriage,) and a "functional" definition of family has been introduced either through statute or case law in specific areas of regulation.
(iii) As empirical research on caretaking duty and resource pooling suggest, nowadays marriage can be an underinclusive and overinclusive mechanism to allocate benefits and privileges in several situations.
This section intends to parse out such trends and findings in order. Its final claim is that each government program should be reassessed with a view to understanding if a valid state interest exists, and whether such interest supports an extension of eligibility requirements so as to include new families or otherwise.
Likewise, the introduction of an alternative regime with default rules, unless operating a full equation of the new regime with marriage, which I believe is not advisable, needs to undergo such thorough reassessment of programs and entitlements. Full equation is not advisable since the policy reasons for extending the relevant definition of family are not valid across the board, and do not warrant a wholesale extension of benefits to new families. The analysis thus proceeds by outlining recent developments in marriage as a legal regime, the rise of family legal pluralism in the U.S., and the empirical studies showing that marriage is no longer the appropriate vehicle to convey family benefits.

3.1. Recent developments in marriage as a legal regime

As to the trend occurring "inside" marriage, it can be noted that marriage as a legal regime no longer resembles an ideal norm. While once the state had an interest in channeling relationships within marriage for procreative purposes and for the sake of social stability, nowadays the natural law vision of marriage tends to be replaced by a utilitarian version pivoting on pleasure and personal liberty.
This normative shift reflected upon the legal regime of marriage, which moved from a set of mandatory rules policing entry, exit, and parties' behavior, to a set of much more flexible default rules giving paramount importance to autonomy and self-fulfillment. With ebbs and flows, the trend is now clearly distinguishable in that

marriage as a life commitment, exclusive, procreative relationship, governed by a set of mandatory rules, is slowly becoming a more flexible institution, which stands alongside other options.

The choice-based approach accepted by the legislator gives the parties the opportunity of tailoring the relationship to their needs and preferences, by departing from legal baselines.[73] The distinctions based on legitimacy[74] were struck down along the same lines of the doctrinal revolution in the field of abortion. Also, the introduction of divorce (challenging the marriage-for-life ideal norm,) the decriminalization of fornication and adultery (allowing sex outside of marriage) are but a few of the many ways in which the state loosened its grip on the traditional notion of marriage. This trend is also evidenced by developments in the field of contracts, such as the enforceability of prenuptial and post-nuptial agreements.[75]

Ultimately, one should mention that the treatment common law couples enjoy is no longer one of total invisibility.[76] Parties are usually considered to be in a common law marriage if four conditions are met:

(i) they have the legal capacity to enter a valid marriage;

(ii) they should enter an agreement to marry *per verba de presenti;*

(iii) they should usually cohabit;

(iv) they hold themselves out as husband and wife.[77]

However, the trend of common law marriages recognition is on the decline. At present this form of marital-like cohabitation is only recognized in a minority of states,[78] in New Hampshire for inheritance purposes only, and other states are gradually phasing it out by recognizing only common law marriages entered into before a certain date.[79] Furthermore, when recognized its consequences are variable,

[73] William N. Eskridge, *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1884 (2012).

[74] Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208 (1972) (stricking down state laws conditioning recognition of parental status for fathers upon marriage).

[75] Martha M. Ertman, *Marital Contracting in the post-Windsor World*, 42 FLA. ST. U. L. REV. 479 (2015).

[76] Eskridge, *supra* note 73, at 1933-34.

[77] Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709 (1996).

[78] The states recognizing at present common law marriage aer Alabama, Colorado, District of Columbia, Iowa, Kansas, Montana, Rhode Island, South Carolina, Texas, Utah. *Common Law Marriage Fact Sheet*, UNMARRIED EQUALITY, http://www.unmarried.org/common-law-marriage-fact-sheet/ (accessed Sept 30, 2018).

[79] This is the case of Georgia, Idaho, Ohio, Oklahoma, and Pennsylvania. *Id.*

usually including the need to go to courts for divorce, to be able to file taxes under "marital status," and to gain some public entitlements depending on the conditions of eligibility set out by statute.[80]

In other words, the public stake in marriage has been gradually stripped-down, since couples enjoy ample leeway in tailoring their relationships or in avoiding marriage altogether without becoming outlaws.

Under a utilitarian approach, the state will still be able to make a distinction, and thus to discriminate, between relationships. The distinction must, however, be supported by a reasonable objective, which can no longer coincide with mere moral disapproval (as was the case in the past.)[81] The new normative framework suggests that the utilitarian approach carries an unprecedented baseline of nondiscrimination.[82] The prediction that such a principle will be controlling in the next decades is also supported by a concomitant shift in legal scholarship showing a startling attention toward the harms current legal systems inflict to non-marital families.[83]

Not only does this baseline require that the self-fulfillment of parties be given paramount weight in balancing concurring interests, it also entails that the basis for allocating social goods cannot coincide with a bare promotion of the institution of marriage over other family forms.

3.2. Recent developments in family legal pluralism: Laws that recognize new families (other than same-sex couples or de facto couples)

Family law in the United States is already more plural than one would expect both in terms of statutes and case law. An increased family legal pluralism has resulted from

[80] Common law marriages are for instance recognized for purposes of immigration benefits.

[81] The concurring judgment of Justice O'Connor in *Lawrence* was clear in its rejection of the contention that criminalization or other state interventions in the field of private matters can be buttressed by mere "moral disapproval." *Lawrence,* 539 U.S. (O'Connor J concurring op.) ("This case raises a different issue than Bowers: whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. … Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons").

[82] Eskridge, *supra* note 73, at 1973.

[83] Goldberg, *supra* note 25, at 224.

both comprehensive reforms, aimed at introducing regimes alternative to marriage, and from area-specific reforms, carried out by statute or judicial decisions.

Both trends are outlined in turn for they demonstrate that we are "already" undergoing a revolution in the field of family law. These profound changes affect the societal and individual perception of the family and the way one decides to structure family networks. They convey the idea that unmarried families are no longer outcasts, and that they do "deserve" dignity and even a set of material benefits.[84] The implicit contention is that there is no way back from this shift.

3.2.1. Comprehensive schemes

This section will offer some examples of comprehensive schemes enacted by the states to extend a few incidents of marriage to non-traditional couples. The reasons behind the introduction are varied and tend to coincide with the necessity of recognizing same-sex couples through regimes other than marriage (thereby protecting the "sanctity" of marriage itself.) The examples are, however, illustrative of a non-uniform but steadfast trend leading to the decentralization of marriage mainly in health-related prerogatives, and in rare instances in the field of inheritance rights and workers' compensation benefits (Colorado and Hawaii.)

These innovative reforms, if on the one side aim at strengthening the link between marriage and expressive benefits (such as dignity, worth, etc.) they wear thin the link between marriage itself and material benefits. They demonstrate how the conferred rights and prerogatives are more properly to attach to a definition of family that is often grounded in the actual (not presumed) commitment toward one another.

The range of regulatory schemes clearly varies from state to state. As anticipated, they range from schemes extending only health-related decision-making to schemes giving wide recognition under both private and public family law. In none of these cases, however, non-traditional families have been equated to married families.

Domestic partnerships were first enacted at the municipal level (and adopted by corporations) and thus did not constitute a valid alternative to marriage, especially as far as public benefits are concerned. By contrast, civil unions and statewide domestic

[84] This aspect might contribute to the development of a sense of shared identity leading new family forms to gather and pursue their objectives through active lobbying.

partnerships constitute parallel schemes at the state level. Civil unions tend to be considered a marriage by another name.[85] Comprehensive statewide domestic partnerships can also confer all, or nearly all, the marital rights and privileges, recognized under state law to married couples.[86] Finally, other statuses called designated beneficiary schemes or reciprocal beneficiary schemes are available. Their difference mainly consists in the former being "tailor-made" (*i.e.* giving the parties the opportunity of conferring specific benefits upon each other) and the latter conferring a definite set of rights. In both cases the number of entitlements are more limited as compared to domestic partnerships and civil unions.

The schemes on designated and reciprocal beneficiaries constitute the most innovative pathways for adjusting the relevant notion of family to the landscape of committed relationships. The irony is that the schemes, despite being touted by pro-family organizations and conservative parties, have produced a dramatic pluralization of family law, generating a shift toward the unexplored land of the non-romantic, non-conjugal, or otherwise non-traditional family.

[85] Among the state recognizing civil unions, some have chosen to conceive it as a scheme for same-sex partners only, while others have opened it up to heterosexual couples as well. *See* Eskridge, *supra* note 4, at 1944-45.

[86] Currently, California, D.C., Nevada, and Oregon have enacted a domestic partnership registration system: CAL FAM CODE § 298; D.C. CODE §§ 32-701 to -710; NEV. REV. STAT. ANN. §§ 122A.200-10; OR. REV. STAT. ANN. §§ 106.300-40. By contrast, Maine, Maryland, New York, and Wisconsin grant limited rights and responsibilities to domestic partners. *See*: Marriage, Domestic Partnerships, and Civil Unions: An overview of relationship recognition for same-sex couples Within the United States., NATIONAL CENTER FOR LESBIAN RIGHTS (2015), http://www.nclrights.org/legal-help-resources/resource/marriage-domestic-partnerships-and-civil-unions-an-overview-of-relationship-recognition-for-same-sex-couples-within-the-united-states/ (last visited Jan 24, 2018).

FIGURE 1.

Families eligible to enter designated/reciprocal beneficiary schemes

	Same-sex couples	Unmarried conjugal partners	relatives	friends	Eligibility conditions
Colorado	x	x	x	x	Any two unmarried people, consenting adults, of sound mind
Hawaii	x*		x		Any two adults unable to marry
Vermont			x		Any two people unable to marry (or enter a civil union) and related by blood or by adoption
Maine	x	x		x	Any two individuals except within some specified degrees of consanguinity
Maryland	x	x		x	Two cohabiting individuals of any gender in a mutually caring relationship
D.C.	x	x	x	x	Any two unmarried individuals in a committed relationship

**before the introduction of same-sex marriage*

I will now offer a brief account of the designated/reciprocal beneficiary schemes and domestic partnerships that, despite their nomenclature, can be subsumed within the category of reciprocal beneficiary schemes for they apply to non-intimate partners (namely, the domestic partnerships in Maryland, Maine, and D.C.)

The statutes will be examined in descending order, starting from the scheme offering the broadest protection (Colorado) to the scheme offering the most limited one (Vermont.)

FIGURE 2.

Benefits attached to designated/reciprocal beneficiary schemes

	Social or tax benefits	Workers' comp	Health-related rights	Intestate rights	Property rights	Wrongful death comp	Other
Colorado	x*	x	x	x	x	x	
Hawaii			x**	x	x	x	Family and funeral leave, miscellaneous provisions
Vermont			x				Abuse prevention
Maine			x	x			
Maryland	x***		x				
D.C.			x				Family and funeral leave

**See C.R.S. 15-22-105(1)(a)*

*** Only visitation rights*

**** Tax exemption for property transfers*

3.2.1.1. Colorado Designated Beneficiary Act

The Designated Beneficiary Act of 2009 in Colorado confers any two unmarried persons some important protections in the field of estate and health-related decisions.[87] Pursuant to the law,[88] a person can be named a "designated beneficiary"

[87] Unlike the schemes in Hawaii and Vermont, the reform constituted a stepping stone to enhancing the protection of same-sex marriage, whose introduction was urged by the LGBT state advocacy group Equal Rights Colorado. The default regime, pushed forward by the Democratic Party, was born out of the concern that people often do not draft wills, power of attorneys, or other estate planning

by agreement (Designated Beneficiary Agreement or DBA.) Unlike Hawaii, where a person must be legally unable to enter a valid marriage to register, here there is no such condition. The law only requires that the two parties be consenting adults (at least 18 years old,) of sound mind (*i.e.,* legally competent to enter a valid contract). Therefore, two friends can register.

Although the scheme has been viewed as an estate planning tool for intimate (opposite-sex or same-sex couples) deciding to not marry or enter a civil union, its reach is much broader: the agreement can be entered by two unmarried friends or with any relative, including one's adult child.[89]

The range of relationships it covers is also the broadest one. It potentially covers unmarried conjugal couples, and non-conjugal couples comprised of relatives or friends. It is also relatively cheap in that the agreement is entered through a form that is easy to fill out and does not require parties to be assisted by an attorney.[90]

Upon designation, the party to a DBA can exercise some rights and be entitled to some protections, as specified in the agreement.[91] Therefore, the scheme is highly flexible in that parties can tailor it to their needs and expectations and confer benefits or privileges without a duty of reciprocity. Unless otherwise provided, the law conveys the following:

(1) "The right to acquire, hold title to, own jointly, or transfer *inter vivos* or at death real or personal property."[92]

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tools: "Beyond legal impediments, people often fail to plan for their own mortality." However, opponents to the bill argue that the broadest range of couples were included as a "fig leaf" to protect same-sex couples. *See* COLO. REV. STAT. § 15-22-102 (1)(b); Claire Trageser, *Designated beneficiary rules grant unmarried pairs decision-making power*, THE DENVER POST, June 30, 2009. https://www.denverpost.com/2009/06/30/designated-beneficiary-rules-grant-unmarried-pairs-decision-making-power/ (last visited Mar 14, 2018).

[88] COLO. REV. STAT. § 15-22-105(1).

[89] ELIZABETH A. BRYANT & ERICA L. JOHNSON, COLORADO HANDBOOK OF ELDER LAW § 14.6 (2006)

[90] COLO. REV. STAT. § 15-22-106.

[91] A sample beneficiary agreement can be found on the website of the City and County of Denver, https://www.denvergov.org/content/dam/denvergov/Portals/777/documents/MarriageCivilUnions/Designated%20Beneficiary%20Agreement.pdf (last visited Oct 23, 2018). As it can be easily noticed, the document can be superseded by any other valid document concerning the specific right/entitlement: "This designated beneficiary agreement is operative in the absence of other estate planning documents and will be superseded and set aside to the extent it conflicts with valid instruments such as a will, power of attorney, or beneficiary designation on an insurance policy or pension plan. This designated beneficiary agreement is superseded by such other documents and does not cause any changes to be made to those documents or designations."

[92] COLO. REV. STAT. § 15-22-105 (1)(a).

(2) The right to receive public employees' retirement benefits;[93] insurance policies for life insurance coverage; and health insurance policies or health coverage if the employer so decides.[94]

(3) The right to visitation by the other designated beneficiary in a hospital, nursing home, hospice, or similar health care facility.

(4) The right to act as a proxy decision-maker or surrogate decision-maker to make medical treatment decisions, as well as to act as a legal guardian.[95]

(5) The right to inherit real or personal property through intestate succession.[96]

(6) The right to receive benefits pursuant to the "Workers' Compensation Act of Colorado."[97]

(7) Legal standing to sue for wrongful death on behalf of the other designated beneficiary.[98]

The default regime is also the broadest one. It carries legal protections both in the field of private and public law. Not only does it include health-related decisions and hospital visitation rights, as in Vermont, it also covers intestate prerogatives, property rights, workers' compensation benefits, wrongful death compensation, and a specified list of public benefits, including retirement benefits for public employees and health coverage, whenever the private employers elects to do so.

3.2.1.2. Hawaii Reciprocal beneficiary scheme

Hawaii allows two parties which cannot enter into a valid marriage to designate each other as "reciprocal beneficiaries."[99] The Hawaii Supreme Court's decision in *Baehr v. Lewin*[100] was the first time a U.S. court ruled that excluding same-sex couples

[93] Pursuant to COLO. REV. STAT., Title 24 § 51-54.6.
[94] COLO. REV. STAT. § 15-22-105 (1)(c).
[95] COLO. REV. STAT. § 15-22-105(1)(d) and (f).
[96] COLO. REV. STAT. § 15-22-105 (1)(i). Clearly, the provision of an additional person as heir at law creates the right to challenge a will or trust of the decedent. It is also incumbent upon a personal representative to establish whether the DBA of the decedent was still valid and unrevoked. *See* BRYANT & JOHNSON, *supra* note 89.
[97] COLO. REV. STAT. § 15-22-105(1)(j).
[98] COLO. REV. STAT. § 15-22-105(1)(k).
[99] Hawaii Reciprocal Beneficiaries Act, 1997 Haw. Sess. Laws 383 (codified in part at HAW. REV. STAT. §572C (2008)).
[100] Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993).

from marriage was unconstitutional.[101] The case was then remanded to the trial court to determine whether the state action passed muster under the strict scrutiny, and the Court found it did not in 1996.[102] Pending the appeal of that decision, Hawaii voters passed a referendum that amended the state constitution to restrict the definition of marriage to opposite-sex spouses.[103] As a consequence the case was declared moot in 1999.

Nonetheless, the litigation served as a fuel to the enactment of the Hawaii's Reciprocal Beneficiary Act of 1997, which created the category of reciprocal beneficiaries.[104] The law was passed as a concession to the conservatives, who hoped that the introduction of a neutral scheme open to a wider array of couples would satisfy the complaints of same-sex couples.[105]

"Reciprocal beneficiaries" were therefore conferred a few benefits attached to marriage. The law mainly applies to relatives, as the parties must be consenting adults of "ancestor and descendant of any degree whatsoever, brother and sister of the half as well as to the whole blood, uncle and niece, aunt and nephew, whether the relationship is the result of the issue of parents married or not married to each other."[106]

By registering with the Department of Health, through an easy-to-fill form, these parties gain can a limited array of benefits that are enjoyed by married couples at the state level, including: legal standing to sue for wrongful death and domestic violence family status, property and inheritance rights (including the right to an elective share upon death), hospital visitation rights, family and funeral leave, miscellaneous benefits under state law, such as government vehicle emergency use, use to the facilities of the University of Hawaii, etc.

Yet, the most controversial part of the scheme was the extension of family health insurance benefits (both private and public) and the right to workers' compensation

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[101] *Id*; *see* Dee Ann Habegger, *Living in Sin and the Law: Benefits for Unmarried Couples Depending on Sexual Orientation?*, 33 IND. L. REV. 1000 (2000).
[102] Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235, at *21-22 (Haw. Cir. Ct. Dec. 3, 1996).
[103] HAW. CONST. Article I, § 23.
[104] Ian Curry-Sumner & Scott Curry-Sumner, *Is the union civil? Same-sex marriages, civil unions, domestic partnerships and reciprocal benefits in the USA*, 4 UTRECHT L. REV. 236, 243 (2008).
[105] *Id*, at 243; Eskridge, *supra* note 61, at 1938.
[106] HAW. REV. STAT. §572-1.

benefits to reciprocal beneficiaries.[107] This ambitious scheme was curtailed right after its enactment by the Attorney General (interpreting the worker medical insurance provision as not applying to private employers,) the legislature (refusing to fund this section of the law) and courts in several decisions.[108] Therefore, it never "got off the ground." Therefore, the statute at present confers only a limited set of benefits confined to private law, torts, visitation prerogatives, and family leave.

3.2.1.3. Domestic partnerships in Maryland, Maine, and D.C.

Some statuses can be included in the category of reciprocal beneficiary schemes, despite their nomenclature. Such statutes have been enacted in Maryland, Maine, and the District of Columbia.[109]

Maryland has introduced a scheme under the label "domestic partnership."[110] Under the Maryland domestic partnership law, two cohabiting individuals of any gender in a mutually caring relationship can register. Economic interdependence can be shown through a variety of items of proof, such as a joint bank account statement, or a property deed. Unlike Vermont and Hawaii, neither party can be related to the other by *blood* or marriage within four degrees of consanguinity. The notion of family adopted, while extended to non-conjugal couples made up of friends, bars the protection of non-conjugal couples made up of relatives or siblings. The statute

[107] Catherine L. Fisk, *ERISA Preemption of State and Local Laws on Domestic Partnership and Sexual Orientation Discrimination in Employment*, 8 UCLA WOMEN'S L. J. 267 (1998).

[108] *Id*. (reporting how a federal court, in un unreported decision, held that the Employment Retirement Income Act (ERISA) had the effect of preempting state law and thus that the state could not regulate private sector benefits plans to which ERISA applied).

[109] MD. SB 785 (2009); ME. REV. STAT. tit. 18-A.; D.C. CODE § 32–701. Wisconsin had a similar statute: the state has however shelved it since the delivery of the *Obergefell* decision and the introduction of same-sex marriage. The decision shows the genealogy of these schemes, born with an aim to provide an alternative to same-sex marriage (and implicitly to prevent its introduction in the state). With the passage of the Wisconsin 2017-2019 biennial budget, the WIS. STAT. § 66.0510 was introduced, preventing all municipalities, counties, and school districts from "offering employee benefit plan coverage to domestic partners of employees as of January 1, 2018." *See Wisconsin Budget Imposes Changes to Domestic Partner Coverage*, EMPLOYEE BENEFITS CORPORATION, October 10, 2017, http://www.ebcflex.com/Education/ComplianceBuzz/tabid/1140/ArticleID/528/Wisconsin-Budget-Imposes-Changes-to-Domestic-Partner-Coverage-January-1-2018.aspx (last visited Jan 24, 2018).

[110] MD. SB 785 (2009); MD. SB 566 (2008). Under Md. SB 785 (2009), parties are eligible if they "agree to be in a relationship of mutual interdependence in which each domestic partner contributes to the maintenance and support of the other domestic partner and to the relationship …".

confers a limited set of rights, such as hospital visitation rights, funeral and burial decisions, and tax exemptions in case of a property transfer.

In a similar vein, the Maine domestic partnership law allows any two individuals to register, while including a reference to the prohibitions on polygamy and to marry within some specified degrees of consanguinity, as applicable to married couples. The statute grants only some prerogatives in case of death of the partner. namely, rights of inheritance[111] and decisionmaking rights regarding the disposal of remains.[112]

Finally, the domestic partnership in D.C. are open to any two unmarried individuals in a committed relationship. The status extends to non-romantic relationships. This broader reach, as compared to marriage, was stressed by the Council of the District of Columbia Committee on Public Safety and the Judiciary with an aim to advocate against the repeal of the scheme, which after the introduction of same-sex marriage was deemed an unnecessary relic of the past.[113] The status confers limited rights, especially *lato sensu* health-related rights and privileges. These include visitation rights,[114] the right for the District employees to request funeral and family leave,[115] and to opt for self-financed family health insurance coverage.[116]

3.2.1.4. Vermont reciprocal beneficiary scheme

The Vermont scheme of "reciprocal beneficiaries," repealed in 2013,[117] applied to any two people unable to marry (or enter a civil union) and related by blood or by adoption. In 1999, the Vermont Supreme Court ruled that the exclusion of same-sex couples from the "statutory benefits, protections, and security incident to marriage" infringed the equal protection clause of the state constitution.[118] The Court decided to leave a wide margin of appreciation to the Legislature in fashioning the

[111] Specified under ME. REV. STAT. tit. 18-A.
[112] *See* ME. REV. STAT. tit. 22, § 2843-A.
[113] Council of the Dist. of Columbia Comm. on Pub. Safety & the Judiciary*, Report on Bill 18-482, Religious Freedom and Civil Marriage Amendment Act of 2009*, GAY & LESBIAN ACTIVISTS ALLIANCE, Nov. 10, 2009, http://www.glaa.org/archive/2009/b18-482committeereport1110.pdf (last visited Mar 12, 2018).
[114] D.C. CODE § 32–704 (1992).
[115] D.C. CODE § 32–705.
[116] D.C. CODE § 32–706.
[117] VT. STAT. ANN. tit. 15, §§ 1301-1306. Repealed. 2013, No. 164 (Adj. Sess.), § 2(b).
[118] Baker v. State, 170 Vt. 194, 744 A.2d 864 (1999).

appropriate remedy. The government eventually opted for civil unions restricted to same-sex couples, in an attempt to preserve the purity of marriage. In addition to introducing a civil union for same-sex couples only, the legislature added another layer of protection to confer minimum rights upon unmarried non-gay couples, with the effect of reducing the symbolic relevance of recognizing same-sex couples through civil unions.

The scheme was even more limited in scope as compared to Hawaii. It did not include intestate succession nor legal standing to sue for wrongful death. It also expressly prevented courts from construing the statute in such a way as "to create any spousal benefits, protections or responsibilities for reciprocal beneficiaries not specifically enumerated herein."[119] Upon registration, two persons were entitled to appoint the other as a proxy in decision making relating to anatomical gifts, disposition of remains, patient's bill of rights,[120] privacy for visits the Nursing home patient's bill of rights, [121] and to have hospital visitation rights.[122]

This scheme was avant-garde at the time of its adoption. In the context of the reciprocal beneficiary schemes, however, the Vermont law stood out for being limited only to health-related choices and protection against domestic violence. Social or tax benefits were not included in the scheme.[123] In any case, the statute proved unpopular, and few non-intimate partners registered before its repeal.[124]

[119] VT. STAT. ANN. tit. 15, § 1301(b) (1999).

[120] Pursuant to the Patient's Bill of Rights under VT. STAT. ANN. tit. 18 § 1852(3), and (14), the reciprocal beneficiary had the right to be informed about the diagnosis and prognosis whenever the other party consents or is incompetent to receive them; they also enjoy visitation rights and the right of continuous permanence (24 hours a day) with terminally ill patients.

[121] VT. STAT. ANN. tit. 13 § 7301(2)(N) ("If married or in a reciprocal beneficiaries relationship, [the nursing home resident] is assured privacy for visits by the resident's spouse or reciprocal beneficiary; if both are residents of the facility, they are permitted to share a room.").

[122] *See* VT. STAT. ANN. tit. 15, § 1301. The list does not include advanced directives for health care and end of life. VT. STAT. ANN. tit. 18, § 5263-5278 (2011 through Adj Sess) has in fact been repealed in 2005 (No. 55, { 9, eff. Sept. 1, 2005).

[123] Interestingly, in the case Embree v. Balfanz*,* 174 Vt. 560, 817 A.2d 6 (2002) the Vermont Supreme Court states that the reciprocal beneficiary is a "family," not merely a household member, for purposes of the applicability of the Vermont's Abuse Prevention Statute. This shows a gradual judicial updating of the notion of family.

[124] Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 592-93 (2013).

3.2.1.5 Summary

The described schemes are illustrative of the increasing family legal pluralism in the United States. They can be usually entered through a form that is easy to fill out (Colorado probably features the simplest scheme,) without the assistance of an attorney. The main shortcoming is that they are often confined to people legally unable to marry (such as siblings, relatives, and at the time of the adoption same-sex couples.)[125] However, Colorado seems again the most complete scheme in that no such restriction applies, and any two people are thus able to formalize their relationship.

The schemes laudably shift away the focus from the romanticized, sexual relationship, by excluding from their scope fidelity rights and duties. They ultimately tend to offer a set of prerogatives that mainly focus on health-related rights and decision-making prerogatives, and rights in the field of succession law. Colorado and Hawaii offer in addition to the foregoing workers' compensation benefits. Such schemes rarely include social security or tax benefits (Colorado and, to a much more limited extent, Maryland being two of the rare examples to the contrary.)[126] Therefore, they stop short of addressing the problem of redistributive justice achievable through government programs, and are only partial response to the problem.

The inclusion of cost-free prerogatives, such as decision-making prerogative vis-à-vis health or visitation rights, is rational and understandable from a public law perspective. The inclusion of private law rights, which can at most entail a loss in tax revenue, *e.g.* in the case of an intra-familiar transfer of property, is a bolder move which looks promising in terms of laying the foundation for including direct outlays from the state through tax and social security/welfare programs in the future.

3.2.2. Area-specific reforms

Family pluralism has also been enhanced on a case-by-case basis by judicial courts. Chapter II shows how several states have introduced a functional notion of family to

[125] This is the case of Vermont and Hawaii.
[126] Maryland, however, only recognizes the tax exemption for intra-familiar property transfers.

allocate workers' death compensation benefits, to allow recovery for infliction of emotional distress, and to compensate parties for the wrongful death of a family member. The change has been the result of either a judicial decision or of a legislative reform.

In some cases, it has resulted from a combination of both judicial and legislative reforms, as in the example that follows. In California, pursuant to the workers' compensation law introduced after the *Donovan* decision,[127] death benefits are payed to a spouse, children, or other dependents (which however must hold kinship with the deceased.) This approach is now also accepted in other states such as Arizona, Minnesota, and New Jersey, where the primary beneficiaries are presumed as dependent (usually the spouse and the children), and in Ohio, Georgia, and Colorado, where every beneficiary must show dependency.

In addition, many states include dependents among the persons qualifying to sue under wrongful death statutes. These include New Jersey, Virginia, Wyoming, and California.[128] The majority of states also confer legal standing upon a broad array of persons holding kinship to the deceased, such as domestic partners or designated beneficiaries, grandchildren, parents, siblings, or those entitled to inherit under state law. Again, albeit the presumption of dependence only applies to spouses,[129] the notion of family here adopted is much more "functional" than in other areas of law.

According to Professor Polikoff, the emphasis these statutes place on proof of dependency a is a good occasion to reflect on the objective of the law (compensate for loss of an economic provider,) and find definitions and measures carefully tailored to achieve this goal. For instance, the presumption of dependency that a spouse enjoys in many states disregards the fact that some married couples do not live together nor are financially inter-dependent, and therefore need not be compensated.[130]

When it comes to marital status discrimination in public accommodation, a similar (albeit much less marked) trend can be highlighted. A handful of states extend the protection of the anti-discrimination statutes to cohabiting couples and relatives.

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[127] Donovan v. Workers' Comp. Appeals Bd., 138 Cal. App. 3d 323, 187 Cal. Rptr. 869 (1982).
[128] In the case of California, the dependent must also reside in the deceased's dwelling.
[129] Note that Michigan, Illinois, and Maryland require proof of dependency by the spouse as well.
[130] Polikoff, *supra* note 33, at 198-99.

Among the twenty-one states which have enacted legislation in the field of housing, employment, or both,[131] only a few go beyond a narrow definition that includes married people, single individuals, and divorced couples. This startling narrow interpretation has been put forward either as a result of statutory definitions[132] or of courts' constructions[133] of these definitions.

There are some statutes which, by contrast, provide a broader definition encompassing cohabiting conjugal couples or blood relatives living together. An example of the former being Alaska, California and Massachusetts, and of the latter, Connecticut.[134]

Alaska has banned discrimination against non-married cohabiting couples both at the municipal and state level.[135] Similarly, courts in California and Massachusetts have outlawed discrimination respectively in the context of the Fair Employment and Housing Act, [136] and in leasing agreements.[137] The relevant schemes in Connecticut mandate that accommodation laws in the field of housing "shall not be construed to prohibit the denial of a dwelling to a man or a woman who are both unrelated by blood and not married to each other." Friends (since they are unmarried and unrelated by blood) fall, albeit incidentally, within the purview of the law.

Many changes went into effect also through a judicial updating. The most illustrative area is probably that of tort recovery, especially recovery of damages for infliction of emotional distress.

As seen in Chapter II, starting from the pioneering decision in *Graves v. Estabrook*,[138] New Hampshire courts adopted a functional notion of family in defining the third requirement of the foreseeability test (that the parties be "closely related.") Under the new approach, courts were directed to find that, regardless of

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[131] Lynne M. Kohm, *Does Marriage Make Good Business? Examining the Notion of Employer Endorsement of Marriage*, 25 WHITTIER L. REV. 563, 576 (2004).
[132] *See, e.g.,* NEB. REV. STAT. § 48-1102(12) (2010) (defining "marital status" to mean "the status of a person whether married or single").
[133] Manhattan Pizza Hut, Inc. v. N.Y. State Human Rights Appeal Bd., 51 N.Y.2d 506, 434 N.Y.S.2d 961, 415 N.E.2d 950 (1980) (applying the *expressio unius* to deny that the legislature intended to cover discrimination against non-marital cohabiting partners in the field of employment).
[134] CONN. GEN. STAT. ANN. § 46a-64c(b)(1) (2009).
[135] Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199 (Alaska 1989), at 1203.
[136] Smith v. Fair Emp't & Hous. Com, 12 Cal. 4th 1143, 51 Cal. Rptr. 2d 700, 913 P.2d 909 (1996), at 914-15.
[137] Attorney General v. Desilets, 418 Mass. 316, 636 N.E.2d 233 (1994).
[138] Graves v. Estabrook, 149 N.H. 202, 818 A.2d 1255 (2003.

labels, the parties were in a "stable, enduring, substantial, and mutually supportive" relationship. The approach has then been adopted in Hawaii,[139] Nebraska,[140] Ohio,[141] Tennessee,[142] West Virginia,[143] Pennsylvania,[144] and to a more limited extent New Jersey.[145]

Likewise, in 1989, a New York court dealing with succession rights in a rent-controlled apartment, construed the term "family" under the rent control code as encompassing family members who have not formalized their relationship.[146] In assessing the objective of the law, the Court concluded that the intended protection against sudden eviction should not rest on legal fictions, such as a marriage certificate or an adoption order. The Court set forth several criteria to go beyond "fictious legal distinctions" and account for the "reality of family life," amongst which is: "the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services."[147] The test is an objective one. It is also a test where the totality of the circumstances of a relationship is controlling, and thus absence of one or more of the foregoing aspects is not dispositive.[148]

While the case *Blake v Stradford*[149] in 2001 seemed to cast doubt on this doctrinal development, the principle that "[p]rotections against sudden eviction should not be determined by genetic history, but should instead be based on the reality of family life"[150] was then reaffirmed on many occasions.[151] This functional definition of

[139] Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974) (permitting a stepgrandmother to recover for NIED).
[140] James v. Lieb, 221 Neb. 47, 375 N.W.2d 109 (1985).
[141] Paugh v. Hanks, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983).
[142] Thurmon v. Sellers, 62 S.W.3d 145 (Tenn. Ct. App. 2001).
[143] Heldreth v. Marrs, 188 W. Va. 481, 425 S.E.2d 157 (1992).
[144] Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979).
[145] Dunphy v. Gregor, 136 N.J. 99, 642 A.2d 372 (1994).
[146] Braschi v. Stahl Assocs. Co., 74 N.Y.2d 201, 544 N.Y.S.2d 784, 543 N.E.2d 49 (1989).
[147] *Id*, at par. 213.
[148] Interestingly, the court justified this outcome by applying ordinary meaning as the controlling canon of construction. To that end, it quoted the (unusual?) Webster's Dictionary definition of "family" as "a group of people united by certain convictions or common affiliation." *Id*, at par. 212.
[149] Blake v. Stradford, 188 Misc. 2d 347, 725 N.Y.S.2d 189 (Dist. Ct. 2001).
[150] Williams v. Williams, 2006 NY Slip Op 26302, 13 Misc. 3d 395, 822 N.Y.S.2d 415 (Civ. Ct.).
[151] *Id; see also* DeJesus v. Rodriguez, 196 Misc. 2d 881, 768 N.Y.S.2d 126 (Civ. Ct. 2003).

family has then been codified in various provisions of the rent stabilization code and in the implementing regulations.[152]

3.3. Overinclusiveness and underinclusiveness of marriage

This section will argue for the inadequacy of marriage as the basis for allocating government benefits. As argued in the introduction of section 3, the focal point of the analysis is not the model of recognition, but rather the specific benefit(s) being conferred upon the family. For instance, when a registration scheme is introduced the question arises of which government benefits are to be included in the package. Likewise, in the case of ascription, where the status is ascribed to parties meeting the statutory requirements (regardless of whether they want to acquire the status,) the question of which benefits to confer – and more often to withhold[153] – arise. Therefore, albeit the focus is on a specific benefit, the policy argument here put forward can apply to each model alike.

The preference for a benefit-based focus derives from a second aspect. I reject the contention that new families should seek total equation with married couples, and thus systematic reassessment is warranted because it is necessary to review the whole package of benefits attaching to marriage in the first place. Paradigmatic shifts require massive reassessments. In addition, and on a more pragmatic note, many benefits could not or should not apply to non-marital families (*see* below). Therefore, a reevaluation of *all* the benefits conveyed through a scheme is not only advisable, but also needed.

A thorough reassessment should be carried out under a two-step framework, whereby one responds in turn to the following questions:

(i) What is the purpose of the program? Is there a valid rationale for maintaining it?

(ii) If there is a valid rationale, does the purpose of the program warrant an extension of the definition of "family"?

[152] Hazel Towers Co., L.P. v. González, 2013 NY Slip Op 51937(U), 41 Misc. 3d 1230(A), 981 N.Y.S.2d 635 (Civ. Ct.).
[153] Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276 (2014).

3.3.1. Purpose of the program

It is preliminarily necessary to assess the overall purpose of each program. Hence, no general answer can be provided. For instance, spousal immunity in evidentiary rules could fail at the very first stage. The rule is a relic of the past stemming from the doctrine of coverture. The doctrine posits that "[b]y marriage, the husband and wife are one person in law: that is, the very being or existence of a woman is suspended during marriage or at least is incorporated and consolidated into that of the husband."[154] Thus, immunities, along with common surnames and similar legacies of coverture, could be questioned on the ground that, absent an alternative legitimate purpose, coverture is no longer a valid state interest.

Most programs targeting married couples for preferential treatment, do so for no reason other than incentivizing marriage. Is this a valid state interest?

The traditional reasons for nudging people into marriage center on tradition and history (and perhaps moral judgments.) The interest in preserving marriage has been undoubtable in constitutional doctrine, until recently. Courts have been adamant in their decision to uphold such state interest when rejecting the extension of privileges beyond marriage,[155] and when refusing to change the consolidated definition of marriage.[156] Even in landmark cases leading to the introduction of legal remedies for non-marital couples, such as *Marvin v. Marvin*, establishing the enforceability of post-breakdown agreements entered by an unmarried conjugal couples, the court has promptly clarified that the decision is without prejudice to the undisputed state interest in preserving the institution of marriage.[157]

However, the liberty jurisprudence on same-sex couples' rights casts doubt on the validity of this interest when framed in terms of "preservation of a traditional notion of marriage." Specifically, the two most recent pivotal judgments in favor of same-

[154] WILLIAM BLACKSTONE, COMMENTARIES 442 (University of Chicago Press, 1979) (1765).
[155] N.D. Fair Hous. Council, Inc. v. Peterson, 2001 ND 81, 625 N.W.2d 551 (rejecting the contention that the N.D. code prohibiting discrimination in housing applies to unmarried couples).
[156] *Brown v. Buhman*, 947 F. Supp. 2d (upholding the constitutionality of the Utah criminal law on bigamy, while rejecting the religious cohabitation prong of the statute).
[157] Marvin v. Marvin, 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976), at 684 ("Lest we be misunderstood, however, we take this occasion to point out that the structure of society itself largely depends upon the institution of marriage, and nothing we have said in this opinion should be taken to derogate from that institution.").

sex couples, *Windsor*[158] and *Obergefell*,[159] seem to reject the contention that preserving a traditional understanding of marriage constitutes a valid state interest. First, in *Windsor* the Supreme Court reasoned that similar appeals to tradition were rejected in *Lawrence*;[160] then in *Obergefell* the Court argued that upholding a traditional notion of marriage is not a valid interest given that rights cannot be defined by who exercised them in the past.[161] Therefore, while the interest in preserving marriage is still valid in constitutional doctrine, the liberty jurisprudence started eroding it by crossing-out a specific variation, *i.e*. the preservation of a traditional understanding of the institution.

By contrast, solid and undisputed reasons buttress the fundamental state interest in nudging people into mutually caring relationships to avoid that they become public charges.[162] The interest in privatization of care posits that private individuals, rather than the government through public subsidies, should take care of other individuals where possible.[163] Not only is privatization a legitimate state interest, also both family and civil courts in the United States, tend to excessively spell out such interest, the result being quite distasteful. For instance, in *State v. Oakley*,[164] a Wisconsin court of appeals upheld the constitutionality of a condition prohibiting the father to procreate due to his unwillingness to financially support his previous children, and discussed at length the paramount importance of the interest in protecting the fisc.

Hence, while constitutional law seems to have undergone a phase where tradition and *mores* are regarded as an insufficient basis for perpetuating discrimination, case law

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[158] *Windsor*, 570 U.S.
[159] *Obergefell*, 135 S. Ct.
[160] Lawrence, 539 U.S.
[161] *Obergefell,* 135 S. Ct., at 2602 (quoting both *Loving v. Virginia* and *Lawrence v. Texas* as precedents supporting this view).
[162] *Windsor,* 570 U.S. (arguing that fiscal prudence is undoubtedly an important government interest).
[163] Examples in state case-law are countless: In re Hein, 253 P.3d 636 (Colo. App. 2010) (finding an abuse of discretion by a judge whom deviates downward to preserve paternal grandparents' eligibility for public daycare assistance benefits); State v. Oakley, 245 Wis. 2d 447, 629 N.W.2d 200 (2001) (upholding the constitutionality of a condition prohibiting the father from procreate due to the financial unwillingness to support the previous children). The interest is also incorporated in statutes governing custody awards: for instance, in D.C. one of the listed factors weighting in custody decisions is the following: "(P) the impact on Temporary Assistance for Needy Families, or Program on Work, Employment, and Responsibilities, and medical assistance." D.C. CODE § 16-914. Therefore, if the custody decision causes the parent's income to drop and consequently she becomes eligible for TANF, such eligibility weighs against her.
[164] *Oakley*, 629 N.W.2d.

consistently upholds the said interest in the privatization of care and, hence, in protecting the fisc. Such state interest weighs in favor of new families to the extent that their relationship is based on mutual care, and that recognition entails the establishment of a mutual duty of support and maintenance amongst the parties to the relationship.

Clearly, when it comes to public benefits and outlays, this interest seems to run counter their recognition. A recognition of families only for private family law entitlements clearly risks of shifting the burden of care from the state to private parties and might do no good to these families. Yet, there is no valid state interest at present that I can come up with to push for the introduction of public family law benefits. This point will need further research.

Meanwhile, a policy argument would thus emphasize the undisputed state interest in privatizing care, where applicable, and contextually deemphasize the interest in protecting/preserving marriage, reasoning from the slow erosion of mentioned interest brought about by the liberty jurisprudence.

3.3.2. Does the purpose warrant an extension of eligibility requirements?

At the second stage, one has to evaluate whether the current definition of family adopted by a government program or private law entitlement is suitable to achieving the purpose.

As Chapter II shows, the marital couple is the focus of the majority of U.S. government programs and private law entitlements. It could well be the case that such focus should be maintained, where, for instance, the program passes muster at stage one and the purpose consists in incentivizing marriage as such. In any such case, step one and step two would largely overlap, and if it passes muster at stage one, as it is likely to do, I can find no reason for it to not pass muster at stage two.

In many cases, however, under a functional approach, marriage is unlikely to pass muster at stage two, where an inquiry over the existence of a rational connection between the goal pursued and the means employed is carried out. I will try to argue below that marriage would be unlikely to pass muster in that it is both underinclusive and overinclusive.

Let us consider social security law. If stage one results in a finding that the purpose of a social security plan is to compensate the other member of the relationship for private informal and unpaid care, then, a pension scheme that provides a survivor's or retirement pension to a person who either married two months before death or retirement, or who did not actually provide care for the family, would be unreasonable and unable to fulfill its goals.

When it comes to tax regimes, a similar purpose can be found. Here the contention would be that the notion of family thereto adopted is underinclusive, because it does not account for non-conjugal families or other family arrangements outside marriage that, as empirical findings demonstrate, constitute innovative ways of sharing resources.[165] Hence, an argument can be made that the definition should be expanded to confer more favorable tax brackets to these types of families which are now outside the purview of the law.

In a similar vein, a functional test suggests that the relevant notion of family is overinclusive in the sense that it recognizes all married families as economic units. This is an undemonstrated claim, which recent empirical research tends to repudiate.[166] In particular, social scientists have shown that the main justification behind joint returns, asset pooling, and control sharing, is largely unsupported.[167]

By contrast, empirical research suggests that a significant percentage (30-50%) of marital couples do not share or pool resources very often.[168] The presumption on pooling marital couples enjoy thus is not grounded in reality, especially if one considers a sub-category of married couples: *i.e.*, married couples living apart. These spouses do not necessarily pool income and nonetheless are able to file taxes jointly.

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[165] Marjorie E. Kornhauser, *Love, Money and the IRS: Family, Income Sharing and the Joint Return*, 45 HAST. L.J. 63, 104-109 (1993) ("The rapid rise in nontraditional living arrangements calls into question assumptions about patterns of sharing resources, as well as the concept of family itself.").

[166] Ashley McGuire, *The Case for Merging Finances in Marriage*, INST. FOR FAM. STUD. (2015), available at https://ifstudies.org/blog/the-case-for-merging-finances-in-marriage (last visited Apr 23, 2018) (reporting that "31 percent of married or cohabiting couples have separate checking accounts, and 23 percent keep separate personal savings accounts," and that "closer to half of couples with joint accounts also maintain separate accounts.").

[167] *Id*.

[168] *Id*; *see also Kornhauser*, *supra* note 165*,* at 224. The Author advocates in favor of the abolition of the joint return altogether: "The joint return ought to be abolished ... If we wish to use the tax system to assist people who have taken on dependents, then Congress can enact tax provisions giving deductions or credits for dependents, be they adults or children" and Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605, 617.

Now, contrast this scenario with the possibility that of an unmarried cohabiting couple which pools resources. The cohabiting couple will not be able in the latter case to file a joint tax return. This is mainly a critique of the filing status, but the whole tax architecture, and set of exemptions/deductions, is based on similar assumptions, *rectius* presumptions.[169]

By way of conclusion, stage one seems to be the crucial stage. Once the focus shifts from preserving marriage to promoting privatization of care and avoiding public outlays, then, at stage two, recent findings on resource pooling and caretaking duties would cut in favor of an expansion of the legal definition of family.

3.4. Summary

While no general answer can be provided, the two-step analysis here proposed to assess each government program (for purposes of its inclusion in a default registration scheme or otherwise) shows that marriage can often be underinclusive and/or overinclusive. Where the legitimate interest is that of incentivizing mutually caring relationships for purposes of reducing the burden on the public purse, the concept of "economic unit" or functional family is much more suitable. As this section attempted to argue, while decreasingly solid (constitutional) reasons exist for nudging people into marriage, valid constitutional reasons and family law precedents buttress the fundamental state interest in nudging people into mutually caring relationships. Once the latter state interest is deemed as prevalent, the definition should be tailored to achieve the goal. For purposes of this, empirical findings will suggest that marriage can be both overinclusive, in that a significant rate of marital couples do not pool resources nor engage in caretaking duties, and underinclusive, in that it excludes many families that do possess these features.

This consideration acts in tandem with the contention that marriage as a legal regime is no longer supported by a natural law approach but rather by a utilitarian approach, and that the public stake was marriage significantly stripped-down in recent years.

[169] From the perspective of gender theory and family law scholarship, wealth transfer rules also suffer from these very shortcomings: Bridget J. Crawford, *The Profits and Penalties of Kinship: Conflicting Meanings of Family in Estate Tax Law*, 3 PITTSBURGH TAX REV. 249 (2005).

Furthermore, one cannot accept the contention that functional definitions in government programs are unworkable. Extensive findings vis-à-vis statutory enactments (such as designated/reciprocal beneficiary schemes) and judicial decisions constitute evidence that functional definitions can and do work. Nowadays there is a plethora of default regimes that new families can enter and case law and statutory enactments adopting such functional definition in specific areas of law and with regard to specific benefits.

Conclusion

The chapter has examined the different approaches to the problem of new families' invisibility in the United States. It has stressed that introducing legal protection for new families bearing certain attributes is the approach more aligned with constitutional values.

Aware that only weak constitutional arguments could be plead to seek the introduction of legal protections, the third section was devoted to building a policy argument to protect new families.

That section has urged law-makers to reassess each and any government program under a two-step framework. It has questioned the ongoing validity of the preservation of marriage as a valid state interest under the current constitutional doctrine. It is my view that the interest has been partially eclipsed but not eliminated by recent decisions. By contrast, the state interest in privatizing care is most assuredly unchallenged. Hence, when examining the purpose of the program, a policy argument worth your salt would emphasize the latter over the first. Second, when tailoring the definition of family to the relevant state interest, the section has urged the introduction of a functional test in assessing family formations, where appropriate (*i.e.,* where the interest at stake is that of avoiding that parties become public charges.)

The policy-based argument is aimed at supporting the view that marriage can be underinclusive and overinclusive in many respects when allocating social goods and resources. In addition to that, the concomitant changes occurring vis-à-vis the institution and outside marriage (pointing to a judicial and statutory expansion of the

notion of "family") suggest that the time is ripe to shift the focus from the marital family to the functional family. While no compelling constitutional reasons for pursuing change in this direction exist, this chapter has pointed to many recent trends in marriage as a regime, in family forms, in attitudes toward pooling and caretaking. Under a "totality of the circumstances" approach, thus, they are important clues that current eligibility requirements for public programs and private law entitlements are out of date.

The challenges ahead are many and no definitive solution exists to protect new families. However, in the United States the direction is clear and it must point to reassessing government programs in such a way as to extend their reach to those families actually, not presumptively, performing caregiving duties.

CHAPTER V
CANADA

Introduction

Canada is a unique comparison. Its demographics are unique in the sense that they reveal a marked trend towards the pluralization of family arrangements. For example, the rise of *de facto* couples is especially visible in Quebec.[1] A constant decline of marriage has also been noted nationwide.[2]

The last available census in Canada is illustrative of the changing landscape of families in the country. The limits of the census lie in its underinclusiveness, deriving from the fact that many families, despite being recognized as "economic families,"[3] are not captured by the census.[4] These include: persons living with other relatives, persons living with non-relatives (without being a couple,) persons living alone.[5] While this exclusion severely curtails the possibility of grasping the full extent of family pluralism, the available data are still relevant to the contention that new families are on the rise.

Amongst the families included in the census, called census families, are married couples, common law marriages, whether same-sex or opposite-sex, multigenerational families composed of grandparents, parents and children, and skip-generation families

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[1] Céline Le Bourdais & Évelyne Lapierre-Adamcyk, *Portrait des familles québécoises à l'horizon 2020 : esquisse des grandes tendances démographiques*, dans GILLES P RONOVOST ET AL., LA FAMILLE À L' HORIZON 2020 80 (2008).

[2] JULIEN D. PAYNE & MARILYN A. PAYNE, CANADIAN FAMILY LAW 2 ff (6th ed., 2015).

[3] The concept of economic family is broader than that of census family in that it includes all those persons "who live in the same dwelling and are related to each other by blood, marriage, common-law union, adoption or a foster relationship." *See* STATISTICS CAN., DICTIONARY, CENSUS OF POPULATION, 2016: ECONOMIC FAMILY (2017), http://www12.statcan.gc.ca/census-recensement/2016/ref/dict/fam011-eng.cfm (last visited May 20, 2018).

[4] STATISTICS CAN., FAMILIES, HOUSEHOLDS AND MARITAL STATUS HIGHLIGHT TABLES, 2016 CENSUS: PRIVATE HOUSEHOLDS BY HOUSEHOLD TYPE, 2016 COUNTS, CANADA, PROVINCES AND TERRITORIES, 2016 CENSUS – 100% DATA (2016), https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-fst/fam/Table.cfm?Lang=E&T=21&Geo=00 (last visited May 20, 2018).

[5] *Id*.

composed of grandparents and grandchildren. The Vanier Institute, processing these data, not only did notice that only 66% of families in Canada include a married couple (while 18% live in a common law marriage and 16% are lone-parent families,) but also that family structures continuously evolve, by achieving an unprecedented degree of complexity.[6] While in 2010 only 5.9% of couples were in a non-marital conjugal union, these couples now account for one fifth of all conjugal (dyadic) families in the country.

The Institute also noticed that, in 2016, 404,000 multi-generational households in Canada were registered, and that multi-generational families are the "fastest-growing household type since 2001 (+38%)."[7] Along this trend, there is another notable one consisting in an increasing number of one-persons households: in 2016, these accounted for 28.2% of all households, the highest share since the birth of the Confederation.[8] Furthermore, amongst all provinces, Québec stands out as the Province with the highest share of *de facto* couples and of one-person households (and with the lowest rate of marriage.)

As to families other than census families, there is a scarcity of data. Even Alberta, *i.e.* the only jurisdiction that enacted a comprehensive scheme to protect non-conjugal families, lacks data on non-conjugal couples.[9] Furthermore, Statistics Canada did not engage in a comprehensive research about polyamorous relationships. Yet, the Vanier Institute conducted an online survey that based on 537 valid responses pointed to the increasing relevance of the phenomenon. Amongst the respondents, almost two thirds were in a self-proclaimed polyamorous relationship, and the remaining third alleged that it was involved in some way in a polyamorous relationship in the last five years.[10]

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[6] VANIER INST. FAM., A SNAPSHOT OF FAMILY DIVERSITY IN CANADA (FEBRUARY 2018) (2018), http://vanierinstitute.ca/snapshot-family-diversity-canada-february-2018/ (last visited May 20, 2018).

[7] *Id*.

[8] STATISTICS CAN., FAMILIES, HOUSEHOLDS AND MARITAL STATUS: KEY RESULTS FROM THE 2016 CENSUS (2017), https://www150.statcan.gc.ca/n1/daily-quotidien/170802/dq170802a-eng.htm (last visited May 20, 2018).

[9] ALTA. L. REFORM INST., PROPERTY DIVISION: COMMON LAW COUPLES AND ADULTS INTERDEPENDENT PARTNERS, Final Report 112, par. 244 (2018) ("Although some respondents were concerned that non -conjugal adult interdependent partners would not intend to share property, we do not have data about the attitudes and expectations of non -conjugal adult interdependent partners.").

[10] VANIER INSTITUTE OF THE FAMILY, POLYAMORY IN CANADA: RESEARCH ON AN EMERGING FAMILY STRUCTURE 3 (2017), http://vanierinstitute.ca/polyamory-in-canada-research-on-an-emerging-family-structure/> (last visited Aug 20, 2018). *See also* Drake Baer, *Maybe Monogamy Isn't the Only Way to Love*, THE CUT, March 6, 2017, https://www.thecut.com/2017/03/science-of-polyamory-open-relationships-and-nonmonogamy.html (last visited Aug 20, 2018).

This picture, again, is not complete but points to an obvious trend toward the decline of the nuclear family composed of mum, dad, and children. The shift is also crystal-clear to the general public. Pursuant to a survey conducted in 2007, Canadians believe there is "no such thing a s a typical family."[11]

Canada is also strongly committed to recognizing family pluralism from a legal perspective, although it cannot be said that full legal pluralism has been achieved. Parties to a common law marriage,[12] whether same-sex or opposite sex, enjoy some of the protections as marriage, mainly through an ascriptive regime at the federal and provincial level. However, except for common law marriages, new family forms do not usually receive legal recognition, an exception to this being a fair-reaching registration scheme that includes non-conjugal couples in Alberta.

The extension of protections to non-marital families is the product of the anti-discrimination approach in force in the country.[13] The Canadian anti-discrimination system is multi-layered and rich. It mainly comprises the Canadian Charter of Fundamental Rights and Freedoms of 1982,[14] provincial Charters such as the *Charte des droits et libertés de la personne*[15] in Québec, the Canadian Bill of Rights,[16] a national and several provincial human rights codes, and the rights and freedoms guaranteed under common law. This rich system has produced important breakthroughs in the field of family legal pluralism.

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[11] VANIER INSTITUTE OF THE FAMILY, FAMILIES COUNT: PROFILING CANADA'S FAMILIES IV 26 (2010), www.vanierinstitute.ca/resources/families-count (last visited Aug 20, 2018), cited in ALTA. L. REFORM INST., *supra* note 9, at n.135.

[12] *See* for a definition of common law spouse R. v. Lomond, 2015 ONCJ 109 (CanLII), at par. 11 (a common-law partner is defined in federal legislation as a "person who is cohabiting with the individual in a conjugal relationship having so cohabited for a period of at least one year or having a child together, or entering into a cohabitation agreement.").

[13] For a comparison amongst the anti-discrimination and the equality approach *see* Christopher McCrudden & Sacha Prechal, *The Concepts of Equality and Non-Discrimination in Europe: A practical approach*, 2009 EUR. COMM'N, DIRECTORATE-GENERAL EMP., SOC. AFF. & EQUAL OPPORTUNITIES.

[14] Canadian Charter of Rights and Freedoms, 1982 (Schedule B to the Canada Act, 1982 [U.K.]), c. 11, repr. RSC 1985.

[15] Charte des droits et libertés de la personne, L.R.Q. 1975, c. C-12.

[16] Canadian Bill of Rights, S.C. 1960, c. 44. Assented on 1960-08-10. The fundamental limits of the instrument were its statutory nature, that turns it into a mere interpretative guide in construing laws, and the non-applicability to provincial governments, which did not participate in its enactment. Yet, in the 1980s, the Supreme Court recognized these instruments as having a constitutional nature, and thus as conferring the power to invalidate conflicting statutes. Respectively: Singh v. Minister of Employment and Immigration, [1985] 1 SCR 177, 1985 CanLII 65 (Supr. Ct. Can.), and Winnipeg School Division No. 1 v. Craton, [1985] 2 SCR 150, 1985 CanLII 48 (Supr. Ct. Can.).

First, the Canadian Supreme Court has consistently interpreted the equality clause as encompassing a prohibition to discriminate based on marital status. The prohibited ground has been carved out from the general prohibition over the "analogous ground[s] for discrimination." Such an interpretation added impulse to the modernization of family law, and led some non-normative relationships (*rectius*, couples) to slip under the radar of the law. That paves the way for a legal strategy which, again, could be unique in a comparative perspective: achieving more pluralism *through constitutional litigation* and, thus, through a liberal and large interpretation of the Canadian Charter of Fundamental Rights and Freedoms of 1982, in addition to the more conventional policy arguments to introduce protections.

A further path that could be followed pivots on the potential of the human rights codes.[17] The federal and provincial governments supplemented the constitutional safeguards enshrined in the Charter with a wide array of statutes protecting against discrimination.

Therefore, the strategies that could be pursued in Canada for achieving the objectives set forth in this dissertation are the following:

(i) pleading arguments in constitutional litigation.

(ii) pleading an extensive interpretation of Human Rights Codes before the relevant commissions/tribunals.

(iii) putting forward policy-based arguments before judicial courts.

The complex landscape of families and family legal pluralism in the country deserves special consideration with a view to crafting the legal remedy the better suits such a complex reality. Section 1 will thus be devoted to analyzing the current legal framework in the country. Section 2 parses out the menu of legal remedies to protect new families. Upon rejecting marriage as a suitable option, such section argues that, when policy-based arguments are employed, a comprehensive scheme is the best remedy to achieve equality. By contrast, the liberal interpretation of "service," along with the type of remedies available under human rights codes, suggest that the most viable legal remedy in the context of human rights codes is a protection-driven approach (that seeks to introduce protections on a case-by-case basis.) Likewise, in the

[17] FUNDAMENTALS OF HUMAN RIGHTS LAW IN CANADA 1 (Thomson Reuters, 2017).

context of constitutional litigation, the preferred remedy is that of seeking an extension of benefits on a case-by-case basis.

Sections 4-6 will move to crafting the arguments that could be put forward in each context, namely: a constitutional argument, an argument based on human rights codes, and a policy-based argument.

While I believe that the utility of a policy-based approach to reforming family law does not pose special problems, I preliminarily intend to problematize the approaches under (i) and (ii) in section 3.

The final section will attempt to tie all sections together and lay out the most viable argument to plead the adoption of the proposed remedy, namely a registration scheme open to new families.

1. A primer on the legal landscape

The section will now examine the current landscape of family legal pluralism in the country with a view to outlining what the specific challenges in the country are to extend legal protections to new families.

First, parties to a common law marriage, whether same-sex or opposite sex, enjoy some of the protections of marriage, mainly through an ascriptive regime at the federal and provincial level. While valid in general, this point is of course an oversimplification of the issue. There is a significant difference in the approach across provinces and across areas of regulation.[18]

Yet, this pluralism is controversial. On the one side, extended recognition has been praised as "accommodate[ing] the sexual revolution that brought into society the

[18] The legal framework of property division of separating couples gives a general idea of the variety of approaches in each Province. The jurisdictions that have legislated this area are British Columbia, Saskatchewan, Manitoba, Northwest Territories, Nunavut, Nova Scotia and the federal level (through the Family Homes on Reserves and Matrimonial Interests or Rights Act). Each of the relevant jurisdiction has for example different required periods of cohabitation to ascribe the status. British Columbia: 2 years of cohabitation. Saskatchewan: 2 years of cohabitation. Manitoba: 3 years of cohabitation or registration with the government agency under the Vital Statistics Act. Northwest Territories: 2 years of cohabitation or "relationship of some permanence" if there is a child. Nunavut: 2 years of cohabitation or "relationship of some permanence" if there is a child. Nova Scotia: domestic partnership declaration under the Vital Statistics Act. Federal: 1 year of cohabitation. *See* ALTA. L. REFORM INST., *supra* note 9, at par. 199.

different-sex cohabitation without marriage."[19] On the other side, the ascriptive regime in force in the jurisdiction has been the target of harsh criticism, in that it excessively sacrifices autonomy and privacy. These comments summarize both sides of the debate surrounding ascription in Canada. While the system has its limits, the tendency to equate civil marriages and common law marriages is a notable achievement.

The available menu of option for unmarried conjugal couples is quite vast in Canada. Couples are usually provided with the option of: (a) getting married; (b) entering a civil union; (c) performing a long-term common law relationship in common law provinces; (d) performing a *de facto* relationship in Quebec or a relationship that does not aim to be recognized as common law in the remaining provinces.

There is a *decalage* of protections associated with each choice. Civil unions are usually offered the same primary regime of marriage with a few exceptions; common law couples have gained significant rights and benefits in common law provinces (support obligations, compensatory allowances, etc.;) finally, *de facto* couples in Québec are legal strangers and no rights/benefits accrue through the relationship.[20] However, this might change soon.[21]

Unlike other countries, conjugal couples in common law provinces of Canada are not obliged to marry in order to gain government benefits. They enjoy an ample protection and can access marital benefits regardless of their marital status. The legal path to equality began in 1972, and started with the eradication of discrimination in the domain of private law. Starting from a first decision in 1972, unmarried couples obtained an extension of spousal support rights. A second important judicial victory followed and extended partners' obligations upon separation.

Meanwhile the federal government started granting government benefits to cohabitants (who had lived together for a certain amount of time, usually one to three years.) These

[19] NANCY POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 115 (2008).

[20] CENTRE PAUL-ANDRÉ CRÉPEAU DE DROIT PRIVÉ ET COMPARÉ, DICTIONNAIRE DE DROIT PRIVÉ ET LEXIQUES BILINGUES : LES FAMILLES 28 (2ème éd., 2016), s.v . "conjoint de droit."

[21] Comité Consultatif Sur Le Droit De La Famille, Alain Roy (prés.), *Pour un droit de la famille adapté aux nouvelles réalités conjugales et familiales*, MINISTÈRE DE LA JUSTICE DU QUÉBEC (2015).

included war veterans allowance[22] and old age pension.[23] In 1995, the Supreme court held for the first time that the definition of "spouse" in a car insurance policy run counter the constitution, and that the marital status discrimination was prohibited.

Following another landmark decision in favor of a lesbian partner,[24] the Parliament amended sixty-eight federal laws.[25] Spousal benefits were thereby extended to "common law partners," defined as dyadic couples who cohabit for at least one year. The Legislature also extended the definition of spouse in the context of criminal law, by referring to a gender-neutral common law partner.

Some differences persist in the field of private law, especially vis-à-vis the distribution of property.[26] Other notable victories, obtained by same-sex couples in Ontario, Quebec, and British Columbia, paved the way for the nationwide introduction of same-sex marriage in 2005.

Unlike other provinces, Québec did not extend the same protections of civil unions and marriage to *de facto* couples. In the much-awaited pronouncement of the Supreme court in 2013, *Quebec (Attorney General) v. A,*[27] the Court upheld the civil law tradition of invisibility of *de facto* couples. Unmarried couples in Québec can resort to contracts to govern their patrimonial regime. They can also bring an action for unjust enrichment if wronged upon breakdown of the relationship.[28] Yet, these remedies fall far short of what married couples and partners in a civil union may presumptively obtain. However, for purposes of some specific social statutes, they are equated to married and civil union spouses (*e.g.,* they can give consent to care in case of incapacity of the partner,[29] or bring a direct action in liability in case of wrongful death.[30])

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[22] Bill C-4, 1st Sess, 30th Parl, 23 Eliz II, 1974, amending the War Veterans Allowance Act, RS c W-5, c 34 (2nd Supp) (Royal Assent: November 1974).

[23] The drafting technique consisted in introducing an omnibus amendment to the Canada Pension Plan and Old Age Security Act: Bill C-16, Statute Law (Status of Women) Amendment Act, 1974, 1st Sess, 30th Parl, 23-24 Eliz II, 1974-5 (Royal Assent: 30 July 1975).

[24] M. v. H., [1999] 2 SCR 3, 1999 CanLII 686 (Supr. Ct. Can.). The decision concerned post-breakdown support payments.

[25] Modernization of Benefits and Obligations Act S.C. 2000, c. 12 (Royal Assent: 29 June 2000).

[26] POLIKOFF, *supra* note 19, at 113.

[27] Quebec (Attorney General) v. A, [2013] 1 SCR 61, 2013 SCC 5 (CanLII).

[28] Robert Leckey, *L'enrichissement injustifié, l'union de fait et l'emprunt à la common law dans le droit mixte du Québec*, forthcoming in 59 LES CAHIERS DE DROIT, 12-28 (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3214829 (last visited Oct. 20, 2018).

[29] Art. 15 C.C.Q.

[30] Abolition of the rule in Art. 1056 C.C.L.C.

Along with same-sex marriage, Quebec allows same-sex and opposite-sex unmarried couples to register;[31] the province instituted civil unions by amending the Civil Code and a number of provincial laws through the Act instituting civil unions and establishing new rules of filiation.[32] The registration scheme, however, turned out to be a failure, as witnessed by the low number or registered couples.

Nova Scotia introduced a registration scheme for unmarried couples as well, offering the same incidents of marriage with some exceptions, such as adoption.[33] Pursuant to the law, *two* individuals *cohabiting* in a *conjugal* relationship are eligible to file for registration as domestic-partners.

Manitoba followed, by enacting a registration scheme for common law couples, the Common-Law Partners' Property Act.[34] The remaining provinces and territories all provide for an ascription model, through which unmarried couples gain the same rights and obligations as married couples, with some exceptions concerning the distribution of property upon dissolution of the relationship.[35]

The problems associated with ascription have been deal with in Chapter III. It is especially problematic the fact that parties might be unaware of being ascribed a status upon cohabitation. The shortcomings associated with this regime are magnified due to the relative legal illiteracy of couples, who often drift into cohabitation and do not take into account the legal consequences flowing from it. The principal occasions when they might find this out are upon breakdown of the relationship, whenever a party is seeking support, or when an applicant is seeking social assistance, as provincial offices are entitled to investigate the relationship before fulfilling the party's request.

In addition, one should be aware of a trend, in common law provinces, to not stipulate the terms and conditions of the relationship, except for separation agreements.[36] A limited use of contracts might lead to the conclusion that it is appropriate to articulate

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[31] PIERRE-CLAUDE LAFOND & BRIGITTE LEFEBVRE (DIR.), L'UNION CIVILE: NOUVEAUX MODÈLES DE CONJUGALITÉ ET DE PARENTALITÉ AU 21E SIÈCLE (2003).
[32] S.Q. 2002, c. 6.
[33] Law Reform (2000) Act, S.N.S. 2000, c. 29, s. 45, adding a new "Part II: Domestic Partners" to the Vital Statistics Act, R.S.N.S. 1989, c. 494.
[34] S.M. 2002, c. 48. According to the law, one is considered common law partner after: 1. Filing for registration with the Vital Statistics; 2. Having lived in a *conjugal* relationship for three years.
[35] On the recent convergence of property entitlements regimes in Nunavut, Northwestern Territories, Manitoba, Saskatchewan, and British Columbia *see* Donalee Moulton, *Common law couples face changing reality*, THE LAWYERS WEEKLY, 6 April 2012, at 10.
[36] Winifred Holland, *Intimate Relationships in the New Millenium: The Assimilation of Marriage and Cohabitation*, 17 CAN. J. FAM. L. 114, 151-167 (2000).

parties' expectations through a default regime, in order to protect the most vulnerable party, absent an agreement. Ascription, as conceived in Canada, thus is a regime that shifts the burden of articulating expectations on couples aiming to avoid a forcible regulation of their relationship. If unwilling to be ascribed status, such couples must contract out of rights and obligations.

The mentioned country-specific analysis demonstrates that parties tend not to enter into contracts in the course of their relationship, except for separation agreements. This tendency is equally applicable to opting out contracts. Why would such couples be all of a sudden aware of the legal consequences of cohabitation and opt-out of the obligations flowing from it?

In the end, the current legal framework, while more cognizant and respectful of family diversity compared to other countries, is still largely unsatisfactory. The next sections will thus parse out the potential routes for change.

2. Remedies to overcome the marital privilege

2.1. Marriage as an unsuitable option

First, this section highlights the constitutional competence in regulating marriage and related matters. Then, it offers some remarks about marriage and the conclusion that it is an unsuitable option for new families in Canada.

The competence of the federal government to regulate registration schemes is unclear.[37] By contrast, marriage squarely falls within the powers of the Federation. As to the federal and provincial jurisdiction in marriage-related matters, both the federal and the provincial (or territorial) governments have jurisdiction. When skimming through the Constitution Act, 1867,[38] the *prima facie* relevant provisions are section 91(26), which confers upon Parliament legislative power over "Marriage and divorce," and section 92(12), which endows provinces with the power to regulate "The solemnization of marriage in the Province."

[37] L. COMMISSION CAN., BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE ADULT RELATIONSHIPS 121 (2001), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1720747&rec=1&srcabs=1524246&alg=7&pos=3 (last visited Oct. 20, 2018).

[38] Constitution Act, 1867 (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5.

However, the majority of enacted provisions in marriage-related matters falls under a different umbrella: section 92(13), pursuant to which provinces have the power to regulate "property and civil rights in the Province." A non-exhaustive list of matters covered by this section would include: filiation, adoption, matrimonial property, succession, guardianship, legitimacy, and spousal support.[39]

The scope of section 91(26), on "Marriage and divorce," was clarified as early as 1912. The Privy Council rendered a judgment on whether the Dominion Parliament had exclusive jurisdiction over all questions concerning the validity of the contract of marriage, including the conditions of validity.[40] The question also revolved around whether the provincial jurisdiction over the formalities necessary to authenticate the contract extended to the conditions of validity. On that occasion, the Council held that provinces had jurisdiction in respect of the solemnization of marriage, in such a way that might also affect the validity of the contract in their territory.[41]

The contours of the constitutional division of legislative authority were further clarified in a recent seminal case. The case concerned the constitutionality of "the Proposed Act," whereby Parliament, following the civil rights litigation, defined the legal capacity to enter a valid marriage. Under the new definition marriage was the "lawful union of two persons to the exclusion of all others." The Court thereto held the Act was *intra vires* Parliament,[42] as referable to the power under section 91(26) to determine the legal capacity to marry, and that the law was not unduly interfering with the provinces' powers over property rights and solemnization of marriage. In short, the Parliament of Canada can set the substantive conditions of marriage, referred to as the essential validity of marriage, and provinces retain the power over formal conditions (in French, *conditions de forme*.)

The present analysis proposes a comprehensive and principled approach to protecting new families. After 2004, it is clear that extending marriage to other families is *intra vires* Parliament. By contrast, it is not clear that an alternative regime to marriage could be enacted by Parliament. The power under Section 92(13) to regulate "property and civil rights in the Province," combined with the emphasis that these alternative regimes

[39] GUY RÉGIMBALD & DWIGHT NEWMAN, THE LAW OF THE CANADIAN CONSTITUTION 502 (2017).
[40] Reference Re: Marriage Act (Canada), 1912 46 S.C.R. 132, at par. 11.
[41] *Id*, at par. 33.
[42] Reference re Same-Sex Marriage, [2004] 3 SCR 698, 2004 SCC 79 (CanLII), at par. 16.

place on material benefits, as opposed to symbolic benefits, seems to suggest that provinces are better suited to address the problem. Hence, the task of protecting new unions through a comprehensive scheme should be assigned to the provinces.

As to the reasons why marriage is not the proper vehicle to protect new families, they are many and revolve around the inappropriateness of an incrementalist approach, and the inability of new families to dovetail with the marital ideal. The marriage equality struggle was the product of a deliberate choice to compromise on same-sex marriage as a stepping-stone to achieving further equality for other unions in the future. Many scholars and activists, while recognizing the shortcomings associated with an incremental approach, believed that these (partial) reforms could be conducive to equality for new families in the future. Under the mentioned approach, what would come next is extending marriage to polyamorous relationships.

However, incrementalism comes at queer families' expenses because it causes exclusion rather than inclusion.[43] Nibbling protections for self-identified discrete groups, as same-sex couples, further entrenches the marginalization of couples unable to fit dominant notions of familyhood,[44] marked by conjugality, exclusivity, and often childrearing. The marriage equality narrative entrenches marriage as a traditional and foundational institution in a way that harms unrecognized relationships.[45] With its emphasis on conjugality and intimacy as the central markers of deserving relationships, this narrative epitomizes the entrenchment of marriage and marital-like relationships and pushes legal recognition of new families one step further away.

By contrast, a principled approach that addresses from scratch the functional attributes of familyhood tends to be more interested in including rather than excluding all families. It is uncontroversial that marriage does not fit non-conjugal couples. First, I would not want to marry my sister,[46] while I would be willing to register her to assign some benefits. Second, marriage has a clear pedigree of exclusion and discrimination.

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[43] Nausica Palazzo, *Identity politics e il suo reciproco: riflessioni giuridico-politiche sull'attivismo queer*, in ANNALISA MURGIA AND BARBARA POGGIO (EDS.), PROSPETTIVE INTERDISCIPLINARI SU FORMAZIONE, UNIVERSITÀ, LAVORO, POLITICHE E MOVIMENTI SOCIALI (2017).

[44] *Id*.

[45] Nausica Palazzo, *The Strange Pairing: Building Alliances Between Queer Activists and Conservative Groups to Recognize New Families* (University of Michigan Public Law Research Paper No. 615, 2018).

[46] Cassie Williams, *Nova Scotia sisters who've lived together 38 years want survivor benefits*, CBC, October 28, 2016, http://www.cbc.ca/news/canada/nova-scotia/nova-scotia-sisters-living-together-benefits-pension-access-1.3826095 (last visited 26 May 2018).

While it has now been made gender-neutral, it can hardly be disentangled from conjugality and the other markers mentioned above. Not only can it hardly be disentangled from conjugality, but, due to the marriage equality movement, the link between the two is also now stronger than ever.[47]

This concern over the influence of conjugality can only be attenuated, yet not overcome, by the Supreme Court's decision to adopt a living tree principle in the interpretation of the meaning of marriage, "which, by way of progressive interpretation, accommodates and addresses the realities of modern life."[48] This approach is open to any adjustment required by evolving notions of equality. It expressly refuses to rely on frozen concepts and to inquire over a purportedly "natural" meaning of marriage. Yet, the considerations vis-à-vis the unsuitability of marriage for new families apply to Canada. Especially, the descriptive considerations around the fluidity, non-exclusivity, and structural non-heteronormativity[49] of these families suggest that they can hardly square with marriage, no matter what liberal and large interpretation is given to eligibility requirements.

2.2. Extending the protections through a comprehensive registration scheme

The current ascriptive system for common law marriages raises concerns in terms of autonomy. As seen, the system covers conjugal couples in many provinces and schemes at the federal level. The trend towards the customization of personal relationships and self-regulation of private matters is severely curtailed by an approach that ascribes a status that parties not necessarily want.

In addition to the concerns vis-à-vis autonomy, the approach is not comprehensive. It lacks consistency across areas in that it only applies in specific areas of law, upon deliberation by a public authority or (in the context of private law entitlements) upon request of one party. The same concern around inconsistency applies to registration

[47] Brenda Cossman & Bruce Ryder, *Fifteen Years Beyond Beyond Conjugality*, 30 CAN. J. FAM. L. 241 (2018) ("…from a federal legislative perspective, the aftermath of the Beyond Conjugality report has been precisely what it feared and the opposite of what it sought to achieve: the legal definition of coupled conjugality has been extended to the previously excluded and as a result has become more deeply entrenched at the heart of the state's approach to relationship recognition and support.").
[48] Reference Re: Marriage Act (Canada), 46 S.C.R, at par. 22.
[49] Laura A. Rosenbury, *Friends with Benefits*, 106 MICH. L. REV. 189, 231 (2007).

systems that are not comprehensive but that are designed to confer specific benefits. This unique partial registration system is in force in two provinces, Manitoba and Nova Scotia, and allows unmarried conjugal couples to register with the government agency to gain a few marital benefits, such as property division rules.[50]

The lack of consistency of both systems risks rendering couples "family" for some purposes and strangers for other purposes. However, some cases cast doubt on the viability of such an approach. For instance, as to the detachment of public law definitions from the private law ones, it has been argued that a disconnection is not permissible. It amounts to a violation of the Charter to be treated as a "spouse" in the context of social assistance, without being a spouse for purposes of private law. In *Falkiner*,[51] an Appeal court for Ontario assessed the constitutionality of the "spouse in the house" rule, establishing a rebuttable presumption that opposite-sex people living together were spouses. As a consequence of the application of the rule, the applicant, allegedly in a "try on" relationship with his boyfriend, had social assistance terminated upon reclassification by the Community and Social Services (due to the other "spouse" income.) The Court conceded that, when the policy maker choses a private law definition of "spouse," she cannot choose a different definition for another purpose, especially when the autonomous definition yields a negative impact on a vulnerable group. This decision casts doubt on the constitutionality of what has been named deprivative recognition, that is the trend in both Canada and the U.S. that leads to couples' recognition for purposes of *withholding* benefits or privileges.[52]

The benefits associated with a comprehensive registration scheme are thus many and range for the due respect for the need of autonormativity and customization of private relationships that connotes modern family arrangements. It is also congruent with the need to provide a comprehensive set of prerogatives across different areas of law. It is, ultimately, less intrusive in that it requires the parties to take affirmative steps to gain recognition, without a state intrusion into the realm of private lives. The perks of a comprehensive registration scheme have also been acknowledged by the Law Commission of Canada:

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[50] Family Property Act, CCSM c F25.
[51] Falkiner v. Ontario (Minister of Community and Social Services), 2002 CanLII 44902 (Ont. Ct. App.).
[52] Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276 (2014); Nicola Barker, *Rethinking Conjugality as the Basis for Family Recognition*, 6 OÑATI SOCIO-LEGAL SERIES 1249 (2016).

> "Like marriage, registrations have the characteristics of voluntariness, stability, certainty and publicity. They provide an orderly framework in which people can express their commitment to each other, receive public recognition and support, and voluntarily assume a range of legal rights and obligations. These regimes also provide for an orderly and equitable resolution of the registrants' affairs if their relationships break down."[53]

Thus, in addition to the reasons that warrant the introduction of a registration system in the United States, in Canada the system becomes necessary to remedy the distributive injustice associated with the partial and pure ascription system currently in force. A comprehensive registration scheme is the preferred legal remedy. The section devoted to building a policy argument will thus support the introduction of such a remedy.

2.3. Area-specific approach

As noted above, the extension of marriage could fall within the scope of the powers of Parliament. By contrast, given the jurisdiction over property and civil rights, alternative regimes to marriage most likely fall within the competences of the single provinces. Besides jurisdiction, there is no guidance on the constitutionality of introducing alternative regimes to marriage. Hence, the section that attempts to build a constitutional argument[54] will not address the compatibility with the Charter of introducing or extending such alternative regimes. In the constitutional context, the preferred remedy is to seek an extension of benefits on a case-by-case basis.

The same strategy was initially pursued by both same-sex couples and parties to a common law marriage. This area-specific or protection-driven approach, unlike the comprehensive approach, benefits from extensive case law. Especially, it can draw on several decisions regarding common law marriages/*de facto* couples and same-sex

[53] L. COMMISSION CAN., *supra* note 37, at 117.
[54] *See infra* par. 4.

couples. It also has the perk of avoiding the highly contentious issue of whether the constitution protects negative or affirmative rights.[55]

The same conclusion applies to human rights codes. The protections against specific acts of misconduct, combined with the liberal and large interpretation of "service,"[56] are conducive to framing claims so as to seek benefits on a case-by-case basis. Put differently, human rights codes are structured in such a way that claimants tend to challenge a discriminatory exclusion from certain benefits. Thus, a protection-driven approach is the preferred remedy in the context of human rights codes as well.

3. Charter v. human rights codes: a comparison

I here intend to problematize the approaches pleading respectively a Charter infringement and a violation of human rights codes.

It is necessary to start out by saying that s. 15 challenges are on the decline. In the first years of their Charter jurisprudence, Canadian courts have been hesitant about letting the suit to move ahead on equality grounds. Some alleged reasons for the decline cut against pursuing change through Charter-based claims.

Section 15 pleadings rates have been fluctuating quite a lot over the time. In the 1989-2009 period a decline from an average of 40 cases ruling on s. 15 per year, to 7 cases in the first semester of 2010, has been noted.[57] In the 2010-2013 period, again, has been noted an average of 23 cases per year disposing of s. 15 claims, with a strikingly low success rate of 7.2 per cent of cases.[58] However, it seems that recent rates show

[55] There is a long-standing debate around whether there are negative or positive Charter rights, ever since at least Eldridge v. British Columbia (Attorney General), [1997] 3 SCR 624, 1997 CanLII 327 (Supr. Ct. Can.) and Vriend v. Alberta, [1998] 1 SCR 493, 1998 CanLII 816 (Supr. Ct. Can.). For a brief overview of this debate *see*: Jonnette Watson Hamilton, *The Supreme Court of Canada's Approach to the Charter's Equality Guarantee in its Pay Equity Decisions*, ABLAWG.CA, July 12, 2018, https://ablawg.ca/2018/07/12/the-supreme-court-of-canadas-approach-to-the-charters-equality-guarantee-in-its-pay-equity-decisions/ (last visited May 28, 2018).

[56] *See infra* par. 5.

[57] This section draws heavily on Bruce Ryder & Taufiq Hashmani, *Managing Charter Equality Rights: The Supreme Court of Canada's Disposition of Leave to Appeal Applications in Section 15 Cases* n.4 (Comparative Research in Law & Political Economy, Research Paper No. 41, 2010).

[58] Bruce Ryder, *The Strange Double Life of Canadian Equality Rights*, 62 SUPR. CT. L. REV. 261, 270-271 (2013). The trend in s. 15 leave cases is even more illustrative: while in the period 1994-1999 such rate was 47.1%, in the five-year period 2004-2009 it went down to 22.0%. This declining rate is more visible when an s. 15 violation has not been established by the Court of Appeal. Under such circumstances, a leave is even more likely to be denied.

an increasing willingness of claimants to bring equality claims and of lower courts to consider them.[59]

Hence, it is not possible to identify a unified trend in section 15 pleadings. What is apparent, again, is that the Supreme Court has been since recently quite reluctant to accept equality-based challenges to laws. Some tentative reasons for the relative marginality of the equality jurisprudence in that period can be traced.

For one thing, litigation has been prevented by the states' "voluntary compliance" with the equality clause. In the aftermath of the enactment of the Charter, there has been a massive implementation at both the federal and state level, leading to amending the legislation to bring it in line with the Charter values. Later, after the Supreme Court recognized marital status[60] and sexual orientation[61] as analogous grounds for discrimination, states reacted by amending hundreds of statutes and regulations. This proactive attitude has played a key role in reducing litigation rates.

A second reason could be the enhanced familiarity of courts with "individualistic" rights. Comparatively, it has been shown that s. 7 claims (implicating a breach of the right to the security of the person,) raised along with equality claims, proved much more successful.[62] In a similar vein, when a violation of the equality rights and freedom of association protected by s. 2(d) of the Charter were simultaneously raised, the Court showed willingness to uphold the latter, not the former.[63]

Detecting the reasons for the Court's reliance on s. 7 and s. 2(d) is too much of an endeavor. What can be said is that there is a much greater comfort in the Canadian top

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[59] This point was raised by Bruce Ryder during the conference "Italo-Canadian conference: Celebrating the 150° anniversary of the Canadian constitution," held at the University of Toronto on 17 September, 2017.

[60] Miron v. Trudel, [1995] 2 SCR 418, 1995 CanLII 97 (Supr. Ct. Can.).

[61] *M. v. H.*, 2 SCR 418.

[62] *See* the recent cases: Carter v. Canada (Attorney General), [2015] 1 SCR 331, 2015 SCC 5 (CanLII) (finding that the criminal law on assisted suicide violated the security of the person under s. 7 of the Charter and that was unnecessary to move on to the equality claims), and Canada (Attorney General) v. Bedford, [2013] 3 SCR 1101, 2013 SCC 72 (CanLII) (finding that the criminal prohibitions on prostitution was in breach of the security of the person protected by s. 7). A shift to s. 7 claims has been strategically promoted by feminist and anti-discrimination legal scholars. *See, e.g.,* Kerri A. Froc, *Constitutional Coalescence: Substantive Equality as a Principle of Fundamental Justice*, 42 OTTAWA L. REV. 411 (2010).

[63] For instance, in the case Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia, [2007] 2 SCR 391, 2007 SCC 27 (CanLII), the issue concerned the limitation of collective bargaining rights which had a disproportionate impact on women, mostly employed in this sector. The court's finding was in the sense that the B.C. legislation run afoul the constitutional freedom of association, while it dismissed the s. 15 claim alleging a violation of the constitutional prohibition to discriminate on grounds of sex.

court in dealing with rights articulated in individualistic and universalistic terms.[64] One of the chief examples for this was the *Carter* case,[65] on medical assistance in dying. The case was originally framed both in terms of discrimination on the basis of disability and infringement of the right to life and security of the person. While the lower courts upheld the claims finding an actual discrimination toward those in need of assistance based on disability, along with a s. 7 violation, the Supreme Court discarded the equality claim. In a similar vein, in *Alberta v. Hutterian Brethren of Wilson Colony*,[66] the Supreme Court conceded that the universal photo requirement on the driving license was an infringement of the freedom of religion of those who objected to having their photographs taken on religious grounds (despite upholding the requirement under s. 1).[67] At the same time, the court discarded the claim that the requirement was a form of religious-based discrimination altogether.

However, the scope of s. 7 is different, due to its focus on the individual sphere, compared to s. 15, which engages with group and collective identities.[68] Similarly, s. 2(d) cannot act as a surrogate. Associational rights tend to be more process-oriented, compared to (substantive) equality rights, which have a more pronounced focus on redistributive justice.[69]

A third tentative reason for the relative marginality of the equality jurisprudence is perhaps the most important one: The central axis of litigation has shifted from constitutional claims to legislative claims. Human Rights Commissions, where statutory claims are filed, tend to be preferred over ordinary courts in that they are a less costly, conciliatory and faster means of protection. Second, Commissions are specialized in human rights law, thereby showing a much broader expertise in this field of law.

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[64] This consideration has emerged in a speech that Prof. Bruce Ryder gave at the "Italo-Canadian conference: Celebrating the 150° anniversary of the Canadian constitution," hosted by the University of Toronto on September 23, 2017, Toronto.

[65] *Carter*, 1 SCR 331.

[66] Alberta v. Hutterian Brethren of Wilson Colony, [2009] 2 SCR 567, 2009 SCC 37 (CanLII).

[67] *Id*.

[68] Under a s. 7 analysis, the holding of the case does not necessarily apply to other similarly situated people, where even marginal factual circumstances differ. Furthermore, one is to be aware of the theoretical hurdles traditionally associated with the doctrine of individualism, such as its heavy reliance on rationalism and depersonalization. RAINER KNOPFF, HUMAN RIGHTS AND SOCIAL TECHNOLOGY: THE NEW WAR ON DISCRIMINATION chap. 4 (1989).

[69] Jennifer Koshan, *Inequality and Identity at Work*, 38 DALHOUSIE L.J. 497 (2015).

Yet, human rights codes litigation is not a surrogate for constitutional litigation. When inequality is embedded in a statute, the proper remedy is that of striking down the law, rather than granting access to benefits on a case-by-case basis; second, the systematic inequalities that underlie the non-recognition of new families are not easily discernible in concrete cases. Hence, the most appropriate fora to disentangle them are the ordinary courts, endowed with the power of constitutional control.

However, two characteristics of the human rights codes make them suitable to the challenge. First, the codes apply to governmental actors and the services they provide, and this has led the human rights commissions to address the compatibility with anti-discrimination values of a broad array of rules or practices. Particularly, the expansion of the notion of service has been conducive to framing charter claims under the human rights code and to generate an overlap between the two jurisdictions.[70]

This must be combined with the quasi-constitutional nature of the human rights codes, which reflects inwards and outwards. Such a nature affects the rules of interpretation that judges are required to follow in interpreting the codes themselves (such statutes ought to be interpreted purposively, while the limitations to the rights are to be construed narrowly.) It also reflects outwards on the relationship with other sources of law. Since quasi-constitutional statutes are considered "more important than other laws,"[71] when a conflict with a statute arises, the code shall prevail and "supersede" the statute, "except where a contrary intention is clearly and unequivocally expressed by the Legislature"[72] (*i.e.*, except when the latter statute is a quasi-constitutional source as well.) This power to supersede conflicting laws renders the legislative claims much more powerful in disentangling inequalities, compared to ordinary legislative claims.

In the end, the constitutional approach still maintains its importance, since it is the main forum to disentangle systemic inequalities and the principal means to wipe away unconstitutional laws with *erga omnes* effects. Yet, there is a trend showing the courts' reluctance, at least until recently, to uphold s. 15 challenges.

By contrast, pleadings a violation of human rights codes proved much more successful. Applicants have benefited from the conciliatory and more specialized nature of these

[70] Claire Mummé, *At the Crossroads in Discrimination Law: How the Human Rights Codes Overtook the Charter in Canadian Government Services Cases*, 9 J. L. & EQUALITY 103 (2012).
[71] Insurance Corporation of British Columbia v. Heerspink, [1982] 2 SCR 145, 1982 CanLII 27 (SCC), at par. 178.
[72] *Id*.

tribunals, from the quasi-constitutional nature of the rules being enforced, and from the possibility of extending the services provided by governmental actors.

The potential and shortcomings associated with each anti-discrimination system suggest caution in finding that one system is preferable over the other. I would rather approach such systems as alternative routes for disentangling inequalities.

4. Constitutional arguments

The constitutional argument pivots on the equality clause enshrined in section 15 of the Charter. Be reminded that the proposed remedy in this case is not a comprehensive scheme, but rather an area-specific approach, that seeks to extend specific benefits through Charter-based litigation.

With a view to building such an argument the present section will first provide an overview of the general constitutional model of review vis-à-vis discrimination. It will then parse out the interpretation of the marital status ground. Ultimately, it will attempt to tie these paragraphs together and build a constitutional argument to protect new families.

4.1. An introduction to the evolution of the constitutional model of review vis-à-vis discrimination

The constitutional dimension of anti-discrimination in Canada is relatively "young."[73] Despite some courts having made an effort to shape an "implied bill of rights" to curb government action, and implement responsible government, it is the advent of the Charter that marks a watershed in Canadian anti-discrimination law. The Charter empowered courts to protect fundamental rights and freedoms throughout the Nation through "wide and unfettered discretion" under s. 24(1) of the Charter.

The protection under s. 15 is fairly broad and follows four trajectories.[74] It guarantees equality "before the law," as the Canadian Bill of Rights did previously. It also

[73] Under s. 32(2) of the Charter, the equality clause (s. 15) did not enter into force until April 17, 1985.

[74] Section 15 reads "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

guarantees equality "under the law."[75] Furthermore, "equal benefit of the law"[76] relates to a fair administration of government benefits, previously excluded from the scope of the Bill. Finally, the reference to the "equal protection of the law" recalls the Fourteenth Amendment jurisprudence in the U.S., thereby introducing in the Canadian system, to the extent suitable, the most innovative solutions reached by U.S. superior courts.[77]

But in order to appreciate its reach, one has to consider the "broad range of values embraced by s. 15."[78] Particularly, it prevents any possibility of a person being attacked in his or her essential dignity and being treated as "less worthy"[79] than any other person.

Now, the Canadian constitutional model of review with respect to discrimination possesses the following features:

(i) a non-exhaustive list of protected grounds, which has been shaped and expanded over time by the judiciary;

(ii) a judicially mandated test for discrimination, which does not depend on the relevant ground, as in the U.S., but is unified;

(iii) a two-tier approach focused on the disadvantage suffered by a specific group, and on the absence of reasonable limits prescribed by law; and

(iv) a quite far-reaching protection, attentive not only to facially discriminatory rules, but also to the effects of facially-neutral legislation (indirect discrimination.)

It is thus an open system, largely shaped by courts as for the protected grounds, relevant test, and type of the prohibited discrimination.

The approach is essentially two-pronged. First, the claimant must show a denial of "equal protection" or "equal benefit" of the law, compared with some other group, and that the denial constitutes discrimination based on an enumerated or analogous ground

[75] The addition addresses the drafters' concern that the Bill of Rights merely dealt with the discriminatory administration of the law, without extending to the substantive inequalities thereto enshrined.

[76] The Canadian influence on the drafting of the constitution of South Africa is undoubtable. Section 9 (1) of the Constitution of South Africa of December 18, 1996 guarantees equality under the law, and the right of equal protection and benefit of the law. However, this provision is not confined to state action, and extends to all kinds of discrimination carried out by private individuals.

[77] PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA (5th ed., 2007).

[78] Andrews v. Law Society of British Columbia, [1989] 1 SCR 143, 1989 CanLII 2 (SCC), at 171.

[79] Gosselin v. Québec (Attorney General), [2002] 4 SCR 429, 2002 SCC 84 (CanLII), at par. 20.

(s. 15 prong.) Once a violation is established, the onus shifts to the defendant to justify the discrimination under s. 1 of the Charter (s. 1 prong.)[80]

The relevant test to establish an infringement (s. 15 prong) has been modified over and over by the Supreme Court. It was first derived from *Andrews,*[81] then *Law* introduced a human dignity approach.[82] After *Law* came *Kapp* which reinstated a version of the *Andrews* approach.[83] Another test was established under *Quebec (Attorney General) v A,*[84] and then adjusted in the recent companion decision on Quebec's pay equity legislation. Under the current approach, courts are required to inquire over whether:

(1) the law or government action creates a distinction based on enumerated or analogous grounds; and

(2) the distinction reinforces, perpetuates, or exacerbates disadvantage.[85]

One should be alert to the unsettled nature of the s. 15 analysis. This partly sacrifices the possibility of predicting a victorious challenge to the discrimination suffered by new families. Yet, the next sections will attempt to sketch out this fast-changing jurisprudence and lay out a constitutional argument.

Distinction linked to a ground

The centrality of the ground for discrimination in the Canadian jurisprudence is undeniable.[86] That turned out to be the stage where the courts define the categories of persons who will benefit from the equality clause.[87] In *Andrews* the top court inaugurated the "enumerated and analogous grounds approach," whereby grounds are

[80] *Miron*, 2 SCR 418.
[81] *Andrews*, 1 SCR 143.
[82] Law v. Canada (Minister of Employment and Immigration), [1999] 1 SCR 497, 1999 CanLII 675 (Supr. Ct. Can.) (Iacobucci J opinion), at par. 88.
[83] R. v. Kapp, [2008] 2 SCR 483, 2008 SCC 41 (CanLII) (concerning the grant of a 24-hour priority license to fishers from three First Nations).
[84] Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux, 2018 SCC 17 (CanLII) ["APP"]; Centrale des syndicats du Québec v. Quebec (Attorney General), 2018 SCC 18 (CanLII) ["CSQ"].
[85] The two steps are not immune from reciprocal interference. They act in tandem with each other in defining who deserves the protection of the equality clause, as witnessed by the use of "perpetuating" instead of "creating" prejudice or stereotyping, as if they were qualities somehow presupposed to finding an enumerated or analogous ground.
[86] Withler v. Canada (Attorney General), [2011] 1 SCR 396, 2011 SCC 12 (CanLII), at par. 33 (stating that grounds are "constant markers of suspect decision making or potential discrimination.").
[87] SÉBASTIEN GRAMMOND, IDENTITY CAPTURED BY LAW: MEMBERSHIP IN CANADA'S INDIGENOUS PEOPLES AND LINGUISTIC MINORITIES 54 (2009).

given the function of "screening out"[88] trivial claims. The Court seemed to agree upon making grounds a threshold requirement to enforce equality rights. In particular, the trilogy of decisions released in 1995, *i.e. Egan,*[89] *Thibeaudeau,*[90] and *Miron*[91] seemed to deviate from the disadvantage-based approach, to place greater emphasis on the grounds. Justice L'Heureux-Dubé was then the only member of the Court resisting the abandonment of the group disadvantage approach,[92] by promoting an "approach that looks to groups rather than grounds…"[93]

As a consequence, the Court barred the door to claims attacking merely "irrational" or "arbitrary" laws, as it would be possible under the rational basis test elaborated by the U.S. Supreme Court. Questions of reasonableness are dealt with under the s. 1 prong, where an inquiry over the reasonableness of the legislative distinction is conducted.

This approach has the practical implication of demanding that new family forms plead their claims in terms of a violation of the equal protection based on one (or more) of the existing grounds. The applicants could not, under the current constitutional doctrine, argue that the law is merely arbitrary, without showing that they square with one of the constitutional grounds for discrimination. This approach has been criticized as being too formalistic, [94] however, at present the centrality of grounds in Canada cannot be overstated.

It is thus necessary to understand what a "ground" is and which groups the courts have considered as deserving protection. Courts have laid out alternative approaches to determining whether an analogous ground is present:

(1) The target group suffers from historical disadvantage;[95] (2) The target group constitutes a discrete and insular minority which lacks political power and does not fully participate in the political process;[96] (3) The distinction is grounded on a personal

[88] *Andrews*, 1 SCR 143, at 189.
[89] Egan v. Canada, [1995] 2 SCR 513, 1995 CanLII 98 (Supr. Ct. Can.).
[90] Thibaudeau v. Canada, [1995] 2 SCR 627, 1995 CanLII 99 (SCC).
[91] *Miron,* 2 SCR 418.
[92] Jessica Eisen, *On Shaky Grounds: Poverty and Analogous Grounds under the Charter*, 2 CAN. J. POVERTY L. 8 (2013).
[93] *Egan*, 2 SCR 513, at 552.
[94] Martha Jackman, *Constitutional Castaways: Poverty and the McLachlin Court*, 50 SUPR. CT. L. REV. 297 (2010); Eisen, *supra* note 92.
[95] Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203, 1999 CanLII 687 (SCC).
[96] *Andrews*, 1 SCR 143. The second factor is epitomized by the *Andrews* decision. In that case, the state was denying admission to the practice of law to non-citizens, who were in all other respects qualified. The distinction was deemed invidious as non-citizens, as a class of persons, were singled out on the

characteristic which is immutable or can only be changed at unacceptable personal expense.[97]

The current approach is that under (3). It was outlined in the *Corbiere*[98] case, which linked the notion of analogous ground to the immutability (or constructive immutability) of the characteristic. Grounds thus became synonym at "characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law."[99] Under this approach, courts are called upon to assess whether their status can only be changed at unacceptable personal expense (*e.g.* by forcing couples to change their status from "unmarried" to "married.")[100]

As a consequence, the more flexible approach envisioned in *Miron*,[101] where the Court urged to give a liberal and large interpretation to s. 15[102] and to consider a range of factors, none of them necessary, to decide whether the characteristic constitutes an analogous ground, was rejected.[103] On a more positive note, the recent move of the Court to do without a mirror comparator group is extremely useful.[104] It avoids time-consuming searches for a group that resembles the applicants' one under some respects. It also avoids the risk that the application is rejected due to an impossible

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ground of their personal characteristics (non-citizen status.) Both the majority opinion, delivered by Justice McIntyre, and Justice Wilson's dissenting opinion construed the notion of grounds after the footnote 4 of the *Carolene Products* decision of the United States Supreme Court (United States v. Carolene Products Company, 304 U.S. 144 (1938)). Justice Wilson elaborated on the political process prong of the footnote, and placed emphasis of a lack of voting rights, which renders some groups of people more vulnerable than others. While this approach could be germane to remedying discrimination, for instance, in the case of prisoners being deprived of the right to vote, it would however be of little help in the case of non-normative families.

[97] *Miron*, 2 SCR 418.

[98] *Corbiere,* 2 SCR 203.

[99] *Id.*, at par. 13.

[100] *Id*.

[101] *See also id,* (L'Heureux-Dubé J., minority opinion).

[102] *Miron,* 2 SCR 418. "This division of the analysis between s. 15(1) and s. 1 accords with the injunction that courts should interpret the enumerated rights in a broad and generous fashion, leaving the task of narrowing the prima facie protection thus granted to conform to conflicting social and legislative interests to s. 1."

[103] PATRICK MACKLEM, CANADIAN CONSITUTIONAL LAW 1342 (2017).

[104] *Withler*, 1 SCR 396, confirmed in *APP*, at par. 27.

assimilation of new families within the hegemonic notion of family.[105] Ultimately, it sits well with discrimination that comes from multiple, interwoven sources.[106]

Thus far, the Supreme Court has recognized as analogous grounds the following: non-citizenship,[107] marital status,[108] sexual orientation,[109] and aboriginality-residence.[110] In *R v. Turpin*,[111] the two applicants, charged with murder, alleged a violation of s. 15 for the Criminal Code did not give them the possibility of choosing a trial by judge alone.[112] The Court unanimously rejected their claim reasoning from the purpose of the section, which is that of preventing "discrimination against groups suffering social, political, and legal disadvantage in our society."[113]

The occupational status saga bears many similarities with our case in that these groups lack a coherent identity and their mobilization is based on the material interest being pursued (both new families and groups of workers are merely seeking further protections in their respective domains.) However, the Court has consistently declined to find that occupational status of farm workers is an analogous ground.[114] Yet, in *Fraser*,[115] a case concerning the protection of farm workers governed by a separate labor relations regime, it dismissed a s. 15 claim on the ground that there was an insufficient evidentiary record showing that the new law yielded an adverse impact on farm workers (instead of discarding it for inability to link discrimination to a prohibited ground.)[116] The concurring opinion of Justice Rothstein rejected the claim reasoning that employment status was not an analogous ground, as the plaintiff had not been established that the regime "utilizes unfair stereotypes or perpetuates existing

[105] *Withler*, 1 SCR 396, at par. 57 ("the focus on a precisely corresponding, or "like" comparator group, becomes a search for sameness, rather than a search for disadvantage, again occluding the real issue — whether the law disadvantages the claimant or perpetuates a stigmatized view of the claimant.").
[106] *Id*, at par. 58 ("A further concern is that allowing a mirror comparator group to determine the outcome overlooks the fact that a claimant may be impacted by many interwoven grounds of discrimination.").
[107] *Andrews*, 1 SCR 143; Lavoie v. Canada, [2002] 1 SCR 769, 2002 SCC 23 (CanLII).
[108] *See infra* par. 4.2.
[109] *Egan*, 2 SCR 513; *Vriend*, 1 SCR 493; *M. v. H.*, 2 SCR 418; Little Sisters Book and Art Emporium v. Canada (Minister of Justice), [2000] 2 SCR 1120, 2000 SCC 69 (CanLII).
[110] *Corbiere*, 2 SCR 203.
[111] R. v. Turpin, [1989] 1 SCR 1296, 1989 CanLII 98 (Supr. Ct. Can.).
[112] MACKLEM, *supra* note 103, at 1290.
[113] *Id*.
[114] Reference Re Workers' Compensation Act, 1983 (Nfld.), [1989] 1 SCR 922, 1989 CanLII 86 (Supr. Ct. Can.); Baier v. Alberta, [2007] 2 SCR 673, 2007 SCC 31 (CanLII); Dunmore v. Ontario (Attorney General), [2001] 3 SCR 1016, 2001 SCC 94 (CanLII).
[115] Ontario (Attorney General) v. Fraser, [2011] 2 SCR 3, 2011 SCC 20 (CanLII).
[116] Colleen Sheppard, *'Bread and Roses: Economic Justice and Constitutional Rights,* 5 OÑATI SOCIO-LEGAL SERIES 225 (2015).

prejudice and disadvantage."[117] A robust evidentiary record showing an adverse impact on new families could overcome this restrictive approach.

The interpretation of "constructive immutability" in the field of marital status discrimination is likewise encouraging. The Court has rejected the idea that analogous grounds can be considered immutable in some contexts and a matter of choice in others, and thus that couples can be penalized because they did not choose to marry.[118] An interpretation to the contrary would render the marital status ground meaningless, as one could often[119] object that the couple could have married. Marital status is immutable, not in a strong sense, but in a subtler one in the sense that the person has not an exclusive control over the decision. The choice to marry is not always "free," as acknowledged in *Miron*, and can often be influenced by a plethora of factors.[120] This is a crucial point. One of the chief objections to introducing legal remedies in favor of non-normative couples eligible to marry has thus been crossed out in constitutional doctrine. However, this notion of immutability does apply to those families ineligible to marry, such as cohabiting siblings, as shown further below.

Disadvantage

The jurisprudence on the second step under s. 15(1) is a nightmare for lawyers. The Supreme Court has repeatedly shifted opinion, lastly in May 2018, with the two companion decisions on the Quebec's pay equity legislation.[121]

The approach under *Andrews* and *Turpin* was still one giving primary weight to the actual circumstances and to the disadvantage suffered by the complainant. The Court was not willing to uphold claims coming from socially, economically advantaged groups, thereby adopting a relational-status theory of grounds.

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[117] *Fraser,* 2 SCR 3.
[118] *Id*, at par. 335.
[119] *See* Chap. VI, par. 2.1., and 2.2. This is the case for dyadic couples eligible to marry, such as parties to a common law marriage, nonconjugal couples outside the prohibited degrees of consanguinity, and friends.
[120] *Miron*, 2 SCR 418, at par. 153 ("In theory, the individual is free to choose whether to marry or not to marry. In practice, however, the reality may be otherwise. The sanction of the union by the state through civil marriage cannot always be obtained. The law; the reluctance of one's partner to marry; financial, religious or social constraints - these factors and others commonly function to prevent partners who otherwise operate as a family unit from formally marrying. In short, marital status often lies beyond the individual's effective control.").
[121] *APP,* 2018 SCC 17 and *CSQ,* 2018 SCC 18.

The 1995 trilogy had the effect of discarding the disadvantage test in favor of the relevance and stereotyping test, and in turn of taking the focus away from the circumstances of the claimant to move it to the kind of the decision being made (and thus on whether stereotypical decision-making was involved.) A first group of judges pushed for the introduction of the stereotyping test according to which the freedom and dignity of the complainant is violated if the decision is premised on the "stereotypical application of group characteristics rather than on the basis of individual merit, capacity or circumstance."[122] A second group of judges also required that the personal characteristic be irrelevant to the function of the law.[123]

Then came *Law*. The decision added emphasis on the alleged violation of the claimant's human dignity and instructed courts to inquire over such a violation. The human dignity-based approach risked narrowing such a protection by imposing an additional burden on the claimant. The requirement has consequently been discarded in the ensuing case law.

In *Kapp,*[124] the court finally laid down the more congruous two-step approach focusing on (1) discrimination based on a ground, whether listed or analogous; (2) the ensuing disadvantage stemming from perpetuating prejudice[125] or stereotyping.[126] The major cases in the field of family law involved stereotypes. In relying on the functional characteristic of the applicants (typically common law couples or same-sex couples,) these decisions rejected the stereotypical view that they could not function as family. Under this reasoning, denial of benefits could only be a consequence of merit or personal capability, not of wrongly attributed characteristics.[127]

Concerns associated with stereotypes were, however, voiced by legal scholarship and then embraced by the Court. For one thing, stereotypes narrow the scope of the analysis since they are not comparative in nature.[128] Second, "in practice, judges have

[122] *Miron*, 2 SCR 418.
[123] MACKLEM, *supra* note 103, at 1292. On their view, since the purpose of the impugned laws in *Miron* and *Egan* was that of promoting marriage, sexual orientation and marital status were relevant and therefore the laws were constitutionally permissible.
[124] *Kapp*, 2 SCR 483.
[125] *Id*, at par. 18 ("prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds").
[126] *Id*, at par. 18 ("stereotyping on the basis of these grounds that results in a decision that does not correspond to a claimant's or group's actual circumstances and characteristics.").
[127] *Id*.
[128] Stereotyping is directed to a certain group as such, and does not usually entail differential treatment. For all problems associated with the use of the notion of "stereotype" by the Canadian courts *see*

interpreted this added element [stereotypes] in a manner that has turned it into a formidable barrier for claimants."[129] The term also fails to account for other sources of discrimination such as oppression or unjust denial of benefits.[130] Likewise, "prejudice" looks at the attitudes toward the group "motivating or created by"[131] the exclusion from protections.

A desire to soften the focus on prejudice and stereotyping shines through the *Quebec (Attorney General) v A* decision,[132] and has been confirmed in subsequent case law.[133]

The second prong of a s. 15 infringement calls an inquiry over "arbitrary – or discriminatory – disadvantage" and on "whether the impugned law fails to respond to the actual capacities and needs of the members of the group."[134] The "arbitrary – or discriminatory – disadvantage" it refers to is a less demanding benchmark. It requires a "flexible and contextual inquiry into whether a distinction has the effect of *perpetuating arbitrary disadvantage* on the claimant because of his or her membership in an enumerated or analogous group."[135] A treatment is arbitrary or discriminatory if the law fails to respond to the actual capacities of the members of the group and, conversely, withholds benefits thereby "reinforcing, perpetuating or exacerbating" a position of disadvantage.[136] Since the final question is whether there has been a violation of substantive equality, prejudice or stereotypes are but some indicia for discrimination. Thus, the question is not what the attitude toward these couples is, but more objectively what the treatment they receive.

This approach clearly comes with a cost, which is double-barreled. First, the arbitrariness places emphasis on the intention of the legislature rather than the actual

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Alexandra Timmer, *Judging Stereotypes: What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection Law*, 63 AM. J. COMP. L. 239, 265 ff (2015). For a conflation of stereotype and correspondence *see* Fay Faraday, Margaret Denike & M. Kate Stephenson, *In Pursuit of Substantive Equality*, in *EID.*, MAKING EQUALITY RIGHTS REAL: SECURING SUBSTANTIVE EQUALITY UNDER THE CHARTER 15 (2009).

[129] Ryder, *supra* note 58, at 265.

[130] These critiques materialized in a subsequent case on age discrimination, concerning the denial of survivors' death benefits for federal employers (*Withler,* 1 SCR 396) The stereotyping/prejudice step hardly applies to people under the statutory age.

[131] *Quebec (AG) v. A*, 1 SCR 61, at par. 357.

[132] *Id*.

[133] *See* McCormick v. Fasken Martineau DuMoulin LLP, [2014] 2 SCR 108, 2014 SCC 39 (CanLII) and Kahkewistahaw First Nation v. Taypotat, [2015] 2 SCR 548, 2015 SCC 30 (CanLII).

[134] *Taypotat*, 2 SCR 548, at par. 19-20.

[135] *Quebec (AG) v A*, 1 SCR 61, at par. 331.

[136] *Taypotat*, 2 SCR 548, at par. 19-20.

effects on the group.[137] Second, such an emphasis may result in importing considerations pertaining to s. 1 into the s. 15 analysis[138] and shifting the burden on the claimant to prove arbitrariness. Yet, I believe that it is more conducive to recognizing new groups in that the contours of the group are actively shaped by the arbitrariness of the treatment, unlike groups with immutable characteristics. For instance, non-conjugal couples are not often aware that they are a "family" and a clear identity to this effect is unlikely to develop anytime soon. By contrast, the arbitrariness of the treatment, as opposed to the identity of the claimant, may be more conducive to identifying new family forms. Given the rigidity of the current doctrine concerning analogous grounds, I contend that an analysis of the arbitrariness under the infringement prong partly offsets the problems associated with squaring new families into an existing ground (mainly marital status.)

However, the Court has recently adjusted its approach in the two companion decisions on the Québec's pay equity legislation.[139] They both omitted any reference to the arbitrariness of the disadvantage and to the responsiveness to the capacities and needs of the members of the group. The second question is now "does the law impose "burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating… disadvantage…"?[140] It is thus confirmed that disadvantage does not only mean prejudice or stereotyping. It is also confirmed that the issue is not one of causation nor intention of the legislature.[141] Beside this, the Court did not elaborate on this second step[142] and only its future application will clarify the practical implications of the two decisions.

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[137] Jennifer Koshan, *The Supreme Court's Latest Equality Rights Decision: An Emphasis on Arbitrariness*, ABLAWG.CA, May 29, 2015, https://ablawg.ca/2015/05/29/the-supreme-courts-latest-equality-rights-decision-an-emphasis-on-arbitrariness/ (last visited May 28, 2018).
[138] *Id*.
[139] *APP,* 2018 SCC 17 and *CSQ,* 2018 SCC 18.
[140] *APP,* 2018 SCC 17, at par. 25. *CSQ,* 2018 SCC 18, at par. 22 also confirmed this approach my merely adding that disadvantage includes "historical" disadvantage.
[141] *CSQ,* 2018 SCC 18, at par. 35 ("[t]he fact that the Act was intended to help these women does not attenuate the *fact* of the breach").
[142] Watson Hamilton, *supra* note 55.

4.2. Marital status discrimination

Marital status discrimination is prohibited under Section 15(1) of the Charter, starting from *M. v. H*. The introductory section has argued that recognition of Canadian non-normative families can be achieved through constitutional litigation. This is because, once marital status has been recognized as an analogous ground, the legislature encounters some constitutional constraints in distributing benefits in a discriminatory manner or otherwise discriminate based on this ground. This subsection will provide an account of the peculiarities of the marital status discrimination jurisprudence, and then parse out the case law germane to building a constitutional argument.

As a starting point, it must be said that the countermajoritarian difficulty acquires special significance in the field of family law. The promotion of the institution of marriage and the allocation of benefits to families are premised on fundamental policy choices and socio-political values that suggest special caution in second-guessing legislative choices: "Barring evidence of a *change in these values by a clear consensus* that there should be a constitutional constraint on the powers of the state to legislate in relation to marriage, the matter must remain within the scope of legitimate legislative action."[143]

Upon showing that a consensus exists on evolving notions of marriage or family, courts have not been wary to act. However, case law has also clarified that different degrees of discretion are endowed with the legislature. For instance, legislatures enjoy an ample leeway in granting social protections[144] and in deciding whether and under what circumstances to extend the legal consequences incident to marriage.

Crucially, not all distinctions based on marital status are discriminatory. Such an interpretation would lead to the impossibility of designing different models of recognition (*e.g*., the very distinction between marriage and civil union would otherwise be constitutionally impermissible) and maintaining differences amongst systems. Based on this premise, the Supreme Court did not uphold a claim that, by limiting the presumption of equal division of property to married couples, the Matrimonial Property Act of Nova Scotia discriminated on the basis of marital

[143] *M. v. H.,* 2 SCR 418.
[144] *Egan*, 2 SCR 513.

status.[145] The decision was influenced by the equality approach in force at the time, which pivoted on human dignity. Applying this approach, the Court found that the law had no discriminatory purpose or impact on the dignity of the claimants. To the contrary, it was "defining the legal content of relationships." [146] Given that common law couples were not excluded from spousal support nor distribution of property upon dissolution, the different legal treatment flowing from the presumption of equal division was necessary to create two different regimes and respect the choice of many couples to not accept all incidents of marriage.

By contrast, in *Miron*, the Court held that, through the Insurance Act,[147] the Ontario legislature was not defining the content of relationships, but unduly excluding common law spouses from the benefits under an automobile insurance plan. Thus, while modulation of different legal regimes seems to be constitutionally acceptable, outright exclusion of protected categories seems to be constitutionally impermissible. Yet, the distinction seems to be blurred.

In *M. v. H.,* the decision of Ontario to limit post-breakdown support[148] to heterosexual common law couples only was under scrutiny. While the Act seemed to regulate the content of the relationship, thereby being shielded from a marital status discrimination claim, it was found to discriminate based on sexual orientation. The majority of the Court held that the discrimination was not justifiable under s. 1 as the proper benchmark to allocate the benefit was the economically and emotionally interdependent family and that marriage was not an accurate means to identify economically interdependent families.

While this is a revolutionary holding, which could pave the way for the recognition of all emerging family networks showing economic interdependence, the Court put language pointing to the relevance of sexual intimacy. It thereto argued that the exclusion of same-sex partners "implies that they are judged to be incapable of forming *intimate* relationships of economic interdependence,"[149] and that "[b]eing in a

[145] Nova Scotia (Attorney General) v. Walsh, [2002] 4 SCR 325, 2002 SCC 83 (CanLII) [*Walsh*].
[146] *Quebec (AG) v. A*, 1 SCR 61, at. par. 218.
[147] Insurance Act, R.S.O. 1980, c. 218.
[148] Family Law Act, R.S.O. 1990, c. F.3.
[149] *M. v. H.,* 2 SCR 418, at par. 70.

same-sex relationship does not mean that it is an impermanent or a *nonconjugal relationship*."[150]

The link the Court establishes between "impermanence" and "nonconjugality" is problematic. By forming this sort of hendiadys, the aim seems to be that of creating a sharp contrast between the latter and the permanence and intimacy characterizing same-sex couples. Yet, should there be a willingness to extend the protection of the law to non-conjugal couples, the only hermeneutical hurdle would be that these relationships are non-intimate. That clearly brings us back to the point of departure: is sexual intimacy a relevant marker of familyhood?

A final trend can be flagged. The Court seems to be more eager to extend private law benefits, such as spousal support or insurance-related benefits, as opposed to public law ones. This reluctance was at the hearth of the mentioned *Egan* decision, dealing with spousal pension benefits. At the s. 1 stage the Court held that while the exclusion of same-sex couples constituted discrimination based on sexual orientation, it was on the Parliament to decide when it had the financial means to fund the extension the benefit.[151]

4.3. Constitutional arguments

4.3.1 Distinction

I named this subsection "distinction," aware that it would have been more accurate to name it "distinction founded on an existing or analogous ground." However, the decision to omit any reference to the ground is deliberate. Some families cannot plead the marital status ground, and should either seek the introduction of the "family status" ground or push for the introduction of a non-categorical approach to equality, by replacing altogether the existing approach.

Only couples eligible to marry in the abstract can resort to the marital status ground. The current constitutional doctrine places emphasis on the invidiousness of a discrimination that flows from the decision not to marry. Such decision is

[150] *Id*, at par. 3.
[151] MACKLEM, *supra* note 103, at 1291.

characterized as complex and not always "free,"[152] and thus it has been submitted that we should aspire to a "true choice system"[153] that "respect[s] the different reasons why couples choose not to marry."[154]

This doctrine limits its applicability to common law couples. While it would be desirable that it covers friends in a non-conjugal relationship, the decision *Nova Scotia (AG) v. Walsh* makes a deliberate choice to emphasize conjugality as the litmus test for familyhood.[155] Thus, the reasoning can only apply to friends, potentially eligible to marry, after having pled in courts the disentanglement of conjugality from the reasoning of the Justices.

I believe that there are reasons to maintain that the marital status ground should aptly apply to friends in Canada. A marriage entered by two friends would be valid since:

(i) annulment on grounds of non-consummation can only be granted where one party has a physical incapacity of consummating, while it cannot be granted if "failure to consummate is a willful refusal not to partake in intercourse;"[156] and

(ii) the sham marriage doctrine, that applies in the context of immigration sponsorships, does not invalidate the marriage (any such marriage would be merely irrelevant for immigration purposes.)

As in Chapter IV, the point under (ii) does not refer to the contract-based doctrine of marriage frauds,[157] which leads to the annulment of the marriage, but to the different doctrines vis-à-vis sham marriages developed in public law, with a view to "policing" the receipt of public benefits. However, unlike the United States, there is no doctrine applicable across-the-board that warrants a termination of benefits, where the marriage is entered only for the purpose of gaining such benefits. The doctrine of marriage fraud

[152] *See Walsh*, 4 SCR 325, at par. 43.
[153] ALTA. L. REFORM INST., *supra* note 9, at par. 160.
[154] *Id*, at par. 160. Building on the *Walsh* decision, the Institute said that "[w]hatever their reasons, many couples do not marry. A system that requires couples to marry in order to opt-in to legislated property division rules is not a true choice system and will leave many partners to rely on claims for unjust enrichment. A true choice system should also respect the different reasons why couples choose not to marry. Avoiding the financial consequence s of marriage is only one of those reasons."
[155] The decision *Nova Scotia (AG) v Walsh* also places emphasis on heterosexuality by referring to "opposite sex individuals in conjugal relationships of some permanence." However, it must be stressed that at the time same-sex couples were not able to marry. Therefore, a constitutionally-compliant interpretation of this decision would apply the same reasoning to same-sex cohabiting couples. The same, however does not apply to nonconjugal couples, and an extension of the doctrine should be thoroughly justified and pled in court.
[156] Heil v. Heil, [1942] SCR 160, 1942 CanLII 3 (Supr. Ct. Can.).
[157] Kerry Abrams, *Marriage Fraud*, 100 CAL. L. REV. 5-6 (2012).

is much narrower in Canada in that it only applies in the field of immigration law (where one of the spouses is a non-citizen who tries to game the system through a marriage of convenience.)[158] Hence, friends are able to enter a valid (sham!) marriage in Canada and should not be penalized for a decision not to do so.[159]

By contrast, the remaining families, both non-normative conjugal and non-conjugal, are ineligible to marry. Polyamorous relationships cannot access marriage, nor can non-conjugal assemblies or relatives within the prohibited degrees of consanguinity and affinity.[160] These groups are unable to dovetail with the category "marital status" in that they are not discriminated based on marital status but instead based on their family status: they are penalized for having entered a family arrangement which is legally irrelevant despite sharing those features that case law deems germane to allocating government benefits.

We here side-step the question of polyamorous unions (yet not relationships[161]), covered by the criminal prohibition, and defer the analysis to the policy-based argument. By contrast, non-conjugal unions made up of relatives or multiple parties do not contravene any criminal ban, absent a sexual component. The contention is that these unions, where mutually interdependent, should be able to plead the family status card to disentangle inequalities in the distribution of benefits. The case law on marital status discrimination shows that the notion of immutability adopted to create an analogous ground is one of constructive immutability. Given that these individuals are not eligible to marry, the state places an unfair burden on them by forcing them to dissolve their relationship if benefits are to be obtained. Yet, this can only be done "at unacceptable cost to personal identity."[162]

A second compelling reason for introducing a family status ground at the constitutional level lies in the need to harmonize the statutory claims founded on human rights codes with constitutional claims. Such need has been expounded by the Supreme Court ever since *Andrews*, treating the statutory jurisprudence as a guide and inspiration in

[158] Nicholas Bala, *When a wife is not a wife? Immigration authorities rule that man's marriage — his fifth — is a sham*, NATIONAL POST, June 28, 2018.
[159] Compare with Chap. IV, par. 1.1.
[160] Are ineligible to marry those individuals "related linearly, or as brother or sister or half-brother or half-sister, including by adoption" (Marriage Prohibited Degrees Act, S.C. 1990, c. 46).
[161] *See infra* par. 6.2.
[162] *Kapp*, 2 SCR 483, at par. 335, quoting *Corbiere,* 2 SCR 203, par. 13.

interpreting the Charter.[163] Since the family status ground is present in all provincial human rights codes, this well-settled need for harmonization suggests that the ground be added to the Charter grounds for discrimination.

Furthermore, when it comes to the exclusion from government benefits, the distinction amongst groups is quite "straightforward,"[164] and once the new ground is recognized the only question left is whether the distinction is discriminatory.

Second case scenario: new families are unable to obtain a liberal and large interpretation of the analogous ground doctrine and introduce the family status ground. In any such case the only way left for addressing the problems associated with their exclusion would be that suggested by Justice L'Heureux-Dubé. Of course, the opinion parsed out below has not been endorsed by the Court and, therefore, is not "law." Yet, it is a good starting point for reassessing the current approach to discrimination claims, which is especially detrimental to groups unable to fit into existing constitutionally protected categories.

As seen, the trilogy of decisions of 1995 were eager to abandon the disadvantage-based approach, to place greater emphasis on the grounds. Justice L'Heureux-Dubé attempted to oppose the desertion of the group disadvantage approach,[165] by promoting a test that looks to groups rather than grounds.[166] In *Egan*, she offered a manifesto of the approach:

> "… [T]he Charter is not a document of economic rights and freedoms. Rather, it only protects 'economic rights' when such protection is necessarily incidental to protection of the worth and dignity of the human person... If all other things are equal, the more severe and localized the economic consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the Charter…"[167]

She expresses concern that, by looking at the grounds instead of the impact of the distinction on specific groups, courts might end up distancing themselves from the

[163] Ryder, *supra* note 58, at 264-65.
[164] *Withler*, 1 SCR 396, at par. 64.
[165] *See supra* par. 3.
[166] *Egan*, 2 SCR 513, at 552.
[167] *Id*, at 558-59.

reality of persons' experiences.[168] Disadvantage is much more likely to arise from the way in which individuals are treated, rather than from some characteristics of the individuals as such.[169] Her approach is in the end more suitable to our analysis in that expressly focuses on economic prejudice and denial of benefits.

A final strategy which completely does without a "categorical approach"[170] to equality would redirect the analysis to the purpose of the benefit, while allowing space for self-definition when it comes to family definitions. As argued in the interveners' factum in *Mossop*,[171] concerning the exclusion of a same-sex partner from a bereavement leave, the "definition of immediate family could be open-ended, allowing employees to determine for themselves who is immediate family for purpose of the benefit."[172] This approach has not been adopted by any court, so far.

4.3.2. Discrimination

Once a distinction is identified (usually an economic protection that is associated only with marriage, civil unions or similar regimes) and it is established that it is based on a ground, the claimant has to show that the distinction is discriminatory. In deciding whether the treatment is discriminatory, *Withler* illustrates some contextual factors that should be considered:[173]

(i) The claimant's historical position of disadvantage. Here, particular emphasis is placed on whether the group has been historically discriminated. However, if we were to interpret the factor as one concerning the attitude toward new families, it would be harder to apply. The reason is that, unlike those categories deemed worthy of protection, new families often lack a sense of self-awareness (think about non-conjugal couples.) This in turn affects their societal perception which is not one of overt hostility, but of involuntary erasure. By contrast, in the case of polyamorous relationships, one could easily point to a history of exclusion and discrimination, as

[168] *Id*, at 552.
[169] *Id*.
[170] Nitya Iyer, *Categorical Denials: Equality Rights and the Shaping of Social Identity*, 19 QUEEN'S L.J. 179, 205 (1993).
[171] Canada (Attorney General) v. Mossop, [1993] 1 SCR 554, 1993 CanLII 164 (Supr. Ct. Can.).
[172] Factum of EGALE *et al*. in *id*, at par. 58. *See also* Brenda Cossman, *Family Inside/Out*, 44 U. TORONTO L.J. 1-39 (1993).
[173] *Withler*, 1 SCR 396.

also witnessed by the enactment of criminal sanctions for polygamy. However, the factor must be interpreted in a way that is more congruent with the recent disadvantaging approach. Under such an approach, the question is not what is the attitude toward these couples, but, more objectively, what treatment they receive.

(ii) The nature of the affected interest. Here it could be argued that the interest in recognition is pivotal in that it is not merely financial but also an expressive interest in being ackoledged as a family before the law and the society.

(iii) If it is alleged that the law is based on stereotyped views of the group, the question is whether there is "correspondence with the claimants' actual characteristics or circumstances."[174] This factor is at the center of the declaration of unconstitutionality of the exclusion of common law couples from spousal support. Its rationale, but for the emphasis on conjugality, equally applies to non-normative families defined by economic and emotional interdependence.

Pursuant to these factors, in the recent case *Quebec (Attorney General) v. A*, the Court found the distinction between married and unmarried couples to be discriminatory upon finding (a) a history of exclusion from economic remedies,[175] and (b) that *de facto* spouses in Quebec are functionally similar to married couples. The Court also reiterated that heterogeneity within a claimant group is no bar to the claim and that partners can, as they do, enjoy different degrees of vulnerability or dependency.

The functional similarity prong, point under (b), needs a few adjustments in the sense that it is less obvious that it ought to apply to non-normative couples. The decision cites both the many family law reforms in the various provinces acknowledging a functional equivalence, and the relevant case law. As to the first, the work of the Law Commission of Canada, which elaborated the important and widely-cited report in 2001 "Beyond Conjugality,"[176] could be instrumental to showing the functional similarity of emerging family networks. As to the second, a functional equivalence has been found in case law only with respect to unmarried same-sex and opposite-sex

[174] *Id*, at par. 38.

[175] *Quebec (AG) v. A,* 1 SCR 61, at par. 349. ("the law excludes economically vulnerable and dependent de facto spouses from protections considered so fundamental to the welfare of vulnerable married or civil union spouses that one of those protections is presumptive, and the rest are of public order, explicitly overriding the couple's freedom of contract or choice. The disadvantage this exclusion perpetuates is an historic one: it continues to deny de facto spouses access to economic remedies they have always been deprived of …").

[176] L. COMMISSION CAN., *supra* note 37.

couples. The reduced utility of these decisions[177] derives from the emphasis they place on conjugality and sexual intimacy. Thus, this prong as well needs to be supplemented with a robust policy argument showing the functional equivalence of new families.[178] Ultimately, it is still not possible to assess the practical implications of the recent pay equity decisions. However, the disappearance of both the arbitrariness of the disadvantage and the responsiveness to actual capacities and needs of the groups is not a good signal for new families. It could end up reducing the emphasis on the functional similarity prong. Yet, one could still reason around the historic disadvantage suffered by new families (point under (a)), that has been further confirmed by one of the two pay equity decisions, *CSQ*,[179] which is not one that looks at intentions or attitudes, but more objectively at their historical exclusion from benefits.

5.3.3. The s. 1 analysis

Actions found to be discriminatory can still pass muster at justification stage. This is the stage where the state argues for the reasonableness of the distinction. In short, the state first has to point to a valid state interest or purpose of the law. It then has to establish a rational connection, even a tenuous one, between the means employed and the purpose. Third, the law must pass the so-called minimal impairment test,[180] according to which the infringement shall be "as little as is reasonably possible."[181] The final stage is the proportionality one, focusing on the impact of the law on the enjoyment of the right and the "broader public benefits"[182] the measure is seeking to achieve.

In upholding the exclusion of *de facto* couples in Quebec from the presumptive protections of marriage, the majority opinion found the promotion of autonomy and choice of such couples to be a pressing and substantial state interest. Thus, protecting the couple's decision not to marry and not to accept the incidents of marriage is a valid

[177] *See also M. v. H.*, 2 SCR 418, and Pettkus v. Becker, [1980] 2 SCR 834, 1980 CanLII 22 (Supr. Ct. Can.).
[178] *See infra* par. 5.
[179] *CSQ,* 2018 SCC 18, at par. 22.
[180] R. v. Oakes, [1986] 1 SCR 103, 1986 CanLII 46 (Supr. Ct. Can.).
[181] R. v. Edwards Books and Art Ltd., [1986] 2 SCR 713, 1986 CanLII 12 (Supr. Ct. Can.), at 772.
[182] *Quebec (AG) v. A,* 1 SCR 61.

state interest. By contrast, in her dissent, Justice Abella, while conceding that the abovementioned interest is a valid one, considered the law to fail at the proportionality stage in that an opting out system – where couples decide to contract out of marital obligations – instead of the current opting in system – where they are to agree on such obligations – seems to be more compatible with the equality clause.

The autonomy of the will of the members of the relationship has long been recognized as a valid purpose,[183] although before *Kapp* this typical s. 1 consideration ended up been considered at the infringement stage rather than the justification one.[184]

This state interest, however, does not apply to all new families. It only applies to families eligible to marry. Namely: conjugal unmarried couples, non-conjugal couples composed of friends, or relatives outside the prohibited degrees of consanguinity. In any such case, it could be argued that they have chosen to be discriminated against, because the lack of protections is counterbalanced by a lack of obligations.[185] This is the position embraced by the Court in *Quebec (Attorney General) v. A*, which along with considerations vis-à-vis federalism (that have special significance in the context of Quebec,) pointed to autonomy in upholding the exclusion of *de fac*to couples from the regime.

In one of the few successful s. 15 challenges, *M. v. H.*, the Court determined that the means were not rationally connected to the purposes of the spousal support provision in force in Ontario.[186] Such purposes were: (1) "the equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent"[187] break down and (2) the alleviation of "the burden on the public purse"[188] by shifting the relative obligation of support from the state to individuals in the relationship. Both interests equally apply to private law obligations in the case of non-normative families. Again, no special hurdle seems to be present when it comes to privatizing care.

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[183] *Walsh*, 4 S.C.R. 325.
[184] The conflation of considerations pertaining to s. 1 and s. 15 was a consequence of the human rights approach in *Law*.
[185] Robert Leckey, *Chosen Discrimination*, 18 SUPR. CT. L. REV. 445, 458 (2002).
[186] Again, be reminded that what now are s. 1 considerations were dealt with at the s. 15 stage before *Kapp*.
[187] *M. v. H.*, 2 SCR 418.
[188] *Id*.

The lack of a rational connection can be understood by examining the s. 15 prong of the case, that now would fall within the s. 1 stage. The infringement was found, amongst the others, in the lack of a correspondence between the ground and the actual capacity of the applicants (same-sex couples capable of forming intimate relationships of economic interdependence.) Thus, if the purpose of the law is to alleviate the economic consequences of a breakdown, marriage is an insufficient basis for allocating the protection. By contrast, economic dependence and intimacy have been recognized as relevant markers of familyhood. A successful pleading will thus argue for applying the same rationale more broadly to families in an economically and emotionally interdependent relationship.

To overcome the hurdles in extending public law entitlements (and not only private law ones,) the reasoning in *Falkiner* should apply. According to the latter, when the policy maker choses a private law definition of "spouse", she cannot choose a different definition for a related purpose, such as social assistance, especially if the autonomous definition yields a negative impact on a vulnerable group.

4.4. Summary

A constitutional argument has obvious limits under the current s. 15 doctrine, absent doctrinal changes that encompass a more far-reaching notion of equality. First, where grounds are kept as a threshold requirement to enforce equality rights, new families should seek the introduction of a family status ground that better captures the source of their discrimination. By contrast, the section has argued that the marital status ground can be pled by all dyadic couples that, notwithstanding their non-conjugal nature, are virtually eligible to marry, such as cohabiting friends.

The distinction, after having been linked to a ground, will be obvious. It immediately materializes in the state withholding the sought benefit or privilege.

Thereafter, the section has argued that all the relevant factors to establish discrimination apply to new families, particularly the current interpretation of historical disadvantage (which focuses more objectively on the treatment received,) the fundamental nature of the affected interest, and the stereotypical view that new families cannot function as such, although they are economically and emotionally

interdepended. If the new equality approach introduced by *APP* and *CSQ* does not impact upon the inquiry over the functional equivalence of new families, this inquiry has to be conducted and then supplemented by a robust policy argument. A policy argument should clarify that despite some structural peculiarities new families are still families worthy of state protection, much like married couples.

Ultimately, when it comes to the s. 1 analysis, the claim has a high likelihood of passing muster where private law entitlements are at stake. In such a case the fundamental state interest in the privatization of care should be emphasized. Also, the interpretation of the autonomy interest by Justice Abella, pointing to the need for introducing an opting out regime, as opposed to maintaining the current opting in one, is more consistent with the constitutional mandate of equality. At this point, the public law entitlements should be extended referring to the constitutional doctrine that establishes a constitutional violation when the state recognizes families for purposes of private law while depriving them of public law benefits.

5. Human Rights Codes

Human rights codes are but one of the many layers of protection of the complex anti-discrimination apparatus in Canada. In addition to Charter rights, and provincial bill of rights, many safeguards have been enacted at the statutory level, with a view to achieving a horizontal application of rights and covering the conduct of non-governmental actors. These safeguards are enshrined in codes at the federal and provincial level.

Ever since *Andrews*[189] the Supreme Court has attempted to promote a harmonization in the interpretation of s. 15 and of the human rights codes, stating that both are aimed at combatting substantive inequality and that as a consequence the same principles should apply. Yet, the differences in the two approaches remain obvious, especially when it comes to the claimant's burden which is more linear in the case of human rights codes, and much more complex, "fluctuating, verbose, demanding"[190] in the case of constitutional litigation.

[189] *Andrews*, 1 SCR 143, at 172.
[190] Ryder, *supra* note 58, at 268.

The structural differences between these statutes and the Charter have been outlined in section 3. Suffice here to recall the different subjective application and purpose of these laws. The Charter differs from statutory enactments in that it only applies to governmental or quasi-governmental entities. Conversely, the human rights codes apply to private citizens, public and private employers and benefit providers.[191] While the Charter is concerned with civil liberties and freedom, and the notion of equality is essentially one of equality "before and under the law," by antidiscrimination rights the legislature refers to the rights that protect a defined group or person from an act of misconduct.[192]

The general remedies available before human rights tribunals and commissions are financial compensation and non-financial compensation beneficial to the applicants (such as reinstatement to the job.) In addition to the foregoing, it is often possible, as it is in Ontario,[193] to request the so-called public interest remedies. These exert their effects beyond the satisfaction of the single applicant and can include the implementation of proactive measures to combat discrimination, such as changing hiring policies or ordering training or the implementation of internal human rights complaint mechanisms. Also, the expansion of the notion of "service" has been conducive to framing Charter claims under the human rights codes and to challenge generally applicable policies and laws.

This living tree interpretation of "service," along with the type of remedies available under human rights codes suggest that the most viable legal remedy in this context is that of introducing protections through a protection-driven approach (*i.e.,* on a case-by-case basis.)

It can be noted that the Charter prohibits discrimination roughly on the same grounds as antidiscrimination codes enacted at the federal, provincial and territorial level, with some additions related to the application to non-governmental actors, such as "source of income," and different defensive claims, such as "bona fide" conduct (largely applied in the employment context.) More importantly, all the codes and acts

[191] A second major difference consist in the absence within the anti-discrimination legislation of any reference to the "reasonable limits," which constitute an exception to the applicability of the Charter.
[192] FUNDAMENTALS OF HUMAN RIGHTS LAW IN CANADA, *supra* note 17, at 1.
[193] *What Remedies Are Available to Me at the HRTO?,* HUMAN RIGHTS LEGAL SUPPORT CENTRE, http://www.hrlsc.on.ca/en/how-guides/what-remedies-are-available-me-hrto (last visited May 28, 2018).

throughout Canada protect individuals against discriminations based on "marital status" and/or "family status."[194]

However, the lack of a prohibited ground of discrimination is not entirely dispositive in the sense that the Supreme Court has been willing to add via constitutional decisions grounds which were constitutionally mandated. This is for instance the case of "sexual orientation" in the Alberta Human Rights Code.[195] This example shows the extent to which constitutional litigation and human rights legislation are intertwined, and that progressive decisions in the field of family law could carry their positive impact over other systems of protection of human rights. In the example provided above, it is the constitutional litigation that leads and the human rights system that follows along, but they more aptly stand in a position of reciprocal interference and cross-fertilization.

The next section is devoted to building an argument based on the safeguards embedded in the human rights codes. As a caveat, it should be noted that while these laws have played a crucial role in disentangling inequalities affecting same-sex couples, new families do not benefit from a ground clearly applicable to their situation.

5.1. Building an argument

5.1.1. Family/marital status

With very few exceptions, the human rights codes hold a limited potential deriving from the statutory definition and courts' construction of the marital and family statuses. This limited potential has been clear ever since *Mossop*, where the Supreme Court held that same-sex couples could not plead a family status-based discrimination claim.[196]

This subsection will first highlight the general approach to the marital and family statuses in human rights codes, with a view to pointing to their limits. It will then briefly parse out the rare interpretations that "incidentally" protect new families.

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[194] FUNDAMENTALS OF HUMAN RIGHTS LAW IN CANADA, *supra* note 17, 46-52.
[195] *Vriend*, 1 SCR 493.
[196] *Mossop*, 1 SCR 554 (holding that Brian Mossop, a gay man in a same-sex relationship, could not a claim family status discrimination to obtain bereavement leave, a benefit provision in his collective agreement).

As anticipated, every human rights code and act throughout Canada protects against discrimination based on "marital status" and/or "family status." The definition of marital status tends to be the same throughout the provinces. In Ontario and Alberta, it refers to the status of being "married, single, widowed, divorced or separated and includes the status of living with a person in a conjugal relationship outside marriage"[197] to which Saskatchewan adds "the state of being engaged to be married."[198] "Family status" is narrowly defined as the "status of being a parent-child relationship" in Ontario and Saskatchewan. By contrast, in Alberta it stands for the "status of being related to another person by blood, marriage or adoption."[199] It thus incidentally extends to non-conjugal families comprised of relatives. Both statuses are prohibited grounds for discrimination in Manitoba and British Columbia as well, but they lack a formal definition.

As to the shortcomings associated with this type of pleadings, first of all non-conjugal couples are usually barred from protection under both umbrellas: marital status refers to "conjugal relationships outside marriage" in Ontario and Alberta; while in Saskatchewan, the code does not mention the requisite of conjugality, despite referring to a "common-law relationship."

Second, the label "family status" only takes into account the vertical relationship, that is the parent-child relationship (included the relationship with an adopted child or a stepson/stepdaughter.) It inheres to discrimination deriving from pregnancy,[200] parenthood,[201] the status of being the child of a certain parent.[202]

A less narrow, albeit unpromising, definition is found in Alberta: one could argue that a reference to the status of being "related to another person by blood," could at least encompass discrimination against non-conjugal unions made up by relatives or siblings.

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[197] Human Rights Code, R.S.O. 1990, c. H19, s. 10(1) "marital status" [am. 2005, c.5, s. 32(8)]; Alberta Human Rights Act, R.S.A. 2000, c. A-25.5, s. 44(1)(g) "marital status" [am. 2009, c.26, s 30 (b) (i), (ii)].

[198] Saskatchewan Human Rights Code, S.S., 1979, c. S-24.1, s. 2(1)(i.01) "marital status" [en. 2000, c. 26, s. 3(4)].

[199] Alberta Human Rights Act, R.S.A. 2000, c. A-25.5, s. 44(1)(g) "family status."

[200] Peterson v. Anderson, 1991 15 C.H.R.R. D/1 (Ont. Bd of Inquiry).

[201] *See, e.g.,* Brown v. Canada (Department of Natural Revenue – Customs and Excise), 1993 19 C.H.R.R. D/39 (Can. Human Rights Trib.); Flamand v. DGN Investments, 2005 52 C.H.R.R. D/142 (Ont. Human Rights Trib.); Stephenson v. Sooke Lake Modular Home Cooperative Assn*,* 2007 CarswellBC 3511 (B.C. Human Rights Tribunal).

[202] FUNDAMENTALS OF HUMAN RIGHTS LAW IN CANADA, *supra* note 17, 51.

There is another, again not-so-much promising, path to extending protections to non-normative unions. In Ontario "marital status" has been construed so as to cover discrimination for a particular identity.[203] The Supreme Court ruled that the semantic reach of the terms "marital status" and "family status" is broad enough to apply to any situation where an adverse distinction is drawn based on the particular identity of a claimant's spouse or family member.[204] Put differently, the Code protects both discriminations based on the status of being married or single, and on the status of being married or *related* to a specific person (not only in the legal sense but in a much broader sense.) The latter variation of the definition could be broad enough to encompass aspiring family unions.

Likewise, the prohibition against family status discrimination in British Columbia has been interpreted to encompass all kinds of discriminations involving the status of being in a specific type of family, such as being a couple, a single parent family, or a two-parents family.[205] This means that in rare instances the label "family status" is detached from the vertical relationship and accounts for a broad array of horizontal or mixed (vertical and horizontal) relationships as sources of discrimination.

Interestingly, also federal courts have interpreted family status as inhering to discrimination deriving from the obligation to care for a member of an extended family, such as an elderly person.[206] Likewise, Nova Scotia prohibits discrimination that derives from caring for children or of elderly parents.

Therefore, while as a general matter human rights *fora* hold a limited potential to disentangling systematic inequalities that hold back new family formations, applicants can exploit the liberal and large interpretation that from time to time is given to family status. Especially, the liberal construction adopted in Ontario, which seems to leave

[203] B. v. Ontario (Human Rights Commission), [2002] 3 SCR 403, 2002 SCC 66 (CanLII). This interpretation is expressly barred in Saskatchewan, where marital status stands for "that state of being engaged to be married, married, single, separated, divorced, widowed or living in a common-law relationship, *but discrimination on the basis of a relationship with a particular person is not discrimination on the basis of marital status*…". *See* Saskatchewan Human Rights Code, S.S., 1979, c. S-24.1, s. 2(1)(i.01) "marital status" [en. 2000, c. 26, s. 3(4)].

[204] See the *decisum* of the Court of Appeal in B. v. Ontario (Human Rights Comm.) (2002), 44 C.H.R.R. D/1, 2002 SCC 66.

[205] Nelson v. Bodwell High School**,** 2015 CarswellBC 3634 (B.C. Human Rights Tribunal).

[206] Patterson v. Canada Revenue Agency, 2011 CarswellBC 5146 (F.C.); Canada (Attorney General) v. Hicks, 2015 CarswellBC 6957 (F.C.).

space for self-definition when it comes to family ties and bar discrimination flowing from a relationship with *any* family member, must be employed.

5.1.2. Poverty/social condition

Another difference between the constitution and the human rights codes lies in the protection (though on rare occasions) against income discrimination and socio-economic status discrimination. These two grounds are enshrined in some human rights codes at the provincial level and could constitute a ground on which the position of vulnerable new families could be vindicated. By contrast, the Supreme Court has constantly declined to recognize poverty or economic status as an analogous ground.[207] Yet, the limits of this approach cannot be overstated. As the grounds are discussed, it can be noticed how narrowly they are framed. The Ontario Code prohibits discrimination on the basis of receipt of public assistance in the rental housing market. Put differently, a housing provider cannot refuse rental to a household that relies on public assistance. The Human Rights Commission in Ontario has also heard numerous complaints pleading discrimination in housing due to inadequate income.[208]

The British Columbia Human Rights Code bars discrimination based on "lawful source of income," but only in relation to rental accommodation. The Alberta Human Rights Act prohibits discrimination based on the "source of income" with respect to all activities listed in the Code of Conduct. Finally, the Manitoba Human Rights Code prevents any discrimination based on the "source of income," an "applicable characteristic" that individuals cannot consider when denying benefits or housing.[209]

The human rights codes approach is quite cautious in that it does not cover economic status *tout court*, but specific features of this status, such as the source of income. Thus, it can hardly be equated to a more broadly conceptualized "poverty" or "socio-

[207] More precisely, the Supreme Court has been willing to protect socio-economic rights only in the case of underinclusive ameliorative programs, such as social assistance for single mothers (Schachter v. Canada, [1992] 2 SCR 679, 1992 CanLII 74 (Supr. Ct. Can.)) or exclusion of groups from social assistance based on discriminatory grounds, such as the withdrawal of social assistance to single mothers living with male partners (*Falkiner,* CanLII 44902).

[208] *See* the website of the Ontario Human Rights Commission, http://www.ohrc.on.ca/en/human-rights-and-rental-housing-ontario-background-paper/prohibited-grounds-discrimination (last visited 31 July 2017).

[209] FUNDAMENTALS OF HUMAN RIGHTS LAW IN CANADA, *supra* note 17, at 61-63.

economic status" ground, nor can bear the burden of extending withheld benefits to new families. In the end, I'm rather skeptical about the potential of human rights codes in disentangling systemic discrimination toward new unions.

6. Policy-based argument

Several policy reasons support the introduction of a registration scheme that new families can access. This section intends to argue that both non-normative conjugal and non-conjugal families should be recognized through a comprehensive scheme which allows them to make a public commitment and to gain the privileges and obligations thereof. This remedy is to be considered as preferable over the current ascriptive system and the alternative contractual or private law system. The policy argument advanced here is based on four findings:

(i) an increasing awareness that new families are not any less deserving of legal protections and the exposure of the Canadian scholars and (albeit to a lesser extent) the general public to progressive ideas in the field of family legal pluralism;

(ii) the fluidity and unsettled nature of the main concepts employed in case law to confine protections to marital or marital-like couples;

(iii) the enactment of schemes that could or do apply to new families, and which could act as a model in crafting new remedies.

The section will explore some recent studies that have contributed to developing a world-wide debate on new family forms and that have placed Canada in the forefront of such debate. Amongst these is the Law Commission Report "Beyond conjugality," which shows an unprecedented awareness of the legal challenges posed by family pluralism.

Thereafter, the section will skim through the main case law in the field of family law by examining the meaning attributed to terms such as conjugality, sexuality, dyadic, and cohabitation. The aim is that of arguing that the construction of these terms is not settled and that, therefore, room exists for expanding protections to families that are not conjugal, or dyadic or cohabiting in a traditional sense. Ultimately, the analysis will move to examining Canadian statutes wherein protections have been extended to non-normative families, especially the registration scheme in force Alberta.

6.1. The seeds of the Law Commission report "Beyond conjugality"

There is an increasing awareness that the current legal framework does not reflect the reality of family formations and that it should be reformed accordingly. Canada is on the forefront in acknowledging the importance of recognizing new families. For instance, a study elaborated by the British Columbia Law Institute has voiced these concerns and recommended that a registration scheme open to conjugal and non-conjugal relationships be introduced.[210]

Most importantly, in 2001, the Law Commission of Canada, an independent federal law reform agency, elaborated a pivotal report entitled "Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships."[211] The report maintained that family law reflects to a very limited extent the multifold reality and diversity in family arrangements. The script has circulated globally, and is routinely cited or taken as the benchmark study in *fora* where family legal pluralism is discussed. It is not an overstatement to say that it was a "watershed"[212] in the development of the socio-legal understanding of family law diversity.

The report focuses exclusively on non-conjugal caregiving. While acknowledging the limits of the methodological decision of leaving out non-normative conjugal families such as polyamorous relationships, the drafters were persuaded that it was premature to push for any reform in this sense.

The aim of the study was to propose a principled approach whereby all existing laws and regimes employing relational terms to allocate duties, responsibilities or privilege are reassessed.[213] Under their approach, policymakers are called upon to inquire through a four-step analysis the aptness of the current distribution of benefits, by asking in turn whether:

(1) the objectives of the law are legitimate;

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[210] BRITISH COLUMBIA L. INST., REPORT ON RECOGNITION OF SPOUSAL AND FAMILY STATUS (1998), available at http://www.bcli.org/sites/default/files/5-Report-Report_on_Recognition_of_Spousal_and_Family_Support.pdf (last visited Oct. 25, 2018).

[211] L. COMMISSION CAN., *supra* note 37.

[212] Kim Brook, *Cameos from the Margins of Conjugality*, in ROBERT LECKEY (ED.) AFTER LEGAL EQUALITY: FAMILY, SEX, KINSHIP 99 (2014).

[213] L. COMMISSION CAN., *supra* note 37, at Xii.

(2) the relationship on which distribution is based is relevant to the achievement of the objective;
(3) the law allows for the self-designation of the beneficiary;
(4) where self-designation is not possible/appropriate, there is a better way to include the relevant functional relationship.[214]

The report then moves to assessing the main programs structured in relational terms in evidence, tax, social security, private law, etc. For instance, it proposes to reframe the rollover provision in tax for transfers of property so as to include all persons in an economically interdependent relationship: once it is established that the purpose of the law is that of encouraging transfers of property within the family without excessively intruding in the nature of such a relationship, then the statutory conditions for eligibility (marriage or common law marriage) end up being not relevant to the achievement of the objective.[215]

In addition to laying out the four-step approach, the report pushes the analysis one step further and advocates for the introduction of a comprehensive scheme to protect new families. After outlining the limits of marriage, of the contractual approach and of the current ascriptive regime in force at the federal and provincial level, the Commission proposes the introduction of a registration scheme. Under its proposal, the scheme should be open to the self-designation of the beneficiary (and thus not be restricted to conjugal partners, whether same-sex or opposite sex.)

Notwithstanding a state-wide debate on the opportunity to introduce a registration system for non-conjugal units, the Department of Justice laconically dismissed the question. It concluded that:

> "Federal law currently includes family and other adult non-conjugal relationships only in some circumstances. But further study would be needed before Parliament can decide whether it is appropriate to treat non-conjugal relationships in the same way as spouses or common-law partners in all federal laws..."[216]

[214] *Id*, at Xii-Xiii.
[215] *Id*, at Xv.
[216] CAN. DEP'T JUSTICE, MARRIAGE AND LEGAL RECOGNITION OF SAME-SEX UNIONS : A DISCUSSION PAPER 25, n.14 (2002), available at http://publications.gc.ca/collections/Collection/J2-189-2002E.pdf (last visited 24 Oct. 2018).

Interestingly, the discussion paper was envisaging a wide spectrum of potential approaches to protecting Canadian families:

(a) a conservative approach, whereby marriage was preserved as a heterosexual institution;[217]

(b) a progressive approach, whereby the definition of marriage includes same-sex couples;

(c) an ultraprogressive approach, leading to the abolition of civil marriage and its replacement with a neutral registration system for conjugal couples only.

As to the third approach, the Department clarified that a couple could choose to have the marriage officiated by a religious official. Such a marriage would lack legal effects, barring a formal registration in the new neutral registration system. Also, "[t]here would no longer be any references to marriage in any federal law, but existing marriages and new registrations would be eligible for the full range of benefits and obligations under law."[218]

The approach would have been beneficial in terms of achieving a full separation of the Church from the state, and it could have led to de-radicalization of conflicts surrounding the symbolic aspects of marriage. Also, I believe that the replacement of marriage with a registration scheme, albeit open to conjugal couples only, would have been beneficial to non-conjugal units as well in that it would have lessened the tensions surrounding marriage and its symbolic legacy. The advocacy for the extension of a neutral registration scheme to non-conjugal couples and non-normative conjugal assemblies could have more aptly focused on economic considerations, rather that moral ones.

Although the Department of Justice did not take action, the report sprouted the seeds of change, and laid the ground for a debate that more aptly focuses on self-definition, autonomy, and radical pluralism in family law. No other country has thus far shown a similar familiarity with the policy reasons behind the introduction of a neutral registration scheme open to new families. The belief is thus that the latent potential of these seeds could still be exploited.

[217] Be reminded that the report precedes the introduction of same-sex marriage.
[218] CAN. DEP'T JUSTICE, *supra* note 216, at 27.

6.2. Case law dealing with the essential features of familyhood

The third subsection is devoted to assessing the case law that has forged the notions conjugality, the dyadic nature of the union, and the requirement of cohabitation. Its aim is to posit that, thus-construed, these terms leave space for judicial updating in the desired direction, without stretching the spirit and letter of the law. Accordingly, the introduction of a neutral registration scheme, not only is desirable from a pure policy perspective, it is also to some (yet limited) extent grounded in positive law.

The emphasis on conjugality

As seen in the section devoted to the constitutional argument, the exegetical "limit" of the notion of marital status discrimination is that it largely rests on conjugality. This is not unique to the constitutional context. Marital privileges have been allocated through laws and case law to "marital-like" couples bearing some characteristics, among which conjugality stands out as the principal one.

Conjugality is a ubiquitous presence in Canadian case law and statutory law.[219] It is commonly understood as a synonym with sexual intimacy. The bright line to distinguish conjugal unions from non-conjugal ones tends to lie in the absence within a non-conjugal union of a sexual component (which is conversely present in the first.) However, conjugality has also an elusive meaning in Canadian law. In constitutional litigation, the Supreme Court first seemed to link marital status to sex.[220] Then, in *M. v. H.*, the Court balked at defining conjugality, while acknowledging the intrinsic difficulty in understanding what it stands for.[221] In the judgment it clarified that sexual activity is not required, and that no one would deny that a conjugal couple composed of elderly people does not qualify once the couple stops to engage in sexual activity.[222] At the statutory level, the content of conjugality has been shaped in the context of common law relationships and the uphill struggle to equate them to spouses. In

[219] For works critically exploring the legal definitions of spouse and conjugality, *see* Shelley A.M. Gavigan, *Paradise Lost, Paradox Revisited: The Implications of Feminist, Lesbian and Gay Engagement to Law,* 31 OSGOODE HALL L.J. 589 (1993); *id*, *Legal Forms, Family Forms, Gendered Norms: What is a Spouse?* 14 CAN. J. L. & SOC'Y 127 (1999).
[220] *Miron,* 2 SCR 418.
[221] *See M. v. H.*, 2 SCR 418 (Cory J opinion).
[222] Caroline A. Thomas, *The Roles of Registered Partnerships and Conjugality in Canadian Family Law*, 22 CAN. J. FAM. L. 223, 238 (2006).

Québec, a case giving some credence to the link between marital status and sex is *Brunette v Quebec*.[223] The case concerned a "non-conjugal couple" made of a 64-year-old disabled woman and 54-year-old mentally ill man. The couple shared accommodation and living expenses, provided mutual care, and was emotionally interdependent. A Superior Court in Québec held on that occasion that the relationship did not give rise to support obligations due to the asexual nature of the relationship.[224] However, I believe that this holding hinges upon the nature of the case: the appellants were seeking to challenge the termination of their social assistance. The appealed decision of the administrative tribunal reached this outcome since they lived in a marital-like relationship ("vivent maritalement.")[225] Yet, there is a profound injustice associated with terminating benefits to the disabled appellant, which finds herself in a catch 22 situation where she either lives on her own to receive the benefits (although she is not able to,) or she has the benefits terminated if she intends to continue living with the person that helps her out. The asexual nature of the relationship was the easiest way out from the absurd substantive outcome of terminating social assistance.

The landmark precedent in clarifying the notion of conjugality is *Molodowich v. Penttinen*.[226] After 37 years from the delivery of the decision, it is still widely cited as the setting precedent in common law jurisdictions. In delivering the judgment for the court, Justice Kurisko first noted the disentanglement of sexual intimacy and cohabitation. [227] He then provided some useful guidance in determining whether a consortium between the parties existed. He relied on the following functional characteristics, none of which had to be necessarily present: shelter and sleeping arrangements, sexual and personal behavior (*e.g*. their attitude of fidelity), services

[223] Brunette c. Québec (Tribunal administratif), 1999 CanLII 11878 (Q. Ct. Super.).
[224] Daniel Del Gobbo, *"Spousal" Connections and Sexual Connections in Family Law*, COURT.CA, Jan. 12, 2010, https://www.thecourt.ca/spousal-connections-and-sexual-connections-in-family-law/ (last visited June 20, 2018). In so doing, the Court found that for partners to be considered as "spouses" a *condicio sine qua non* was to have entered arrangements for sexual behavior.
[225] *Brunette*, 1999 CanLII 11878.
[226] Molodowich v. Penttinen, 1980 CanLII 1537 (Ont. Dist. Ct.).
[227] Thomas v. Thomas, [1948] 2 K.B. 294, 46 L.G.R. 396 (K.B. Div.), cited in *Id*, at par. 13 ("Cohabitation does not necessarily depend upon whether there is sexual intercourse between husband and wife… [C]ohabitation consists in the husband acting as a husband towards the wife and the wife acting as a wife towards the husband, the wife rendering housewifely duties to the husband and the husband cherishing and supporting his wife as a husband should.").

(*e.g*. preparation of meals), social activities, societal attitude of the community toward the couple, economic support and financial arrangements, and children.[228]

Yet, the circumstance that not all attributes are necessary conditions for conjugality to be present means that the Court had (albeit slightly) slackened the link between conjugality and sexuality, and between conjugality and physical cohabitation. It also means that it is on the judge to determine on a case-by-case basis whether conjugality is present and how many of these functional requirements shall be met.

Notwithstanding the clarification that no quality is necessary, such an approach, called "functional" test, has been criticized for comparing new family formations to an overly

[228] *Id*, at par. 16. These are the guiding questions to establish a consortium:
"(1) SHELTER:
(a) Did the parties live under the same roof?
(b) What were the sleeping arrangements?
(c) Did anyone else occupy or share the available accommodation?
(2) SEXUAL AND PERSONAL BEHAVIOUR:
(a) Did the parties have sexual relations? If not, why not?
(b) Did they maintain an attitude of fidelity to each other?
(c) What were their feelings toward each other?
(d) Did they communicate on a personal level?
(e) Did they eat their meals together?
(f) What, if anything, did they do to assist each other with problems or during illness?
(g) Did they buy gifts for each other on special occasions?
(3) SERVICES:
What was the conduct and habit of the parties in relation to:
(a) Preparation of meals,
(b)Washing and mending clothes,
(c) Shopping,
(d) Household maintenance,
(e) Any other domestic services?
(4) SOCIAL:
(a) Did they participate together or separately in neighbourhood and community activities?
(b) What was the relationship and conduct of each of them towards members of their respective families and how did such families behave towards the parties?
(5) SOCIETAL:
What was the attitude and conduct of the community towards each of them and as a couple?
(6) SUPPORT (ECONOMIC):
(a) What were the financial arrangements between the parties regarding the provision of or contribution towards the necessaries of life (food, clothing, shelter, recreation, etc.)?
(b) What were the arrangements concerning the acquisition and ownership of property?
(c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?
(7) CHILDREN:
What was the attitude and conduct of the parties concerning children?
To the foregoing must be applied the following caveat of Mr. Justice Blair in the *Warwick* case:
The extent to which the different elements of the marriage relationship will be taken into account must vary with the circumstances of each case."

idealized notion of marital union, thereby making it harder for non-normative families to pass muster.[229]

Luckily, courts have progressively realized the dangers associated with an "elusive quest for marriage equivalence."[230] The Supreme Court itself acknowledged that this aspirational model could be employed to subject non-traditional families to a higher scrutiny compared to families conforming to the traditional norm.[231] An approach which is more contextual was thus embraced in *Macmillan-Dekker*. The Court thereto held that: "Each case must be examined in light of its own unique, objective facts ... the seven [Molodowich] factors are meant to provide the Court with a flexible yet objective tool for examining the nature of relationships on a case-by-case basis." [232] No index is hence determinative and conclusive in isolation from the others.[233]

The test confirms how ephemeral is the notion of conjugality in family law. It seems it does not really have a content. Conjugality can only be appreciated in contrast to a notion that is either contiguous or oppositional. It is a rare case where the comparator itself is shaped by the compared term.

The term "conjugality" has been further shaped in the context of polygamy laws, where it has been completely detached from sex. A seminal case in this regard is *R. v. Blackmore*.[234] The decision led to the conviction of two men, "guilty" for having entered a celestial Mormon marriage with respectively six wives and a dozen of wives. The Court confirmed the *Polygamy Reference* approach[235] in deeming as alternative the (i) marriage and (ii) conjugal union requirement of the provision banning polygamy.[236] As a consequence, it is sufficient to show either that multiple marriages

[229] O. L. REFORM COMM., REPORT ON THE RIGHTS AND RESPONSIBILITIES OF COHABITANTS 62 (1993), available at https://archive.org/details/esreportonrights00onta/page/n0 (last visited 24 Oct. 2018); *Mossop*, 1 SCR 554, at 638 ("The use of a functional approach would be problematic if it were used to establish one model of family as the norm, and to then require families to prove that they are similar to that norm.").

[230] Brenda Cossman & Bruce Ryder, *What is Marriage-Like Like? The Irrelevance of Conjugality*, 18 CAN. J. FAM. L. 314 (2001). Note that the Supreme Court itself in 1995 was aware of these dangers. Such an awareness, *e.g.*, emerges in the passage of the *Egan* decision, where it stated that same-sex couples need not comply with a marital ideal to qualify as conjugal.

[231] *Mossop*, 1 SCR 554, at 638.

[232] Macmillan-Dekkerv. Dekker, 2000 CanLII 22428 (O. Sup. Ct. J.), at par. 68.

[233] DeSouza v. DeSouza, 1999 CanLII 19163 (Ont. C. J.).

[234] R v. Blackmore, 2017 BCSC 1288 (CanLII).

[235] Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588 (CanLII).

[236] Section 293 (1)(a) of the Criminal Code of Canada, RSC 1985, c C-46 [Crim. Code].

were entered (bigamy) or that simultaneous unmarried conjugal unions were entered (polygamy.)[237]

More interestingly for purposes of our analysis is the comparison between polygamy and common law relationships as far as the sexual component is concerned. The sexual component of conjugality is absent in polygamy laws, and no proof of sexual intercourse or intention to engage in it must be provided.[238] However, the reason is that the provision wants to leave no loophole, and is directed, regardless of sexual orientation, to all marriages, whether civil or religious or sanctioned by any means.

Besides polygamy laws, which are *lex specialis* and disentangle sex from conjugality for the specific purpose of extending the scope of the criminal prohibition, other studies suggest that sex is no longer a requirement germane to conjugality. For instance, Professors Ryde and Cossman reported how lower courts steered away from a strict functional approach and held fast to the Supreme Court's reasoning in *M. v. H.* holding that sexual intercourse is not a necessary component in conjugality.[239] They welcomed this approach by noting that "[t]aking sex into account at all is wrong-headed and offensive."[240] It is wrong-headed since sex is unrelated to the accomplishment of legitimate state objectives.[241] And it is offensive as it intrudes on the most intimate decisions in family life, which ought not to be disclosed to administrative or judicial bodies.[242]

Therefore, while it can be said what conjugality is not (conjugality does not require sexual activity,) it is much less clear what conjugality *is*. Thus far, it seems that courts largely left it undefined. Family law is growingly fact-driven and conjugality, along with other similarly pivotal markers of familyhood, is left to the discretion of the judge. The interpretation of conjugality in tax courts is particularly instructive of the unsettled nature of the term. Significant empirical evidence of the legal meaning of conjugality in the tax context is provided by Professor Brook in her essay "Cameos from the Margins of Conjugality."[243] Drawing from a sample of cases before tax courts, the

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[237] ANGELA CAMPBELL, SISTER WIVES, SURROGATES AND SEX WORKERS: OUTLAWS BY CHOICE? 67 (2016).
[238] *See* section 293 (2) Crim. Code.
[239] Cossman & Ryder, *supra* note 230, at 294-300, esp. 298.
[240] *Id*, at 326.
[241] *Id*.
[242] *Id*.
[243] Brook, *supra* note 212.

essay maintains that there is a contiguity of conjugal couples and "proximate relationships," relationships which are intimate in various ways.[244]

The takeaways from her essay are:

(a) fluidity of the type of relationship: people often shift along the spectrum of proximity during their relationship; they engage in some practices and take on responsibilities (*e.g.*, sexual intimacy or cohabitation) over some periods and discard them in other periods. Fluidity is even sporadically acknowledged by the tax court.[245] For instance, in *Henry v. R.* a court conceded that parties were in a conjugal union in the first half of their relationship, and that they were not in the second half.

(b) conjugality is not necessarily based on sexual intimacy: couples were found to be in a conjugal relationship even though they engaged in sexual intercourse sporadically, and even though they lived separate and apart for some periods, being thus unable to engage in it.[246]

(c) conjugality is extremely variable and largely depends on judicial discretion. It does not always entail mutual care and care toward the children. It does not necessarily require that couple be perceived as such by the community.[247] Ultimately, a couple can be deemed as "conjugal" even though partners slept in a separate room[248] or lived in different dwellings.[249]

The emphasis on the dyadic couple

Polygamy is *lex specialis*, and is governed by a criminal prohibition. The provision requires either a marriage or a conjugal union with more than one party.[250] The leading case on the constitutionality of the provision, the *Polygamy Reference*,[251] and the

[244] *Id*, at 100.
[245] Henry v. R., 2003 1 C.T.C. 2001 (Can. Tax Ct.); Bellavance v. R., 2004 4 C.T.C. 2179 (Can. Tax Ct.); Savory v. R., 2008 5 C.T.C. 2033 (Can. Tax Ct.); DeRepentigny v. R., 2008 T.C.C. 304 (Can. Tax Ct.).
[246] Astley v. R., 2012 T.C.C. 155 (informal procedure) (Can. Tax Ct.); *DeRepentigny*., 2008 T.C.C 304 (informal procedure).
[247] Hendricken v. R., 2008 5 C.T.C. 2206 (informal procedure) (Can. Tax Ct.).
[248] Richard v. R., 2003 C.C.I. 774 (informal procedure) (Can. Tax Ct.).
[249] Hamel v. R., 2004 T.C.C. 315 (informal procedure) (Can. Tax Ct.).
[250] Section 293(1) of the Crim Code reads: "Every one who (a) practises…
(i) any form of polygamy, or
(ii) any kind of conjugal union with more than one person at the same time,
whether or not it is by law recognized as a binding form of marriage, …is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years."
[251] *Reference re: Section 293 of the Criminal Code of Canada*, BCSC 1588.

recent case sanctioning the first conviction in over a century for polygamy, *R. v. Blackmore*,[252] offer guidance on how to interpret the provision.

First of all, in both cases the issue as to whether the provision requires both proof of marriage and of a "conjugal union" arose. The defendants contended that proof of the conjugal union, meaning a "marital-like relationship," as interpreted in *Molodowich*, was required. The Court disagreed and deemed the two prongs as alternative, and the latter (conjugal union) as a redundant repetition of the former (marriage.)[253] The practical implication of this holding was that polyamorous relationships, unlike polygamous ones, are not covered by the criminal ban.[254]

The Court stressed that a conjugal union is no synonym with "marriage-like relationships" nor "conjugal relationships." A union is created at some point in time by a marriage ceremony or other sanctioning event; while a conjugal relationship unfolds over time and has no specific moment of creation.[255]

Hence, polyamorous relationships are not covered by the criminal ban.[256] Thus, whenever times are ripe to break away from the statutory requisite of a dyadic unit, the *Molodowich* factors could and should apply. None of the factors is inherently unsuitable for polyamorous relationships: the shelter arrangements; the service, social activity, societal perception, or children. Not even the sexual arrangement constitutes an obstacle in that parties have sexual intercourse as other conjugal units, and might maintain an attitude of fidelity. Whenever fidelity is exegetically perceived as excluding polyamorous relationships, one should still recall the need for a contextualized reading of the *Molodowich* factors.

[252] *Blackmore,* BCSC 1288.
[253] *Reference re: Section 293 of the Criminal Code of Canada*, BCSC 1588, at par. 1027.
[254] Michael MacDonald, *3 adults in polyamorous relationship declared legal parents by N. L. court*, CBC, June 14, 2018, https://www.cbc.ca/news/canada/newfoundland-labrador/polyamourous-relationship-three-parents-1.4706560 (last visited Aug 20, 2018) ("Polyamorous relationships are legal in Canada, unlike bigamy and polygamy, which involve people in two or more marriages.").
[255] *Blackmore,* BCSC 1288, at par. 270 ("In other words, conjugal union refers to a marital status, not the attributes of a relationship.").
[256] MacDonald, *supra* note 254.

The emphasis on cohabitation

Conjugal couples are also required to be cohabiting couples from time immemorial.[257] It was once pacific that for the condition to be met people had to live together.[258] The current reality of relationships is much more nuanced. Partners move across the globe to work for extended periods of time, live apart from each other, or maintain separate residences and still hold themselves out to the community as a couple.

The leaving arrangements hold a different weight for married and unmarried partners. While the former continue to be deemed as married and retain their legal obligations upon separation, cohabitation is a "constituent element"[259] of a common law relationship.[260]

Yet the meaning of "cohabitation" is convoluted. It is not always synonymous with co-residence. As maintained by the Supreme Court, "[t]wo people can cohabit even though they do not live under the same roof and, conversely, they may not be cohabiting in the relevant sense even if they are living under the same roof."[261] Periods of physical separation are not *per se* able to end the common law relationship "[i]f there [is] a mutual intention to continue."[262] Lower courts have consistently applied this reasoning to disentangle cohabitation from co-residence. Tellingly, in 2003 an Ontario court granted interim support to a partner in an almost twenty years' relationship, which did not physically cohabit due to his job.[263] The Ontario Court of Justice has recently confirmed the approach, in a case involving (spousal) support for a common law partner, stating that:

> "The fact that one party has not 'moved in' with the other did not mean that they were not living together at that time. Although the parties … continue to maintain separate residences, they did live together under the same roof and slept, shopped, cooked,

[257] *See, e.g.*, Barlee v. Barlee (1822), 1 Add. 301, 162 E.R. 105. ROBERT RAMSEY EVANS, THE LAW AND PRACTICE RELATING TO DIVORCE AND OTHER MATRIMONIAL CAUSES (1923).
[258] Fitzgerald v. Fitzgerald (1869), L.R. 1 P&D. 694, [1861-73] All E.R. Rep. 157, 38 L.J.P.&M. 14, 19 L.T. 575, 17 W.R. 264, at 698.
[259] Hodge v. Canada (Minister of Human Resources Development), [2004] 3 SCR 357, 2004 SCC 65 (CanLII).
[260] This is inevitable in that common law partners are singled out through a functional definition, while spousal status does not call for a glance over the concrete attitudes of the parties.
[261] *Hodge*, 3 SCR 357, at par. 42.
[262] *Id*.
[263] Ross v. Reaney, 2003 CanLII 1929 (Can. Ont. Super. Ct.).

> cleaned, socialized and lived together as a couple and were treated as such by their friends, family and neighbors."[264]

It is now common wisdom that cohabitation does not mean co-residence. By contrast, cohabitation is diluted to the point that is stands as a synonym for the mutual intention to continue the relationship.

This interpretation is more aligned with the reality of family arrangements. It comes close to the requirement of a "significant amount of care," as an alternative to a narrowly-construed "cohabitation," proposed by professor Herring.[265] In his view, cohabitation is not a viable gatekeeper of family status, and ought to be replaced by an inquiry into the time spent together and amount of care provided to each other.

In the end, the essential features of marital-like relationships have been diluted to the point of being malleable. Conjugality is the most illustrative example of this. It is no synonym with sexual intimacy. At the same time is does not seem to have a specific content and its concrete features are intensely fact-driven and left to the discretion of the judge. Likewise, cohabitation is no synonym with co-residence. It merely requires a mutual intention to continue the relationship and to care for each other. The dyadic nature of the relationship is entrenched only with regard to polygamy and polygamous unions. By contrast, polyamorous relationships are not covered by the criminal ban. However, courts have refrained from extending spousal benefits to these unions, although our analysis suggests that no *Molodowich* factor is intrinsically incompatible with them.

In the end, I contend that a comprehensive scheme protecting new families is not at odds with Canadian case law on family law. An extension of protections to these families could pivot on a liberal and large, and holistic interpretation of the *Molodowich* factors. Particularly, their recognition is warranted since the following conditions of familyhood can be met: shelter and sleeping arrangements, personal behavior (*e.g.* their attitude of fidelity, if applicable,) services (*e.g.* preparation of meals,) social activities, economic support and financial arrangements.

[264] Cockerham v. Hanc, 2015 ONCJ 736 (CanLII), at par. 61.
[265] JOHNATHAN HERRING, CARING AND THE LAW 194 (2013).

6.3. Recent developments in family legal pluralism: Laws that recognize new families (other than same-sex couples or de facto couples)

The following schemes in force in Alberta and New Brunswick are examples of viable models for extending protections to new families. They also show that the policy changes proposed in this dissertation are partially grounded in positive law. The subsection will mainly focus on the Adult Interdependent Relationships Act in Alberta in that it comes in the form of a comprehensive scheme, while the New Brunswick law only regards support obligations. It is to be preliminarily noted that both schemes virtually apply to non-conjugal families. However, in both cases either the judicial interpretation or the unawareness that protections are available, prevented these schemes from unleashing their full potential.

6.3.1. Adult Interdependent Relationships Act (Alberta)

The Province of Alberta introduced in 2002 a new legal status through the Adult Interdependent Relationships Act (AIRA.)[266] The status is open to any two adults in an interdependent relationship, and confers some of the rights, obligations and benefits that accrue through marriage. The locution "adult interdependent partners" (AIPs) is now added to many laws and provincial programs, previously reserved to spouses.
As for public law, AIPs receive the same extended health care benefits where one partner's age is above 65 as married couples.[267] Under the Alberta Workers Compensation Act, compensation following the death of a worker is due to AIPs as well as spouses.[268] In the private law sphere, AIPs now have the right to inherit property from a deceased partner under the same circumstances as a spouse.[269] They

[266] Adult Interdependent Relationships Act, Statutes of Alberta 2002, c. A-4.5 [AIRA].
[267] *Id*.
[268] *See, e.g.,* §§ 49, 71, 74 of the Worker Compensation Act, RSA 2000, C W-15.
[269] Vogel LLP Lawyers, *Adult Interdependent Relationships and Estates*, 114 ACTLA'S "THE BARRISTER" MAGAZINE, December 1, 2014, https://www.vogel-llp.ca/resources/ (last visited May 28, 2018).

also have the right to inherit a share of estate assigned by law, irrespective of the content of the will.[270] Furthermore, an AIP can claim "spousal" support obligations.[271] The enactment of the law followed the decisions of the Supreme Court of Canada, holding that discrimination based on sexual orientation was constitutionally impermissible,[272] and the decision of the Alberta Surrogate Court in *Johnson v. Sand*,[273] which, relying on *M. v. H.*, held that the provincial legislation relating to intestate death that denied a surviving same-sex partner the same rights as married couples run afoul section 15 of the Charter.[274] The decisions fueled a massive mobilization by social conservative Christian movements in Alberta. But, albeit animated by a desire to dilute protections for same-sex couples into a bigger basket of non-normative couples, it is this conservative reactionism that led to an increased pluralism in Alberta family law.

The system is a mixed one and sets forth two different models for recognition:

(1) contractual model: parties can sign a written agreement (adult interdependent partner agreement);[275]

(2) ascription: parties acquire the status after having lived in a three-year long interdependent relationship, or in a relationship "of some permanence" should there be a child,[276] absent formal intent.

However, under Section 3(2) of the Act, persons related to each other by blood or adoption are not eligible for ascription, and may only become adult interdependent partners by entering into a written agreement[277] (to which the three-year requirement does not apply.) Therefore, status is not ascribed to blood relations. This amendment was meant to respond to the concerns regarding the adverse impact on the freedom of

[270] *Id*.
[271] *Cohabiting Relationships and Adult Interdependent Partners*, CALGARY LEGAL GUIDANCE, http://clg.ab.ca/programs-services/dial-a-law/cohabiting-relationships-and-adult-independent-partners-2/ (last visited May 28, 2018).
[272] *Reference Re Same-Sex Marriage,* 3 S.C.R. 698.
[273] Johnson v. Sand, 2001 ABQB 253 (CanLII), quoting *M. v. H.*, 2 SCR 418 (finding that the exclusion of same-sex couples from the definition of "common law spouse" is unconstitutionally contrary to Section 15 of the Canadian Charter of Rights and Freedoms).
[274] Nicholas Bala, *Controversy Over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships* (Queen's University Law Research Paper Series no. 41, 2003).
[275] AIRA § 3(1)(b).
[276] AIRA § 3(1)(a).
[277] Since these partnerships are formalized through a private contract, there is at present a lack of statistical evidence concerning the AIPs entered into.

choice of two cohabiting nonconjugal adults unwilling to commit.[278] However, contrary to the recommendations of the Consultation Report, the amendment only concerns interdependent relatives, resulting in the unintended consequence that close friends and roommates meeting the eligibility criteria can have the status ascribed.[279] The Act sets forth the criteria to determine the existence of a "relationship of interdependence." Parties must: "(i) share one another's lives, (ii) [be] emotionally committed to one another, and (iii) function as an economic and domestic unit."[280] However, the Legislature of Alberta snuck conjugality in the law. In order to determine when parties "function as an economic and domestic unit" the following elements shall be taken into account:

> "(a) whether or not the persons have a *conjugal* relationship;
> (b) the degree of *exclusivity* of the relationship;
> (c) the conduct and habits of the persons in respect of household activities and living arrangements;
> (d) the degree to which the persons hold themselves out to others as an economic and domestic unit;
> (e) the degree to which the persons formalize their legal obligations, intentions and responsibilities toward one another;
> (f) the extent to which direct and indirect contributions have been made by either person to the other or to their mutual well-being;
> (g) the degree of financial dependence or interdependence and any arrangements for financial support between the persons;
> (h) the care and support of children;
> (i) the ownership, use and acquisition of property."[281]

[278] Paula Simmons, *Social conservatives become weirdly intrusive social engineers*, EDMONTON JOURNAL, May 11, 2002. The majority of long-term nonconjugal adults residing together are relatives (siblings or an adult child and an elderly relative). The amendment was especially meant to protect the freedom of choice of these categories.
[279] Anu Nijhawan, *Alberta's New Adult Interdependent Relationships Act*, 22 EST. TR. & PENSIONS J. 157, 171 (2003).
[280] AIRA § 1(1)(f).
[281] AIRA § 1(2).

Yet, courts have laid out a holistic approach to determining whether parties constitute an economic and domestic unit, with no single factor carrying more weight than other factors.[282]

The Alberta Legislature's drafting choices – specifically the decision to include conjugality as an element of a domestic unit – seem to constrain what qualifies as an AIP to the realm of the romantic, conjugal couple.[283] While criteria (c) to (i) tend to be applicable to non-conjugal interdependent relationships, criteria (a) and (b) clearly point to conjugality as the crucial marker of familyhood. This aspect is worrisome in that it excludes non-conjugal couples by definition.

However, the interpretation of conjugality is consistent with the case law showing that it is no synonym with sexual activity. It is sufficient a union where parties enjoy each other's company.[284]

As in the case of conjugality, the Legislature's condition that a relationship have a high degree of "exclusivity" is borrowed from the semantics of marriage.[285] Exclusivity has little heuristic value vis-à-vis non-conjugal couples; it does not sit well with non-traditional conjugal couples either, whose parties can be deeply committed and yet non-exclusive. As a purely textual matter, the choice of listing these criteria on top of the list is debatable, in that these requirements might percolate down – and affect the interpretation of the remaining ones.

As to cohabitation, which conjures up the issue of people leaving apart together, and to the multiple facets of living arrangements, the problem has been acknowledged by the Legislature of Alberta. When called upon to identify whether a relationship qualifies when the persons do not live under the same roof, Minister Hancock responded that such non-cohabiting relationships would qualify only in the clearest cases.[286] Namely, they would qualify only where nobody would contend that they are

[282] Kiernan v. Stach Estate, 2009 ABQB 150 (CanLII), at par. 42.
[283] AIRA § 1(2), esp. (a) and (b).
[284] *See ex multis* Riley Estate (Re), 2014 ABQB 725 (CanLII) (claiming relief as the beneficiary of the deceased estate, based on the existence of an exclusive relationship); *Kiernan*, ABQB 150 (seeking relief as a dependent under the Dependents Relief Act, upon death of the partner).
[285] Jane Adolphe*, The Principles and the Canada's "Beyond Conjugality" Report: The Move Toward Abolition of State Marriage Laws*, in ROBIN FRETWELL WILSON (ED.), RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 355 (2006), citing Cormac Burke, *Object of Matrimonial Consent. A Personalist Analysis*, 9 FORUM 39, 70 (1998).
[286] Legislative Assembly, Alberta Hansard, No. 44 (27 November 2002) at 1608-09.

no longer household members (an example being a student who moves away to attend university, or a person moving into seniors' residence or an extended care facility to receive medical treatment.)[287] By contrast, people who have never lived together, and thus LATs, cannot qualify under the regime, as interpreted by subsequent case law.[288] Thus, from a textual perspective, the ideal AIP would be an opposite-sex or same-sex conjugal partner, with a child or who has cohabited for three years. However, the scheme is virtually opened to other couples as well. The ability of such scheme to attract non-conjugal families was thus destined to depend on judicial interpretation.

As a self-fulfilling prophecy, the judicial interpretation shows that great emphasis is placed on an idealized, romantic, conjugal notion of relationship. Based on a legal analysis I conducted over a sample of 50 cases on the application of the AIR by judicial courts in Alberta, the vast majority of lawsuits has been brought by conjugal couples.[289] The results of this analysis are confirmed by a recent survey conducted by the Alberta Law Reform Institute, delivering a final report on the reform of division property rules.[290]

As usual, data shall be interpreted. One could link this trend to the parties' belief that the courts enforcing the scheme will seek elements of conjugality in the relationship, because they have the ideal conjugal relationship in mind. This could create an incentive for couples to frame themselves as if they were conjugal, even in the absence of such a relationship. The trend could also be linked to a lack of awareness of the possibility for non-conjugal couples to enter formal relationships. While it is not the proper venue to engage in inquiries over causation, it is still worth flagging this trend

[287] *Id*.

[288] Henschel Estate, 2008 ABQB 406 (CanLII), at par. 41 ("I note that extending the financial consequences of the adult interdependent partnership to persons who have never cohabited and have not entered into an adult interdependent partnership agreement would dramatically change the legal landscape.").

[289] *See ex multis* Knight v. Wowk, 2015 ABPC 286 (CanLII) (with the plaintiff seeking an order requiring the former "common-law" partner to pay spousal support); R.F.T. v. O.K.G., 2007 ABPC 70 (CanLII) (with the plaintiff filing an application for child support from the other biological parent of the child).

[290] ALTA. L. REFORM INST., *supra* note 9, at par. 215 ("At many of our presentations and roundtables, we asked lawyers about their experience with non-conjugal adult interdependent partners. We asked whether anyone had encountered a case where a non-conjugal relationship was alleged or found to be an adult interdependent relationship. Many lawyers with years of experience in family law or wills and estates attended our presentations and roundtables, but almost no one indicated they had encountered such a case.").

pointing to the stunning disappearance of non-conjugal unions from the application of the law.

Despite these findings, I contend that the regime is likely to create a culture of non-conjugality, in the sense that by making these relationships visible in the eyes of the law, it creates the very concept it is seeking to regulate. The law can make parties aware of the possibility that their relationship is not a mere happenstance but enjoys social and juridical relevance. Although premature, a recent case on interdependent siblings in Alberta is instructive. The applicants were seeking an extension of the federal Canada Pension Plan (CPP) survivor's pension before the Social Security Tribunal.[291] Although rejected on jurisdictional grounds, their case shows the possibility for the emergence of these new kinships and for their self-identification as groups capable of advancing their own agenda.[292]

6.3.2. Family Services Act (New Brunswick)

New Brunswick is also an exception to the centrality of conjugality in the family law realm. However, the law does not provide for an analogous comprehensive scheme but limits its reach to "spousal" support obligations. Under the Family Services Act, spousal support obligations are placed upon any two persons living in a family relationship for a given period of time. The statute reads as follows:

> "Two persons, not being married to each other, who have lived:
> (a) continuously for a period of not less than three years in a family relationship in which one person has been substantially dependent upon the other for support, or (b) in a family relationship of some permanence where there is a child born of whom they are the natural parents, and have lived together in that relationship within the preceding year, have the same obligation as that set out in subsection (1) [an obligation to provide support for himself or herself and for the other spouse]."[293]

[291] E. H. v Minister of Employment and Social Development, 2017 CanLII 30681 (Soc. Sec. Trib.).
[292] While the claim has been denied for jurisdictional reasons, lying in the non-applicability of the AIP scheme to other provincial and federal jurisdictions, the case still bears some value for purposes of our analysis.
[293] Article 112(3) of the Family Services Act, S.N.B. 1980, c. F-2.2.

Such a broad definition could virtually extend support obligations to any individual living with a person who is financially "substantially" dependent. However, again, case law shows that the requirement of cohabitation is automatically converted into one of conjugality.[294] A review of the cases concerning spousal support claims brought by parties to a non-marital relationship corroborates the idea that non-conjugal parties are unaware of the nature of their relationships, and in turn of the possibility of earning support upon dissolution of their relationship.

However, as in the case of Alberta, due to the lack of claims on the part of non-conjugal couples, one could not infer that the stress on conjugality is normative, as opposed to merely descriptive of the type of relationships that litigated support thus far.

6.4. Summary

Section 6 has attempted to show that there are compelling policy reasons for extending through a registration scheme at least some marital protections to new families. Canada has reached an unprecedented awareness of the importance of protecting such families. This awareness has resulted in the groundbreaking report of the Family Law Commission and in two schemes that can be accessed by cohabiting conjugal partners and non-conjugal partners.

Another reason for which Canada could be on the forefront in the recognition of new families relates to the progressive interpretation of the main markers of familyhood, namely: conjugality, the dyadic requisite of the relationship, and the requirement of cohabitation. As to conjugality it is now well-settled that it does not require a sexual component. Also, the holistic approach embraced by lower courts leads to an intensely fact-driven inquiry that leaves space for judicial discretion in identifying families that are worth protecting on a case-by-case basis. Furthermore, cohabitation is no longer synonym with co-residence. The only requirement that is harder to disentangle from the current definition of family is the dyadic nature of the relationship. However, the section has argued that the criminal prohibition on polygamy does not extend to

[294] L.R.R. v. E.M, 2018 NBCA 2 (CanLII); Carruthers v Leger, 2017 NBQB 167 (CanLII); Ryan v Brown, 2016 CanLII 35042 (N.B. Queen's Bench); Virgili v Virgili, 2015 NBQB 251 (CanLII); KK v AK, 2012 NBQB 276 (CanLII); McCormick v. The Estate of Gilles Doiron and Hilda Power, 2009 NBCA 19 (CanLII); S.M. v. R.S., 2003 NBCA 6 (CanLII); Grover v. MacIntosh, 2001 CanLII 21692 (N.B. Queen's Bench).

polyamorous relationships and that none of the *Molodowich* factors is inherently unsuitable for polyamorous relationships. Yet, a compromise could consist in introducing a registration scheme that acknowledging the financial constraints associated with the recognition of assemblies and the current restrictive judicial interpretation (and criminal ban) extends only to *two* interdependent persons. By contrast, the requirement of conjugality ought to be discarded and the progressive interpretation of cohabitation embraced by courts applying the new scheme.

Conclusion

By way of conclusion, it can be argued that the greatest potential lies in employing a policy argument to introduce a broad scheme open to new families (*rectius* couples.) This scheme should not focus on conjugality, and should allow for self-definition. As to the benefits, it should seek to equate new families to married couples to the extent possible (in an attempt to extend both private law entitlements and public law benefits.) Contrary to the United States, constitutional arguments are also available. Yet, one has to bear in mind that there are obvious limits associated with such pleadings, including:
(i) the reluctance of courts to let the suit to move ahead on equality grounds;
(ii) the need to introduce a new analogous ground ("family status") for all those families ineligible to marry; and
(iii) the fact that the courts are much more penchant to recognizing new families when private law entitlements are at stake.
The latter aspect carries the risk of nibbling only limited protections in the private law realm, without extending public law benefits. Not only is this risk inherent in the case-by-case approach to extend protections through constitutional litigation, it is also accentuated by the current constitutional doctrine concerning the section 1 analysis, which supports an undisputable state interest in privatizing care, while entrenching the need to protect the public fisc.
Ultimately, when it comes to human rights codes, one is to be aware that the current interpretation of the marital and family status ground severely curtails the chances of bringing about change at the statutory level.

CHAPTER VI
EUROPE

Introduction

This chapter expounds two "meta-national" systems:[1] The European Union ("EU,") which is a supranational system, and the European Convention of Human Rights framework ("ECHR" framework,) which is an international system. As a consequence, it requires a special structure, which differs from that of the previous chapters on the United States and Canada.

It must be preliminarily submitted that by "Europe" I refer to the member states of the EU, including the United Kingdom (although the country is now on his way out from the EU.) I do not refer to the member states of the Council of Europe, the international organization that upholds human rights as enshrined in the European Convention, which comprises 47 states, and extends to the Middle East countries in Asia. While the reasoning set forth in the section devoted to the ECHR is clearly applicable to all Contracting States, for the sake of consistency, reference is made to the overlapping set of 28 states that participate in both the EU and the ECHR.[2]

The domestic legal regime of the member countries of said meta-national systems are not overlooked. One cannot deal with the EU or ECHR without accounting for national law as it is the structure itself of the two systems that requires an in-depth inquiry into domestic law.

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[1] For the sake of consistency, I will refer to both supranational and international systems as "meta-national systems," *i.e.* as systems that operate "beyond" nation states' boundaries.

[2] This group of states includes: Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden. In shall add to the foregoing states the United Kingdom, although it is now in the process of leaving the European Union (so-called Brexit,) yet not the European Convention of Human Rights. *See* FEDERICO FABBRINI, THE LAW & POLITICS OF BREXIT (2017).

As to the EU, it bears reminding that there is no substantive family law at the European level.[3] The Union is only endowed with the power of fostering judicial cooperation to enhance the free movement of persons amongst the different states of the Union, and the power of harmonizing private international law rules vis-à-vis the family.[4] Even in matters where the Union enjoys a certain competence, unless the competence is an "exclusive" one, the action of the Union must comply with the principles of subsidiarity and proportionality.[5] Furthermore, domestic laws and principles come constantly into play in the assessment of the so-called common constitutional traditions that do inform fundamental rights at the Union level. Pursuant to Article 6(3) of the Lisbon Treaty, "[f]undamental rights, as … they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."[6] In addition to that, Article 4(2) of the Treaty establishes an obligation for the Union to respect the national identity, which again calls an inquiry into what constitutes the core identity of the nations.[7]

Hence, the need to account for domestic law is dictated by judicial self-restraint, with a view to not intruding in matters that have not been transferred to nor shared with the Union. In addition, domestic law informs concepts at the EU level, such as common constitutional traditions and family.

Likewise, the ECHR system calls for an inquiry into domestic law because the notion of European consensus is the main tool employed by its judicial body to make doctrinal advancements. As an international body, the Court can only act under strict conditions. This point conjures up the issue of deference, which is fairly complex and unsettled. The European Court of Human Right's ("ECtHR") deference to the national authority is variable and depends upon the application of the margin of appreciation doctrine.[8] It differs from the general discretion left to the contracting

[3] Katharina Kaesling, *Family Life and EU Citizenship. The Discovery of the Substance of the EU Citizens' Rights and its Genuine Enjoyment*, in KATHARINA BOELE-WOELKI, NINA DETHLOFF & WERNER GEPHART (EDS.), FAMILY LAW AND CULTURE IN EUROPE 293 (2017).

[4] Nausica Palazzo, *The free movement of same-sex spouses in the European space: What comes next?*, MICHIGAN JOURNAL OF INTERNATIONAL LAW (ONLINE), http://www.mjilonline.org/the-free-movement-of-same-sex-spouses-in-the-european-union-what-comes-next/ (last visited 30 Sept 2018).

[5] Article 5(3) of the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, December 13, 2007, 2007/C 306/01 [Treaty of Lisbon].

[6] Article 6(3) of the Treaty of Lisbon.

[7] Article 4(2) of the Treaty of Lisbon.

[8] The doctrine of the margin of appreciation finds its origins in the administrative courts in civil law countries such as France, and Germany. It was then famously adopted in the context of the European

parties in that it entails supervision of the use of such discretion in the sense that the Court will police its use and avoid an interference with human rights as enshrined in the Convention. As a consequence, the doctrine is no synonym with non-justiciability.

The doctrine itself is malleable in the sense that the margin can be narrow or wide depending on several conditions. A wide margin is warranted mainly because there is no "European consensus" on the measure/principle, but the application of the doctrine has not been consistent so far. Importantly, a wide margin of appreciation is for instance warranted in cases involving morality and religion, [9] and clearly family law engages with both.[10] Furthermore, the *acquis* of the Court shows that no such deference is granted where, for instance, there is no exercise of governmental authority in good faith,[11] or whether the decision is unreasonable either due to flaws in the domestic decision-making process[12] or in the substantive outcome reached.[13]

Once clarified in which sense national regimes come into play, a caveat is to be added. A complete summary of domestic regimes would go well-beyond the scope of the dissertation. An overview of domestic law reveals a surprising diversity.[14] States differ in terms of constitutionalization of the marriage or the family, treatment of same-sex couples, introduction of different or alternative regimes to marriage (such as domestic partnerships or civil unions,) legal treatment of *de facto* cohabitation, etc. This is to say that the concept of family widely varies from state to state and that a mere primer on this complex landscape can be provided.

Convention of Human Rights by its adjudicatory body. In the latter context, it was introduced in the leading judgment ECtHR 7 December 1976, Appl. no. 5493/72 (*Handyside v. the United Kingdom*). The doctrine has then been codified through Protocol no. 15 and is now enshrined in the Preamble of the Convention, stating that "the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention."

[9] ECtHR 25 November 1996, Appl. no. 17419/90 (*Wingrove v. The United Kingdom*).

[10] Valentina Petralia, *La dimensione culturale e religiosa dei modelli familiari. Il caso dei matrimoni poligamici*, 2 DIRITTO DI FAMIGLIA E DELLE PERSONE 607 (2016).

[11] Pursuant to Article 26 of the Vienna Convention on the Law of the Treaties, May 23, 1969, U.N.T.S. 1155, discretion must be exercised in good faith.

[12] Yuval Shani, *Toward a General Margin of Appreciation in International Law?* 16 EUR. J. INT'L L. 911 (2006).

[13] ECtHR 20 May 1999, Appl. no. 25390/94 (*Rekvényi v. Hungary*).

[14] JENS M. SCHERPE, THE PRESENT AND FUTURE OF EUROPEAN FAMILY LAW 42 (2016).

Again, as in Canada and the U.S., the law only insufficiently reflects the stunning diversity in family patterns. The "Golden age of family," that is an age where high rates of marriage, birth at young ages and low rates of divorce prevailed, waned in the 60s.[15] Not only non-traditional family forms are on the rise, they are also considered as prevalent by demographic researchers.[16] These researches exemplify the richness of current family diversity, by referring to the increasing rates of "[m]arried and cohabitating couples with or without children, single parents, stepfamilies, blended families, childless couples and same-sex unions, just to mention a few."[17] Changing patterns in family forms have been a *topos* in sociological research ever since the end of the XIX century. By contrast, we are now witnessing the "strong" emergence of the theme of family diversity,[18] which, in addition to being linked to a gradual decentralization of marriage, is also the product of increasing ethnic diversity and migration flows.[19]

This chapter first offers an overview of the sub-constitutional landscape in Europe, with special regard to the growing decentralization of marriage. It then summarizes the constitutional landscape with a view to understanding the degree of constitutionalization of the family and of the institution of marriage.

Section 2 then moves to list the different remedies that could be pursued in Europe, namely the (non-)remedy of non-intervention, the possibility of extending marriage, the opportunity to protect new families through a protection-driven approach, *i.e.* on a case-by-case bases before judicial courts, and finally through a comprehensive regime, ideally a registration scheme.

This section will in the end argue that it is more advisable to pursue a protection driven-approach in both the ECHR and EU framework, and only at a later time seek

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[15] GERDA NEYER, OLIVIER THÉVENON & CHIARA MONFARDINI, POLICIES FOR FAMILIES: IS THERE A BEST PRACTICE?, European Policy Brief 1 (2016), https://ec.europa.eu/research/social-sciences/pdf/policy_briefs/policy_brief_families-and-societies_122016.pdf (last visited 30 Sept 2018).

[16] *Id*.

[17] Daniela Vono de Vilhena & Livia Sz. Oláh, *Family Diversity and its Challenges for Policy Makers in Europe* 2 (Population Europe Discussion Papers Series no. 5, April 2017), http://www.jp-demographic.eu/wp-content/uploads/2017/04/famsoc_discussionpaper5_final_web.pdf (last visited 30 Sept 2018).

[18] Susan C. Ziehl, Globalization, *Migration and Family Diversity*, 14 TWO HOMELANDS 50 (2004).

[19] FAITH ROBERTSON ELLIOT, GENDER, FAMILY, AND SOCIETY (1996) (exploring the impact of ethnic diversity on family patterns in the United Kingdom). For a comparative review of family arbitration systems, in cases where family matters are governed by religious law, *see* Laura Baccaglini, *Arbitration on family matters and religious law: A Civil Procedural Law Perspective*, 5 CIVIL PROC. REV. 3 (2014).

the introduction of a registration scheme before the ECHR. With this aims in mind, it will move to building an argument before the ECtHR, and then an argument before EU courts. These sections devoted to legal arguments will not present the usual structure seeking to build both a constitutional and policy-based argument. Also, although some scholars acknowledge that the attribute "constitutional" is no longer an exclusive prerogative of states, and that international and supranational Charters are appropriating the term, I here preferred to not adopt the term "constitutional."[20] I will rather refer to arguments resting on the Convention and EU law, these references being more neutral and less controversial.

1. A primer on the legal landscape in European countries

1.1. The sub-constitutional landscape

The surprising diversity in family law hinted to in the introductory section is not that surprising if one considers that not only do European nations have different legal traditions, but they also embrace different conceptions of family, and different background societal norms. These differences are part and parcel of the reforms leading to the decentralization of marriage. Since once societies were marriage-centered, family law tended to coincide with the law of marriage. Being marriage a ubiquitous institution,[21] the law of marriage was usually characterized by a similar material and personal scope across countries. As to the material scope, marriage always conferred the broadest protections upon parties,[22] compared to alternative

[20] Antonio Ruggeri, *Modello costituzionale e consuetudini culturali in tema di famiglia, fra tradizione e innovazione*, in CONSULTA ONLINE 511, n.7 (2018), www.giurcost.org/studi/index.html (last visited 30 Sept 2018).
[21] Martha A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2189 (1995).
[22] The characteristic of marriage as a relatively uniform institution surfaced in the debate surrounding the definition of "spouse" under EU law, especially for purposes of family reunification. I summed up this debate in a blog post on the CJEU's *Coman* decision, *see* Palazzo, *supra* note 4. For instance, in interpreting Article 2(2) of the Directive 2004/38/EC, the prevailing view was that "spouse" referred to the domestic recognition of marriage (and thus did not have autonomous meaning under EU law). This conclusion was further buttressed by the wording of Article 2(2) of the Directive, which, in addition to spouses, recognizes as family members registered partners. Yet, it does so through a host-state rule. By contrast, no such *renvoi* exists for the term spouse and thus one could argue that the omission is intentional. *See* the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside

regimes. As to the personal scope, it usually came in the form of a dyadic, exclusive, for-life union of a men and woman.

Only a reductionist approach could now equate family law with marriage, even in the less "progressive" states, where marital status retains its social and institutional centrality. A narrow vision of the family, coinciding with the marital family, has been naturally challenged over the time by *de facto* relationships (*i.e.* relationships developed outside of wedlock) and by same-sex relationships, whose recognition runs a gamut from complete invisibility to comprehensive protection through marriage.[23] While these new trends did not sound the death knell for marriage, they reverberated on marriage, both outwards and inwards.

As to the inwards effects, it can be confidently argued that marriage as an institution has changed dramatically. A trend common to transoceanic common law countries, as Canada and the United States, points to a customization of marriage. The underlying utilitarian approach in personal relationships insists on the idea that parties should be free to customize and terminate the relationship at will.

European legal scholars too have spoken of a "privacy"[24] approach to stress the increasing retreat of the state from governing the marital relationship from the inception to the "grave." Again, while this regulatory power is still visible and far from being stripped away, one should be aware of the several trends lending credit to the privacy view. The introduction of divorce in all European states (except for the Vatican, which however is not part to the EU,) the favorable treatment of marital agreements, including pre-nuptial, post-nuptial and separation agreements,[25] the decriminalization of fornication and adultery,[26] all gear toward viewing marriage law as being more interested in protecting the autonomy of parties than furthering state-mandated policy goals.

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freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, 77–123 [Directive 2004/38/EC].

[23] SCHERPE, *supra* note 14, at 45-47.

[24] Johanna Miles, *Unmarried cohabitation in a European perspective*, in JENS M. SCHERPE (ED.), EUROPEAN FAMILY LAW VOLUME III: FAMILY LAW IN A EUROPEAN PERSPECTIVE 82-115 (2016).

[25] JENS M. SCHERPE, MARITAL AGREEMENTS AND PRIVATE AUTONOMY IN COMPARATIVE PERSPECTIVE (2012).

[26] *See, e.g.,* Article 3 of the Directive 2004/38/EC, *supra* note 22, setting forth that the state shall "facilitate" the reunification of the partner in a durable relationship.

As to the outwards effects, the push for reform generated by these societal changes has led to the introduction of a plurality of forms of recognition that go under the label of "pluralism."[27] Europe is thus no exception to that trend pointing to a pluralization of family law regimes that has been traced in Canada and the United States in the previous chapters.

As of August 2018, out of the 28 states under examination, 15 legally recognize same-sex marriage. These are: Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, the United Kingdom. Pursuant a constitutional decision, Austria will perform same-sex marriages starting from January 2019.[28]

On the other side of the spectrum lie those states imposing some restrictions at the constitutional level with respect to the possibility of extending marriage to same-sex couples. These constitutions are mainly concentrated in the Eastern part of Europe and thus in states formerly under the sphere of influence of the Soviet Union. These are the constitutions of Bulgaria, Croatia, Hungary, Latvia, Lithuania, Poland, Slovakia (although Croatia and Hungary recognize same-sex civil partnerships.) On October 7, 2018 Romania rejected a referendum to the effect of restricting the constitutional definition of marriage to cross-sex couples due to low turnout.[29] Therefore, this list still does not include Romania.

The remaining states afford legal protection to same-sex couples through civil unions or civil partnerships (that for the sake of simplicity I shall call "registered partnerships.") Roughly speaking, the Nordic countries, as Denmark, Norway, Sweden (and Iceland) introduced registered partnerships as a functional equivalent to marriage, in the sense that they were only open to same-sex partners.[30] By contrast, Western countries in Europe enacted registered partnerships as an alternative to marriage, since they were open to both same-sex and cross-sex couples.[31]

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[27] Caroline Sörgjerd, *Marriage in a European Perspective*, in SCHERPE, *supra* note 24, at 21; and *ID*, RECONSTRUCTING MARRIAGE – THE LEGAL STATUS OF RELATIONSHIPS IN A CHANGING SOCIETY (2012).

[28] Verfassungsgerichtshof [BGH] [Federal Court of Justice] 4.12.2017, G 258-259/2017-9.

[29] Anca Gurzu, *Romania's marriage referendum fails due to low turnout*, POLITICO, October 7, 2018, https://www.politico.eu/article/romania-same-sex-marriage-referendum-fails-due-to-low-turnout/ (last visited Oct 7, 2018).

[30] JENS M. SCHERPE, THE FUTURE OF REGISTERED PARTNERSHIPS (2018), *esp*. Part I.

[31] *Id*, *esp*. Part II.

Informal or *de facto* cohabitation is another phenomenon that has deeply affected the way we conceive family arrangements. The current landscape shows that many jurisdictions provide statutory protections, one paradigmatic example being Sweden.[32] In countries that did not adopt comprehensive statutes, cohabitation still triggers legal protections in specific areas, or is fully recognized through the application of general principles/laws.[33] The accretion of social acceptability vis-à-vis cohabitation is reflected (and imposed for countries swimming against the tide) by ECHR and EU case law. Ever since the 80s,[34] the ECtHR has held that informal cohabitants can enjoy a "family" life under Article 8 of the Convention and thus trigger a host of protections dependent thereon. Likewise, EU institutions reflected this trend in their construction of "family" for purposes of family reunification. One is yet to be aware that, notwithstanding increasing recognition of informal cohabitation, there is no "common European trend" concerning this issue.[35]

Some Spanish territories feature an innovative model for recognizing *de facto* families, that cumulates registration with functional recognition. Sweden and Hungary too offer a framework whereby *de facto* couples are recognized through functional recognition.[36]

In Spain, informal relationships gained recognition at both the state and territorial level, through different systems.[37] For instance, under the Basque law, registration is

[32] Kajsa Walleng, *The Sweedish Cohabitee Act in Today's Society,* in KATHARINA BOELE-WOELKI, NINA DETHLOFF & WERNER GEPHART (EDS.), FAMILY LAW AND CULTURE IN EUROPE – DEVELOPMENTS, CHALLENGES AND OPPORTUNITIES 95-108 (2014). Other examples of cohabitation laws include Norway, France, Slovenia, Croatia, Hungary, Serbia, Ukraine, Belgium, Scotland, some regions in Spain. *See* Wendy Schrama, *Marriage and Other Alternative Status Relationships in the Netherlands*, in JOHN EEKELAAR, ROB GEORGE (EDS.), ROUTLEDGE HANDBOOK OF FAMILY LAW AND POLICY 22, n.62 (2014).

[33] SCHERPE, *supra* note 14, at 69; Tone Sverdrup, *Statutory Regulation of Cohabiting Relationships in the Nordic Countries: Recent Developments and Future Challenges*, in BOELE-WOELKI, DETHLOFF & GEPHART, *supra* note 32, at 65-76; JOHN ASLAND, MARGARETA BRATTSTRÖM, GÖRAN LIND, INGRID LUND-ANDERSEN, ANNA SINGER & TONE SVERDRUP, NORDIC COHABITATION LAW (2015).

[34] *See, e.g.,* ECtHR 18 December 1986, Appl. no. 9697/82 (*Johnston and Others v. Ireland*), *esp*. par. 55.

[35] Johanna Miles, *supra* note 24, at 82 ff.

[36] Maria Rosaria Marella, *Famiglie Plurali: Famiglie e diritto. Rilevanza giuridica e "riconoscimento" dello stare insieme*, ASTRID, February 12, 2007, at 5, www.astrid-online.it/static/upload/protected/FAMI/FAMIGLIE-PLURALI.pdf (last visited Aug 30, 2018).

[37] The legal landscape in the country is complex given the partially overlapping jurisdiction in family matters between the central government (laying out the *derecho común*) and the Autonomous communities (laying out the *derechos autonómicos*.) Suffice it to say that Spain allowed some territories to maintain their civil law. Among these, those entitled to regulate civil matters are Catalonia, Aragon, Navarre, Galicia, the Basque country and the Balearic Islands. As to the division of powers, the Spanish government has competence over the civil relationships stemming from

required.[38] Whereas, other territories follow the abovementioned double track systems that either requires registration or functional recognition upon meeting certain requirements vis-à-vis cohabitation or other factual conditions. Examples for the latter group are Catalonia, Navarre and Aragon.

Amongst these, the Catalonia law requires that, for purposes of functional recognition, the couple cohabits in a marital-like relationship for more than 2 years or has a child.[39] Furthermore, relatives in the first degree of the descending line (children and parents) or up to the second degree of the collateral line (siblings and first degree cousins) are excluded from the regime.[40] By contrast, the national law on adoption[41] and on leasehold[42] is more liberal since it merely requires that the couple cohabits for two years or has a common child, without further specifying the grounds for disqualification.

Different considerations apply to the United Kingdom, which is a common law jurisdiction. Pursuant to the common law tradition, the UK recognizes common law marriage. This form of marriage is not recognized as a comprehensive status, but only for limited purposes*, i.e*. specific protections. Furthermore, in recent years the government, concerned with the rising number of cohabiting couples and the relative unawareness that legal consequences do not always attach to the relationship, launched a campaign to dismantle the "myth" of common law marriage.[43]

In detail, UK couples in a common law marriage enjoy tenancy rights, and thus have an automatic right to stay on the property, in case of joint tenancy,[44] enjoy the same

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marriage and other related matters. Albeit ambiguous, the constitutional interpretation has clarified that the notion includes formalities of marriage while it excluded the legal effects of the institution, on which the communities have widely legislated.

[38] Cristina González Beilfuss and Monica Navarro–Michel, *Informal Relationships: Spanish Report*, May 2015, CEFLONLINE, at 1.

[39] Article 234(1) of the Catalan Civil Code.

[40] Gonzales Beilfuss & Navarro, *supra* note 38, at 3. Article 234(2) of the Catalan Civil Code.

[41] Ley 21/1987, de 11 de noviembre, por la que se modifican determinados articulas del Código Civil y de la Ley de Enjuiciamiento Civil en materia de adopción (BOE núm. 275 de 17 de noviembre de 1987).

[42] Ley de Arrendamientos Urbanos (BOE núm 282 de 25 de Noviembre de 1994).

[43] *Cohabiting couples warned of 'common law marriage' myths*, BBC NEWS, 27 November 2017, https://www.bbc.com/news/uk-42134722 (last visited 30 Sept 2018); Tracey Moloney, *Think You're Protected by Common Law Marriage? You're Not,* LEGAL SERVICES, 29 November 2017, https://www.co-oplegalservices.co.uk/media-centre/articles-sep-dec-2017/think-youre-protected-by-common-law-marriage-youre-not/ (last visited 30 Sept 2018).

[44] Section 17(1)(a) of the 1988 Housing Act. 1988 c. 50.

protection as spouses and civil partners against domestic violence,[45] receive means-tested benefits,[46] can now receive survivor's pensions from public service pension schemes.[47]

Yet, they are far from being equated to spouses and civil partners. For instance, there is no guarantee of property rights, and thus if they intend to override legal ownership rules and divide property they should resort to contract.[48] There is no automatic right to inheritance, and even if they can resort to courts, the applicable test is less favorable than the one applying to spouses.[49] They are excluded from many public benefits as the Bereavement Support Payment and Income Support and income-based Jobseeker's Allowance, establishing a reciprocal duty of maintenance and the possibility for departments to recover money from the spouse/civil partner if the person relies on public assistance. Ultimately, they are legal strangers for purposes of tax law. Thus, the concern of the government that cohabitants wrongly believe that they are equated to spouses is well-founded.

The next section will push one step further the contention that family legal pluralism is on the rise, by parsing out the reforms that include within their purview new families, other than *de facto* couples.

1.1.1. Recent developments in family legal pluralism: Laws that recognize new families (other than same-sex couples or de facto couples)

Only a handful of states in Europe recognize, through different means, non-normative relationships, including non-conjugal relationships. Belgium does so through a comprehensive registration scheme, that while falling short of equating partners with married couples, confers major protections in the field of private and public law. The Netherlands recognizes two or more family members through a

[45] Part IV of the Family Law Act 1996, 1996 c. 27.
[46] Catherine Fairbairn, *"Common law marriage" and cohabitatio*n 12 (House of Commons Library Briefing Paper Number 03372, 2018).
[47] Djuna Thurley, *Occupational pensions: survivors' benefits for cohabitants* (House of Commons Library Briefing Paper Number CBP-06348, 2018).
[48] *Id*, at 9.
[49] While a spouse "seek such financial provision as it would be reasonable in all the circumstances of the case for a spouse/civil partner to receive, whether or not that provision is required for maintenance," a cohabitant can only "seek reasonable provision for their own maintenance." *Id*, at 11. Inheritance (Provision for Family and Dependants) Act 1975, 1975 c. 63.

contractual system. Ultimately, Norway takes these families into account for the very limited purpose of purchasing the common household residence or goods at market value, upon termination of the relationship, and the United Kingdom for the limited purpose of granting protections against domestic violence, and allocating pension death benefits.

Belgium

Belgium has enacted the most innovative solution to protect a subset of non-normative families. Under the *cohabitation légale* law, any two persons having made a formal declaration of common life can register,[50] regardless of the nature of their relationship. The law thus covers same-sex and opposite-sex conjugal couples, friends and relatives, included those in the first degree of the descending or collateral line, with exception of minors.[51] The law offers a pared-down list of rules governing the common life and does not yield effects on the civil status of the parties.

It comes in the form of a light regime in the sense fidelity duties and maintenance obligations are excluded from the scope of the law. The regime only entails a basic level of solidarity,[52] such as the duty to contribute to the expenses of the household. Unlike the initial version, it now affords basic protections in the field of succession law, such as usufructuary rights on the common residence and tenancy rights, upon death of a partner, while it falls short of conferring a reserved portion of the estate to the surviving partner. In the field of tax, the couple can now file a joint tax declaration, with the possibility of having a lower taxation rate for the wealthier partner through the *quotient conjugal*[53] or the *attribution au conjoint aidant.*[54] The regime also confers property rights, such as the presumption of joint property, representation and visitation rights,[55] and a plethora of social security and welfare

[50] Article 1475 §1of the Civil Code.
[51] Article 1475 §2, 2° of the Civil Code.
[52] Geoffrey Willelms, *Registered Partnerships in Belgium*, in SCHERPE, *supra* note 30, at 392.
[53] Articles 87 and 88 of the Income Tax Code. This provision allows for the possibility of allocating a portion of the income of the wealthier partner to the partner with lower income.
[54] Article 86 of the Income Tax Code. This mechanism also allows the wealthier party to allocate a portion of its income to the assisting partner.
[55] *See e.g.* Article 219 of the Civil Code on representation rights or Article 14 §3 of the Law on patient rights to representation of the partner unable to express his or her will.

rights, such as rights to social assistance, unemployment benefits, public health insurance and family allowance.[56]

Yet, it falls short of equating spouses and legal cohabitants, since important benefits as survivor's pension benefits are excluded. In addition to the critique denouncing that equation is only partial, the law has been criticized for allowing only *two* persons to enter the scheme.[57]

The Netherlands

The Netherlands supplies an example of recognition of new families through a contractual regime. This regime proved popular, and as of 2010, 50 per cent of non-marital cohabiting couples entered such an agreement.[58] Under Dutch law, the cohabitation agreement (*samenlevingsovereenkomst*) is a contractual agreement entered before a notary. It differs both from marriage and registered partnerships.[59] There is no specific regulation and the contract is governed by the general rules on contracts laid out in Chapters 3, 5 and 6 of the Civil Code. As such, the agreement can be concluded by both conjugal and non-conjugal families, including close relatives. It can furthermore be entered by several persons at the same time, regardless of whether they form a single household.[60]

The only areas open to regulation are thus those that are at free disposition of parties.[61] The agreement can cover the property and financial aspects of cohabitation, included the allocation of the cost of the joint household, the opportunity to have usufruct or tenancy rights upon death of one party, and rights under succession law.[62] It can furthermore regulate the division of labor and duties with respect to family life and children, including maintenance obligations during or upon breakdown of the

[56] Willelms, *supra* note 52, at 397.
[57] FREDRICK SWENNEN, HET PERSONEN-EN FAMILIERECHT 287 (2014); IAN CURRY SUMNER, ALL'S WELL WHAT ENDS REGISTERED? 33-72 (2005).
[58] Wendy Schrama, *Informal Relationships: The Netherlands*, March 2015, CEFLONLINE, at 15.
[59] Ruth Lamont, *Registered Partnerships in European Union Law*, in SCHERPE, *supra* note 30, at 515.
[60] Case T-58/08 *Commission of the European Communities v Anton Pieter Roodhuijzen* [2009], ECLI:EU:T:2009:385, at par. 55.
[61] Ian Curry Sumner, *Registered Partnerships in the Netherlands*, in SCHERPE, *supra* note 30, at 123.
[62] *See* the Website of the Government of the Netherlands, www.government.nl/topics/marriage-cohabitation-agreement-registered-partnership/question-and-answer/entering-into-a-cohabitation-agreement (last visited Oct 3, 2018).

relationship.[63] Ultimately, when the contract includes a reciprocal duty of support (*zorgverplichting*,) the parties automatically qualify for purpose of social security and social benefits, regardless of a will to the contrary,[64] and for the significant inheritance tax exemption threshold,[65] which, as for spouses and registered partners, is above 620,000 euros.

Norway

Norway also introduced some form of protection for all cohabiting relationships, whose material scope, however, is far from being as wide as the scope of the Belgian law. On a more positive note, the law also covers more than two cohabiting family members, and thus potentially also polyamorous relationships. The Norwegian Household Community Act 1991 (*husstandsfellesskap*) applies to people living together in a household, provided that they are unmarried adults. It thus includes conjugal and non-conjugal families alike (included friends and roommates,) and polyamorous relationships.

The chief limit of this Act is the very limited protection it confers upon parties: that is the opportunity for any household member "to purchase what was previously the common residence and household goods at market value upon the termination of the household."[66]

United Kingdom and other states with ascriptive systems

Besides common law marriages, the UK recognizes other types of non-marital families for very limited purposes. A first example concerns domestic abuse, where the criminal prohibition extends to protect relatives,[67] and the Secure Tenancies (Victims of Domestic Abuse) Act 2018, which extends to protect victims of the "household."[68] A second major example concerns survivor pensions. The Finance Act 2004 allows pension schemes to provide pension death benefits to a person

[63] Matteo Bonini Baraldi & Marieke Oderkerk, *Olanda*, in FRANCESCA BRUNETTA D'USSEAUX, IL DIRITTO DI FAMIGLIA NELL'UNIONE EUROPEA 217 (2005).
[64] Schrama, *supra* note 58, at 4.
[65] Art. 24 (2)(a) of the Dutch Inheritance Tax Act 1956.
[66] Tone Sverdrup, *Informal Relationships: Norwegian Report*, April 2015, CEFLONLINE, at 1.
[67] Section 76(6)(c) of the Serious Crime Act 2015, 2015 c. 9.
[68] Wendy Wilson, *Secure Tenancies (Victims of Domestic Abuse) Bill [HL] 2017-19: analysis of progress* (House of Commons Library Briefing Paper Number 8253, 2018).

financially dependent on the scheme member, even if not married or a civil partner of such member. Yet, many member states provide a thus-framed spotty recognition through ascription within specific areas of law. A second example is Italy, conferring tenancy rights upon cohabiting and dependent relatives upon death of one relative. Thus, several European states provide ascriptive systems of recognition. Yet, these systems lack consistency and are quite limited in terms of the number and scope of the protections they trigger.

Debates across Europe

Debates on the opportunity to extend registration schemes to new families were commonplace in the last two decades across Europe. The UK is a chief example for this. Access by siblings has long been at the center of the debate surrounding the introduction of civil partnerships in 2004.[69] In particular, Edward Leigh MP advocated for such extension in order to avoid the adverse consequences that siblings would bear upon death of one of them. The reference is to the inheritance tax liability, that gave rise to litigation before the ECHR.[70] His amendment to the bill was labeled as "wrecking amendment" as many commentators perceived its purpose to be that of derailing the passage of the Civil Partnership Bill and preventing recognition of same-sex couples.[71] Yet, other aptly noted that "[t]he fact that conservative forces may want the same for their own reasons does not change [the fact] that extending rights to various forms of relationships… is a worthwhile project from the perspective of equality and diversity."[72]

Alistar Camichael MP went one step further in challenging the contention that the relationship be restricted to only two siblings, or the exclusion of parents and children.[73] Lately, in 2017, Lord Lexden proposed the Civil Partnerships Act 2004 (Amendment) to allow siblings over 30 years old, in a cohabiting relationship for at

[69] Andy Hayward, *The Future of Civil Partnerships in England and Wales*, in SCHERPE, *supra* note 30, at 187; Catherine Utley, *Yes, Civil Partnership law is deeply unfair – to relatives like me and my sister*, THE SPECTATOR, 29 January 2016, https://blogs.spectator.co.uk/2016/01/yes-civil-partnership-laws-deeply-unfair-to-relatives-like-me-and-my-sister/ (last visited Aug 30, 2018).
[70] *See infra* par. 3.1.3.
[71] Nicola Barker, *After the Wedding, What Next? Conservatism and Conjugality*, in NICOLA BARKER & DANIEL MONK (EDS.), FROM CIVIL PARTNERSHIP TO SAME-SEX MARRIAGE: INTERDISCIPLINARY REFLECTIONS 224-241 (2015).
[72] Aeyal Gross, The *Burden* of Conjugality, in EVA BREMS (ED.), DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR 287-88 (2003).
[73] HB Deb 9 November 2004, Vol. 246, cols 729-730.

least 12 years, to access civil partnerships. However, the Bill has not gained the final approval and is at present unlikely to gain it.[74]

Likewise, in France, the debate around the *Pacte Civil de Solidarité* (PaCS) has featured positions favoring the introduction of a scheme open to non-conjugal couples. The original legislative proposal, by Senator Mélenchon in 1990, was indeed targeting any "pair" (which need not be a conjugal couple,) and thus was virtually open to all kind of dyadic relationships.[75] The next proposal nibbled away at the eligibility of the ascending and descending relatives,[76] and ultimately another proposal made explicit reference to a "couple." The approved version of the PaCS referred two unrelated adults, which are not previously married or *pacsés*, with a common legal residence, and who intend to formalize the economic interdependency of their common life. [77] While this language seems neutral as to the type of relationship being entered, the *Conseil Constitutionnel* restricted the application of the law to relationships conducting "une vie de couple," that is to relationships with a sexual component.[78] This clearly curtailed the potential of the scheme to protect unrelated non-conjugal adults.

A final example concerns the so-called "DICO" proposal, presented and discussed in Italy in 2007 during the XV Legislature. This was a legislative proposal, which, if approved, would have covered through a registration scheme any person in a stable cohabiting relationship, with some exceptions concerning some prohibited degrees of consanguinity or affinity.[79] Yet, the exceptions were limited and the proposal would have covered grandparents and children, siblings and other non-conjugal couples.[80]

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[74] Hayward, *supra* note 69, at 556.

[75] Janet Halley, *Recognition, Rights, Regulation, Normalization: Rhetorics of Justification of the Same-Sex Marriage Debate*, in ROBERT WINTEMUTE & MADS ANDENAS, THE LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 101 (2001) quoting Daniel Borrillo, *The "Pacte Civil de Solidarité" in France: Midway Between Marriage and Cohabitation*, in *Iid*, at 475.

[76] *Id*, at n.12.

[77] Lois no 99-944 du 15 novembre 1999 relative au Pacte Civil de Solidarité.

[78] Conseil Constitutionnel, Decision no. 99-419 DC (9 novembre 1999). Note that the decision precedes the date from which the law yields legal effects since at the time France only had a model of constitutional justice which was ex ante and "political." *See* Justin Orlando Frosini, *Constitutional Justice*, in GIUSEPPE F. FERRARI (ED.), INTRODUCTION TO ITALIAN PUBLIC LAW 186 (2008).

[79] Art. 1 d.d.l. n. 1339, comunicato alla Presidenza 20 febbraio 2007, "Diritti e doveri delle persone stabilmente conviventi", Senato della Repubblica, XV legislatura.

[80] Relazione al Disegno di legge recante diritti e doveri delle persone stabilmente conviventi, available at www.astrid-online.it/static/upload/protected/rela/relazione-illustrativa-dico.pdf (last visited Aug 30, 2018).

1.2. The constitutional landscape

The constitutional treatment of the family and of marriage shows a variety of approaches. With the sole exception of four countries, the most obvious takeaway from this survey is that states in Europe are most assuredly interested in regulating the matter.

Figure 1 below orders these approaches from the least intrusive to the most intrusive. The states regulating marriage and the family adopt a variety of provisions that run a gamut from a mere privacy approach, where the public authority pledges to protect the private and family life of the individual from unlawful interference, to an approach that crystallizes the family as a natural institution antecedent to the state and superior to positive law.

There is clearly more to constitutional law than "meets the eye," as freshmen are taught in their first constitutional law class. Judicial interpretation plays a pivotal role in the defining one country's constitutional doctrine. This holds true for both common law systems and civil law systems.[81] I shall briefly take Italy as an example showing that the bare constitutional provision tells little about the constitutional *law* in the country. Article 29 of the Constitution reads: "The Republic recognises the rights of the family as a natural society founded on marriage."[82] Despite the clear-cut wording of Article 29, protecting the family as such and even as a pre-given (which is the *prima facie* meaning of "natural,") the Court of Cassation has consistently read the Article in conjunction with Article 2, protecting social formations, to state that the family is not the *locus* where inviolable rights are compressed, but the situs where individuals as such, preserving their essential features, can freely develop and fulfill their goals.[83] With this premise in mind I proceed to survey the relevant constitutional provisions in the field of family and marriage law.

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[81] Alessandro Spadaro, *Dalla Costituzione come "atto" (puntuale nel tempo) alla Costituzione come "processo"(storico). Ovvero della continua evoluzione del parametro costituzionale attraverso i giudizi di costituzionalità*, in 3 QUADERNI COST. 343 (1998).

[82] An official translation in English of the Italian Constitution is available on the official website of the Senate, https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (last visited Aug 20, 2018).

[83] Cass., sez. I civ., 10 maggio 2005, n. 9801.

FIGURE 1.

The constitutional regulation of marriage and the family

Approach	State(s)	Relevant provisions
No reference to marriage/family	Netherlands; Denmark	Netherlands: But monist system (international obligations concerning the family are directly applicable) Denmark: The Succession to the Throne Act has the rules on royal marriages and succession
Only division of powers	Austria; Sweden	Const. of Austria Art. 10 Swedish Riksdag Act, chap. 4, Part 6, Art. 6 Supp. Prov. 4.6.5 (competence over marriage) and ch. 10, Part 8, Art. 8 (approval/rejection by the Riksdag of the EU Commission's proposals on family law with cross-border consequences)
Respect of private and family life	Belgium; Bulgaria; Croatia; Cyprus; Czech Republic; Estonia; Greece; Hungary; Lithuania; Malta; Poland; Portugal; Romania; Slovakia; Spain; Switzerland	Const. of Belgium Art. 22 (private and family life); Const. of Bulgaria Art. 32 (private or family affairs) Const. of Croatia Art. 35 (personal and family life) Const. of Cyprus Art. 15 (private and family life) Czech Charter of Fund'l Rights & Basic Freedoms Art. 10(2) (private and family life) Const. of Estonia Art. 26 (private and family life) and Art. 45 (private and family life as limits to the right to disseminate ideas) Const. of Greece Art. 9 (private and family life) Const. of Hungary Art. VI, chap. "Freedom & Responsibilities" (private and family life) Const. of Lithuania Art. 22 (private and family life) Const. of Malta Art. 32 (private and family life) Const. of Poland Art. 47 (private and family life) Const. of Portugal Art. 26 (private and family life) Const. of Romania Art. 26 (private and family life) Const. of Slovakia Art. 19 (private and family life) Const. of Spain Sec. 18 (personal and family life; protection of the family against the use of data processing) Const. of Switzerland Art. 13 (private and family life)
Duty of care	Estonia; Latvia	Const. of Estonia Art. 27, (the family has the duty to care for its needy members) Const. of Latvia Preamble (each individual takes care of oneself, one's relatives and the common good of society)
"empowering" role of the state	France	Const. of France, Preamble (the state provides the individual and the family with the conditions necessary to their development)
Procedural and substantive requisites of	Belgium; Bulgaria; Croatia; Cyprus; Hungary; Ireland;	Belgium const. Art. 21 (civil wedding should precede blessing of marriage); Bulgarian const. Art. 46(1) (matrimony as the free

Approach	State(s)	Relevant provisions
marriage	Lithuania; Luxemburg; Poland; Romania; Slovakia; Slovenia; Spain	union between a man and a woman; Only a civil marriage is legal) Const. of Croatia Art. 61 (marriage as a living union between a woman and a man; (parliamentary legislation– *riserva di legge* – for families and extramarital unions) Const. of Cyprus Art. 22 (person of nubile age is free to marry and to found a family) Const. of Hungary Art. L, 1 ch. "Foundations" (union of a men and a woman) Const. of Ireland Art. 41(3) (divorce provisions. Marriage as a union of any two persons regardless of their sex) Const. of Lithuania Art. 38(3) (marriage as the union between a man and a woman) Const. of Luxemburg Art. 21 (civil marriage should precede blessing of marriage) Const. of Poland Art. 18 (marriage as the union between a man and a woman) Const. of Romania Art. 48(1) (family founded on freely consented marriage) and Art. 48(2) (dissolution, nullity and civil marriage before religious wedding) Const. of Slovakia Art. 41 (union of a men and a woman) Const. of Slovenia Art. 53 (mandatory civil marriage; parliamentary legislation – *riserva di legge* – for marriage, "the legal relations within it and the family" and extramarital unions) Const. of Spain Sec. 32 (parliamentary legislation – *riserva di legge* – for marriage, dissolution and rights/duties of spouses)
Roles within marriage/family	Italy; Malta; Portugal[84]	Const. of Italy Art. 37 (working conditions must allow women to fulfil their essential role in the family) and Art. 29 (moral and legal equality of the spouses within the limit of the unity of the family) Const. of Portugal Art. 59 (reconcile work and family life) Const. of Malta Art. 45 (anti-discrimination does not apply to marriage, adoption or succession law)[85]
Special protection of the state to the family/marriage	Bulgaria; Czech Republic; Estonia; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Poland; Portugal; Slovakia; Spain; Switzerland	Const. of Bulgaria Art. 14 (family, motherhood and children enjoy the protection of the State and society) Czech Charter of Fund'l Rights & Basic Freedoms Art. 32(1) (parenthood and the family) Const. of Estonia Art. 27, (family as fundamental to the preservation and growth of the nation and as the basis of society) German Basic Law Art. 6 (marriage and the family)

[84] *Bulgaria, Lithuania, Poland, Portugal, Romania, Slovenia ensure the equality of the spouses and Switzerland the equality within the family*
[85] *However, Malta legalized same-sex marriage in 2017*

Approach	State(s)	Relevant provisions
		Const. of Greece Art. 21 (the family, being the cornerstone of the preservation and the advancement of the Nation, as well as marriage, motherhood and childhood) Const. of Hungary Art. L, 1 ch. "Foundations" (the family as the basis of the survival of the nation. Family ties are based on marriage and/or the relationship between parents and children) Const. of Ireland Art. 41(2) (the State guarantees to protect the Family, as indispensable to the social order and welfare of the Nation and the State) and 41,3 (special care toward Marriage, on which the Family is founded) Const. of Italy Art. 31 (state assists the formation of the family and the fulfilment of its duties, especially large families) Const. of Latvia Art. 110 (family, marriage, parents and child) and Preamble (family as the foundation of a cohesive society) Const. of Lithuania Art. 38(1) (the family as the basis of society and the State), Art. 38,2 (family, motherhood, fatherhood and childhood) and Art. 39 (take care of families that rise children at home) Const. of Poland Art. 18 (marriage, family, motherhood and parenthood) and Art. 71 (social and economic policies account for the good of the family; Special assistance to needy family, particularly with children) Const. of Portugal Art. 36 (right to found a family and to marry on an equal footing), Art. 67 (family as a fundamental element in society is entitled to special protection of the state and society) and a host of public assistance provisions, *e.g.*, Art. 65 (dwelling) and Art. 59 (crèches, planned parenthood, taxes and social benefits, etc.) Const. of Slovakia Art. 41 (state cherishes and protects marriage) Const. of Spain Sec. 39 (social, economic and legal protection of the family) Const. of Switzerland Art. 14 (right to marry and to have a family)
Family as an antecedent institution	Ireland; Italy; Luxemburg	Const. of Ireland Art. 41(1) (family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law) Const. of Italy Art. 29 (family as a natural society founded on marriage) Const. of Luxemburg Art. 11 (the State guarantees the natural rights of the family)

The provisions analyzed in Figure 1 underlie different policy choices and constitutional values. For instance, the tension between individualism and communitarianism is evident, across each of them. The right to family life, as much as in the ECHR framework, protects the individual as such from unauthorized interferences. By contrast, the majority of written constitutions takes into account the family as an institution, with a view to upholding a communitarian conception of family law.

The state intervention in shaping family roles and the centrality of the family within the society is the norm, while only France limits its role to "enabling" the family to carry out its duties. In addition, two Baltic states constitutionalize the so-called privatization of care, whereby emphasis is placed on the caregiving duties that the members of the family owe to each other, despite complementing the relevant provisions with other rules according a special protection to the family. Given that it is more apt to speak of a spectrum that runs along privatization and over-constitutionalization of the family, the states that lie next to the latter pole are the overwhelming majority.

Let's analyze each group in detail. As Figure 1 shows, only two states omit any reference to the family: the Netherlands and Denmark. However, the Netherlands has adopted a monist system of incorporation of international law. Therefore, the state is under an obligation to make international law provisions concerning family law directly applicable into its own legal system, including the treaties protecting human rights (*e.g.* the ECHR,) guaranteeing children's rights, women's rights within the family, etc. By contrast Denmark has a dualist system of implementation of international law.[86] Despite the system of incorporation, that is less straightforward than that in force in the Netherlands, Denmark too protects the family through the application of international instruments.

A second group of states, comprised of Austria and Sweden, only features provisions concerning the division of power in family-related matters. A third group includes those states that adopted constitutional provisions to shield individuals and the family

[86] Act No. 285 of 29 April 1992 and explanations: Birgitte Kofod Olsen, *Incorporation and Implementation of Human Rights in Denmark*, in MARTIN SCHEININ (ED.), INTERNATIONAL HUMAN RIGHTS NORMS IN THE NORDIC AND BALTIC COUNTRIES 227-232, 248-249 (1996).

from unlawful and unauthorized interferences.[87] Yet, all these states add further provisions either concerning the substantive and procedural requirements to enter marriage, or ensuring a special protection to the family or both. This is to say that none of these states adopts a pure negative liberty approach.

This should come as no surprise. Unlike liberal constitutions, modern European constitutions belong to a subsequent cycle of constitutionalism. The European legal tradition embraces a "holistic" vision of constitutionalism. Constitutions aspire to inform the regulation of society as a whole, its formations and its constituent elements. They indirectly shape society in the sense that they are structured in such a way so as to orient and accompany any social change.[88] They aim at shaping power and indirectly society,[89] rather than merely non-interfering with the natural rights of their citizens.

One aspect of this aspiration is their socio-democratic nature. Pursuant to such a nature, they assume a host of positive duties toward citizens, especially in the field of public assistance. Acknowledging that substantive inequalities hindering the development of human beings exist, they take on the duty to combat them (which is the reason why the constitutionalization of social rights acts in tandem with and is always accompanied by the constitutionalization of human dignity.)

Most of these constitutions yield indirect horizontal effects (after the German doctrine of the *mittelbare Drittwirkung,*) meaning that not only do they bind the public authorities but also citizens in their daily interactions.[90] They do so by "provid[ing] the basis for claims against public authorities to intervene on behalf of rights-claimants in response to threats from third parties."[91]

The foregoing considerations vis-à-vis the nature of European constitutionalism thus explain why states tend not to adopt a pure privacy approach in family matters.

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[87] The states belonging to the family privacy group are: Belgium; Bulgaria; Croatia; Cyprus; Czech Republic; Estonia; Greece; Hungary; Lithuania; Malta; Poland; Portugal; Romania; Slovakia; Spain; Switzerland.

[88] Cesare Pinelli, *The Combination of Negative with Positive Constitutionalism in Europe*, 13 EUROPEAN J. LAW REFORM 31, 37 (2011).

[89] *Id*.

[90] Please note that horizontal effect is still largely debatable in four of the considered countries, namely: Belgium, Croatia, Poland and Portugal. *See* Isabelle Chopin & Catharina Germaine (prep.), *A comparative analysis of non-discrimination law in Europe 2017*, EUROPEAN COMMISSION 10 (2017).

[91] Mattias Kumm, *Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 GERMAN L. J. 341, 344 (2016).

After the privacy approach comes the set of provisions whereby states merely place on the members of the family the duty to care for their relatives or other family members. This is still an approach that falls short of ensuring a direct intervention of the state, but for the enforcement of the care duties that are primarily placed upon the family members. Estonia and Latvia belong to this group. Again, none of these states limit their intervention to this stage, by further adding provisions which confer a special protection upon the family.

France is somewhere in-between a pure liberal privacy approach, aimed at protecting the privacy of the members of the family as such (*i.e.* as individuals,) and a communitarian one, *i.e.* an approach that recognizes family as a social institution to protect. The Constitution of 1958 does not mention marriage, except for the indirect reference contained in Article 34, according to which the marital regime falls under the *domain de la loi*. The preamble of Constitution of 1946 only guarantees the family and the individual "les conditions nécessaires à leur développement." I shall call this approach as encompassing an "empowering role of the state."

The reason for the reticence in family matters is dictated by the need to break up with the constitutions of the revolution. The choice is also consistent with the atomist conception of society inherited from the French revolution. The *travaux preparatoirs* of the Constitution of 1946 are also illustrative of this approach. There, the founding fathers advocated for a notion of family as "social incident" rather than a relationship based on a legal, official recognition.[92] Thus, the subject matter is thoroughly regulated in the Civil Code, the "veritable constitution de la France."[93] Later on, the Constitutional Counsel has elaborated a general constitutional liberty to marry and a right to run a "normal" family life, both derived from Article 66, dealing with personal liberty. Yet, the French model comes closer to the family privacy approach

[92] Pierre Murat, *La Constitution et le mariage : regard d'un privatiste*, 39 NOUVEAUX CAHIERS DU CONSEIL 1-2 (2013). Pursuant to Article 7 of the French Costitution of August 27, 1791, "La loi ne considère le mariage que comme contrat civil. Le Pouvoir législatif établira pour tous les habitants, sans distinction, le mode par lequel les naissances, mariages et décès seront constatés; et il désignera les officiers publics qui en recevront et conserveront les actes."

[93] However, the *Conseil* has consistently declined to review statutory provisions under the Civil Code rather than under the Constitution.

if one considers that the cornerstone of marriage is not the couple, but the individual.[94]

Another group of states features provisions that set forth the substantive and procedural requirements to enter a valid marriage.[95] This cluster of provisions includes those mandating that a civil marriage precedes a religious ceremony, those laying out procedural requirements concerning divorce, separation and succession law, and those setting out other substantive requirements (capacity, consent, etc.) Some constitutions define substantively marriage as the union of two persons regardless of their sex, whilst others define it as a union solely between a man and a woman. The states belonging to the latter group are Bulgaria, Croatia, Hungary, Latvia, Lithuania, Poland, Slovakia, although in Croatia and Hungary the constitutional ban has been interpreted as not preventing recognition of same-sex partnerships through means other than marriage. When it comes to same-sex marriage, the picture shows a fractured Europe. There is a socio-cultural cleavage that sharply divides the European continent in two parts when it comes to conceptions around same-sex couples. This sharp inhomogeneity has long animated and continues to animate critiques around the extension of the EU toward Eastern states.

Within this broad group of states (laying the procedural and substantive requirements of marriage,) only Croatia and Slovenia mention extramarital unions, in order to establish a procedure necessarily governed by parliamentary legislation (*riserva di legge*.)

Another group of three states go beyond policing entrance into and exit from marriage. These states go to the trouble of defining the roles that the parties to a marriage should assume. The Italian example is particularly emblematic in that it refers to the need to set working conditions that allow women to "fulfil their essential role in the family,"[96] while at the same time conditioning the moral and legal equality

[94] Jean Boulouis, *Famille et droit constitutionnel,* en ÉTUDES OFFERTES À PIERRE KAISER, vol. 1, 149 (1979) ("Reléguée sous surveillance dans l'ordre privé, la famille devient politiquement transparente. Cette transparence ... doit permettre de n'apercevoir que l'individu.").

[95] The states belonging to this group are Belgium, Bulgaria, Croatia, Cyprus, Hungary, Ireland, Lithuania, Luxemburg, Poland, Romania, Slovakia, Slovenia, Spain.

[96] Art. 37 of the Italian Constitution of June 2, 1946 [Italian Const.].

of the spouses to "the limit of the unity of the family."[97] Another illustrative example is that of Malta. The country shields the provisions concerning marriage, adoption or succession law from the application of the general prohibition against discrimination.[98] The dangerous effects of this exemption, that could be employed to entrench gendered roles within marriage, are somehow limited by the incorporation of the ECHR, and by its robust apparatus of anti-discrimination provisions and case law.[99]

It is highly significant that almost two thirds of the 27 states confer a special protection upon the family. In addition to that, the family is entrenched as a foundational institution, integral to the preservation of society, in numerous states. This trend is apparent in Baltic states. Family is defined in Estonia as "fundamental to the preservation and growth of the nation and as the basis of society,"[100] as "the foundation of a cohesive society"[101] in Latvia (along with marriage,) as "the basis of society and the State"[102] in Lithuania. Yet, such drafting choice is common to many more states. Family is "the cornerstone of the preservation and the advancement of the Nation"[103] in Greece, "the basis of the survival of the nation"[104] in Hungary, "indispensable to the social order and welfare of the Nation and the State"[105] in Ireland, a "fundamental element in society is entitled to special protection of the state and society"[106] in Portugal.

It is even entrenched as a natural institution that defies attempts to modify its essential and archetypical characteristics in three states, namely Ireland, Italy, and Luxembourg.[107] Definitions of the family as an essential cornerstone of society are also likely to shape that core national identity that the Union pledges to respect

[97] Art. 29 Italian Const.
[98] Art. 45 of the Constitution of Malta of September 21, 1964.
[99] The European Convention Act 1987, incorporating the Convention, allows citizens to petition the Maltese courts for redress in case of a breach of the conventional provisions, amongst which is Art. 14. EUR. COMMISSION, MALTA COUNTRY REPORT: NON-DISCRIMINATION 32 (2017), available at https://www.equalitylaw.eu/downloads/4468-malta-country-report-gender-equality-2017-pdf-1-26-mb (last visited Aug 30, 2018).
[100] Art. 27 of the Constitution of Estonia of July 3, 1992.
[101] Preamble of the Constitution of Latvia of February 15, 1922 (as amended in 1998) [Latvia Const.].
[102] Art. 38(1) Constitution of Lithuania of October 25, 1992.
[103] Art. 21 of the Greek Constitution of December 8, 1974 [Greek Const.].
[104] Art. L, 1 ch. "Foundations" of the Constitution of Hungary of April 18, 2011.
[105] Art. 41(2) of the Constitution of Ireland of December 29, 1937 [Irish Const.].
[106] Art. 67 of the Portuguese Constitution April 2, 1976 [Portuguese Const.].
[107] *See supra* Figure 1.

pursuant to Article 4(2) TFEU, especially if one accepts the majoritarian view that treats national identity as synonymous with constitutional identity.[108]

The latter two groups of states thus epitomize what I referred to as an "over-constitutionalization" of the family. Through this ultra-intrusive approach, they oblige family law reforms to be contrasted against the "rigid" values engrafted in the constitutional document and continuously bargain change via constitutional litigation and constitutional amendments.

This over-constitutionalization is also the product of some philosophical conceptions regarding its nature. Provisions guaranteeing the natural rights of the family are the most intrusive in that they operate on the assumption that families predate the state and its efforts to regulate society through positive law. This conception entrenches the family as a pre-given institution. However, natural law embeds the *fictio* that its characteristics are not state-mandated (and thus immutable.) Yet, they are state-mandated and a conviction to the contrary would be highly misplaced.[109]

I will now address some cross-sectional themes. Highly problematic for purposes of our analysis is the conflation of marriage and the family. This conflation is apparent in a few states. For instance, this marriage-centered definition of family appears in Bulgaria, where "[s]pouses shall have equal rights and obligations in matrimony and the family,"[110] in Lithuania[111] and Romania,[112] where a similar provision exists. This trend is also apparent in Cyprus, where the right to found a family is granted according to the laws relating to marriage,[113] in Hungary where it is stated that "[f]amily ties shall be based on marriage and/or the relationship between parents and

[108] *See* Denis Preshova, *Battleground or Meeting Point? Respect for National Identities in the European Union - Article 4(2) of the Treaty on European Union*, 8 CROATIAN Y.B. EUR. L. & POL'Y 267, 272 (2012) ("The emphasis on fundamental constitutional structures basically ties national identity firmly to constitutional identity and excludes cultural and other types of identity from the scope of this provision.").

[109] ERIC MILLARD, FAMILLE ET DROIT PUBLIC. RECHERCHES SUR LA CONSTRUCTION D'UN OBJET JURIDIQUE 123 (1995).

[110] Art. 46(2) of the Constitution of Bulgaria of July 12, 1991.

[111] Art. 38(5) of the Lithuania Const. ("In the family, the rights of spouses shall be equal.").

[112] Art. 48(1) of the Constitution of Romania of December 8, 1991 ("The family is founded on the freely consented marriage of the spouses.").

[113] Art. 22 of the Constitution of Cyprus of August 16, 1960.

children,"[114] or in Ireland and Italy, where it is explicitly submitted that the family is founded on marriage.[115]

Despite references to the family going missing in Slovakia, one can notice that the "Slovak Republic comprehensively protects and cherishes marriage for its own good,"[116] and thus that the state interest in protecting marriage over other relationships acquires constitutional aegis.

Other states, while not explicitly conflating marriage and the family, tie them together in the relevant provisions. These include Switzerland,[117] Portugal,[118] Germany[119] where the right to marry *and* to have a family is guaranteed (so-called *Institutsgarantie*). Likewise, a "sandwich" provision, whereby the family is placed in between marriage and vertical relationships of parents and children exists in Latvia[120] and Greece.[121]

Where "family" is given an meaning independent of marriage, as in the German constitutional case law, it usually tends to encompass the vertical relationship between children and parents, instead of other non-marital adult-adult relationships.[122] Non-marital cohabitation in Germany receives protection under the general clause guaranteeing the freedom of action, under Art. 2,1 of the Basic Law.[123] Yet, the Federal constitutional tribunal has rejected a restrictive interpretation of Art. 6 as requiring a prohibition to extend marital protections to non-marital unions (so-called distance rule or *Abstandsgebot.*)[124] It is therefore

[114] Thus, in Hungary the horizontal family shall be based on marriage.
[115] Art. 41(3) Irish Const. and Art. 29 Italian Const. *See* Giovanni Di Rosa, *Forme familiari e modello matrimoniale tra discipline interne e normativa comunitaria,* in 3 EUROPA E DIRITTO PRIVATO 755 (2009); *id*, *Famiglia e matrimonio: consolidate tradizioni giuridiche, innovative discipline interne e attuale sistema comunitario*, in BRUNO MONTANARI (CUR.), LA COSTRUZIONE DELL'IDENTITÀ EUROPEA: SICUREZZA COLLETTIVA, LIBERTÀ INDIVIDUALI E MODELLI DI REGOLAZIONE SOCIALE 63 (2013).
[116] Art. 53 of the Constitution of Slovenia of December 23, 1991.
[117] Art. 14 of the Constitution of Switzerland of September 12, 1848.
[118] Art. 36 Portuguese Const.
[119] Art. 6 of the German Basic Law of May 23, 1949.
[120] Art. 110 Latvia Const.
[121] Art. 21 Greek Const. ("The family, being the cornerstone of the preservation and the advancement of the Nation, as well as marriage, motherhood and childhood, shall be under the protection of the State.").
[122] Nina Dethloff, Dieter Martiny, and Mirjam Zschoche, *Informal Relationships – Germany*, 2015, CEFLONLINE, at 7.
[123] *See, e.g.,* Bundesverfassungsgericht [Constitutional Federal Tribunal], 03.04.1990 - 1 BvR 1186/89, 82, 6.
[124] Bundesverfassungsgericht [Constitutional Federal Tribunal], 17.07.2002 - 1 BvF 1/01, 1 BvF 2/01, 105, 313, 347.

constitutionally permissible to equate alternative regimes to the institution of marriage.

Italy is a case-study of interest too. The country has been included in the group of states providing the highest degree of entrenchment of family ideal norms to the extent it defines the family as a "natural society founded on marriage." It thus ties the family at the same time with marriage and with a seemingly natural law conception of familyhood, able to jeopardize judicial or legislative attempts at modifying its "natural" features. This conception, however, has been overcome through judicial updating. Before the introduction of civil unions, opened to same-sex couples, the Constitutional Court, and then the Court of Cassation, adopted a progressive interpretation of Article 2 of the Constitution, protecting "social formations." For instance, in 2010, the Constitutional Court held that, independent of any legislative reform to the effect of protecting (unmarried) same-sex couples, such couples enjoy a right to family life which enables them to seek specific marital protections before judicial courts.[125]

The picture shows in the end a variety of approaches to protecting the family. The majority of states is overly interested in the constitutional status of family forms, and accordingly confer a special protection upon them. This over-constitutionalization is the common denominator of these various approaches, with some limited exceptions. This is to say that any reform in the realm of family law will have to grapple with the entrenchment of marriage, proper familyhood, traditional family roles where applicable, and with the obvious interest that the state shows in policing the matter.

2. Remedies

2.1. Non-intervention

The first (non-)remedy is that of non-intervention. The supporters of non-intervention clearly fail to account for all the families that cannot marry, and thus cannot overcome the marital privilege by accessing the institution. This group of

[125] Corte cost., sentenza n. 138/2010. On which *see* Barbara Pezzini, *Il matrimonio same sex si potrà fare. La qualificazione della discrezionalità del legislatore nella sent. n. 138 del 2010 della Corte costituzionale*, in 3 GIURISPRUDENZA COST. 255 (2010).

families includes relatives within the prohibited degrees of consanguinity and polyamorous relationships.

A second group of new families includes those formations that are virtually eligible to marry. Against the objection that some new families could have married, one should resist the temptation to buy it since: (i) as I observed elsewhere, these unions are not interested in marrying (while they are interested in gaining legal protections;) (ii) there is a chance that any such marriage is considered a "marriage of convenience."

Let's consider two non-conjugal unions eligible to marry, such as two relatives outside the prohibited degrees. They could indeed marry. Yet, is a short step before their marriage can be considered a fraud. Under EU law, and particularly under the citizens' rights directive, the states can adopt all the necessary measures to prevent an abuse of rights or fraud, and "notably marriages of convenience or any other form of relationships *contracted for the sole purpose of enjoying the right of free movement and residence*…"[126] Likewise, the European Migration Network within the European Commission (Directorate General of Home Affairs) defines a marriage of convenience as "[a] marriage contracted for the sole purpose of enabling the person concerned to enter or reside in a (Member) State."[127]

Amongst the potential motivations for entering a marriage of convenience, listed for illustrative purposes in the European Migration Network report on the misuse of family reunification, is the desire of a younger third-country national to care for an older person.[128] Thus, there is little doubt that a caregiving family unit, willing to contract a marriage to gain the relative protections, will be in welfare authorities' sights and potentially liable for fraud.

Likewise, Strasbourg leaves it to the states to define what constitutes a marriage of convenience. In any such context, the state is likely put forward "the prevention of disorder" and similarly framed interests, that the Court has validated.[129] After that, the Court will restrict itself to policing the proportionality of the measure. Yet, one is to be alert that this scrutiny is fairly deferential. For example, in a case involving the

[126] Recital 28 of the Directive 2004/38/EC, *supra* note 22.
[127] EUR. MIGRATION NETWORK, MISUSE OF THE RIGHT TO FAMILY REUNIFICATION. MARRIAGES OF CONVENIENCE AND FALSE DECLARATIONS OF PARENTHOOD 9 (2012).
[128] *Id*, at 5.
[129] ECtHR 6 January 1992, Appl. no. 18643/91, at par. 1 (*Benes v. Austria*).

Austrian provisions on the nullity of a fictious marriage, the Court was satisfied that the respondent state had carefully considered that the couple never had a "common conjugal life," and that the purpose behind their marriage was to confer Austrian nationality upon the applicant.[130] Both findings cut against allowing non-conjugal couples to enter a marriage, and thus render untenable the objection "well, you could have married."

2.2. The unsuitability of marriage

The critiques of marriage from a feminist and queer perspective elaborated in Europe[131] largely trace those seen in the chapter on the U.S. and Canada.[132] In addition to the foregoing, there are some context-specific reasons for not pursuing change through marriage in Europe.

The reasons are quite obvious in the EU context. The EU has no competence over marriage. It has competence over the harmonization of private international law rules vis-à-vis the family. The EU Charter protects both the right to private and family life under Article 7,[133] which has the same scope of Article 8 ECHR, and the right to marry and found a family, under Article 9.[134] As to the latter, first, the right to marry is laid out in gender-neutral terms. Second, notwithstanding the clarification in the official explanations on Article 9 that such article draws from and is based on Article 12 of the ECHR, the scope of the right in the EU context is more extended. The explanations clarify that the ECHR homologue has been taken as a benchmark but also modernized so as to "cover cases in which national legislation recognises arrangements other than marriage for founding a family."[135]

Notwithstanding these notable advancements, there are two limits to the contention that the Court might take on a proactive role in extending marriage to other families:

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[130] *Id,* at par. 1.

[131] For a thorough overview of these "European" critiques *see, e.g.,* NICOLA BARKER, NOT THE MARRYING KIND 129-163 (2012); Clelia Kitzinger & Sue Wilkinson, *The Re-branding of Marriage: Why We Got Married Instead of Registering a Civil Partnership?*, 14 FEMINISM & PSYCHOL. 127, 145 (2014).

[132] *See* respectively Chapter IV, par. 1.2. and Chapter V, par. 2.1.

[133] Article 7 of the Charter of Fundamental Rights of the European Union, 6 October 2012, 2012/C 326/02 [Charter of Nice].

[134] Article 9 of the Charter of Nice.

[135] *Explanation on Article 9 — Right to marry and right to found a family*, Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, 17–35.

first, the Charter only applies to the extent member states are implementing EU law, and thus has no general application; second, Article 51 of the Charter reminds that the Charter does not add any competence or power beyond those set out in the Treaties.[136]

Also, the definition of family under EU law is usually parasitic on the definition laid out in national law. Family status as set out in national law is the relevant status to confer rights under EU law. Until recently, the Court of Justice had adopted an "autonomous" definition only in the context of purely internal matters, such as those relating to the legal treatment of the EU staff. This could change soon if one trusts the ability of the Court to extend the autonomous definition beyond purely internal matters. The first step to this effect has been taken in the *Coman* decision.[137] A pending case on pensions rights will also cast light on the possibility for the Court to adopt autonomous definitions in external matters as well. Unless this attitude becomes clear, the EU jurisprudence will bow to the national definitions when it comes to marriage and alternative regimes to marriage. In the end, these facets of the EU framework lend support to the view that the such framework cannot lead the way in shaping current notions of family.

At the ECHR level, Article 12 enshrines a right to marry and to found a family. Unlike the EU context, where the explanations straighten out that the two rights are distinct, in the ECHR never has the Court clarified whether the rights to marry and to found a family should be regarded as distinct or otherwise.

The right to marry differs from the right to family life in that includes a *prospective* right to found a family. By contrast, as it will be seen, the right to family life merely guards over an already existent family relationship.[138] While there is a partial overlap between Article 8(1) and Article 12, since the right to marry includes within its purview a right to non-interference with one's private and family life, the ECHR singled out married couples to emphasize their special status and confer upon them heightened protection compared to other families.[139]

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[136] Article 51 of the Charter of Nice, and *Explanation on Article 51 — Field of application*, Explanations, *id*.
[137] *See infra* par. 4.
[138] *See infra* par. 3 on the retrospective nature of the right to family life.
[139] Helen Fenwick, *An ECHR Right to Access a Registered Partnership*, in SCHERPE, *supra* note 16, at 474.

Yet, the right to marry under Article 12 has not been subject to a dynamic interpretation. The Court declined to interpret it so as to encompass same-sex marriage.[140] Although it noted that European consensus over the issue has evolved rapidly over the last decade, it held that member states can freely decide whether to introduce same-sex marriage or otherwise. In contrast, the Court has been willing to uphold a convention right to have a specific legal framework introduced to recognize same-sex couples, under certain conditions.[141] This is to say that while the marriage route is essentially impracticable, at least at present, the route that leads to registered partnerships or other alternative regimes has now gained the greenlight. One more reason to follow it.

2.3. Protection-driven (or area-specific) approach

Unlike Canada and other countries, such as South Africa,[142] marital status does not feature amongst the prohibited grounds for discrimination at the European Union level.[143] The European directives in the field of anti-discrimination contain a fixed list of grounds for discrimination amongst which marital status does not feature. Unlike the EU, the ECHR has an open-ended list that includes "other statuses." So far, sexual orientation, age, disability, and marital status[144] have been recognized.[145] One of the leading judgments recognizing marital status is *Sahin v. Germany*,[146] which found that denying a father out of wedlock access to a child violated precisely this Article and held that marital status was a prohibited ground. Along similar lines, marital status discrimination has been found in *Sommerfeld v. Germany*,[147] and the

[140] In *Schalke* the Court concluded that a refuse to recognize same-sex marriage does not run counter the Convention. *See also,* ECtHR 9 June 2016, Application No 40183/07, at par. 48 (*Chapin and Charpentier v France*) [*Chapin and Charpentier*].
[141] *See infra* par. 3.1.
[142] *See e.g.,* Constitutional Court of South Africa, National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others, [1999] ZACC 17.
[143] ROBERT WINTEMUTE, FROM SEX RIGHTS TO LOVE RIGHTS: PARTNERSHIP RIGHTS AS HUMAN RIGHTS 202 (2005).
[144] Nicola Barker, *Rethinking Conjugality as the Basis for Family Recognition*, 6 ONATI SOCIO-LEGAL SERIES 1249, 1267 (2016) ("It is well-established that "other status" covers a range of personal characteristics, including marital status").
[145] EUAFR AND ECHR COUNCIL EUR., HANDBOOK ON EUROPEAN NON-DISCRIMINATION LAW 89 (2011).
[146] ECtHR 8 July 2003, Appl. no. 30943/96 (*Sahin v. Germany*).
[147] ECtHR 8 July 2003*,* Appl. no. 31871/96 (*Sommerfeld v. Germany*).

different treatment of unmarried and married fathers censured. However, nowhere did the Court deny the special status of marriage. By contrast, it has repeatedly found that it was legitimate for state legislation to attach special benefits to the marital or civil partnership status.[148]

This existence or otherwise of such a ground clearly reflects upon the strategies that can be pursued to challenge marital status discrimination and the denial of benefits dependent thereon. If not recognized, a union with parties ineligible to marry (*e.g.*, two close relatives,) could not claim discrimination (exclusively or also) based on marital status, if a marital benefit were to be denied, as it has been the case in Canada. They would have to follow different routes, such as challenging the intrinsic rationality of the scheme.

By contrast, in the ECHR framework, they should enforce the prohibition of marital status discrimination. Any scheme unduly excluding unmarried families could be challenged under the following approaches: Article 8 in conjunction with Article 14 (family life and ban on discrimination; Article 1 of Protocol No. 1. (right to property) in conjunction with Article 14; or Article 1 of Protocol No. 12 (general ban on discrimination.) In so doing, they should be aware that a failure to establish a connection with a prohibited ground for discrimination would usually entail a much less strict standard of review, which is one of manifest unreasonableness.[149]

Thus, notwithstanding the Court reluctance to uphold marital status discrimination in cases where the allocation of marital benefits is at stake, plaintiffs have the possibility of putting forward arguments pivoting on marital-status discrimination. Professor Nikola Barker provides powerful insights on the proper way to do so.[150] She places emphasis on the linearity of the reasoning in the *Muñoz Diaz v. Spain* judgment, where the Third Chamber censured the refusal to grant a survivor's pension to an applicant who got married under Roma customs. The judgment epitomizes the Court's "impatience"[151] for a circular reasoning denying benefits on the ground that the applicant "could have married." The Court there noted that:

[148] KAREN REID, A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 374 (2011).
[149] *See infra* par. 3.3.
[150] Barker, *supra* note 144, at 1268.
[151] *Id*.

> "Lastly, the Court cannot accept the Government's argument that it would have been sufficient for the applicant to enter into a civil marriage in order to obtain the pension claimed. The prohibition of discrimination enshrined in Article 14 of the Convention is meaningful only if, in each particular case, the applicant's personal situation in relation to the criteria listed in that provision is taken into account exactly as it stands. To proceed otherwise in dismissing the victim's claims on the ground that he or she could have avoided the discrimination by altering one of the factors in question – for example, by entering into a civil marriage – would render Article 14 devoid of substance"[152]

While in principle a protection-driven approach is the only suitable approach in the European Union, many institutional and doctrinal hurdles exist to pursue this route. As to the institutional constraints, these will be dealt in depth in section 4. Suffice it to recall that there is no EU competence over substantive family law and that the only fields in which the Union could act to disentangle inequalities for same-sex couples were the situations arising under the citizens' rights directive, on the freedom of movement of family members, the EU staff cases, and the field of employment discrimination. As to the doctrinal constraints, nowhere is marital status or family status listed as a prohibited ground (and be reminded that the list in both the citizens directive and employment discrimination directives is fixed.) These statuses can only be relevant if linked to a listed ground, as it has been the case with sexual orientation. Family and marital status have from times to times also been linked to sex discrimination. However, as it will be shown, this link does not fit the situation of new families.

2.4. Comprehensive approach through a registration scheme

The prediction is even less optimistic if one seeks to introduce a comprehensive scheme for new families. The EU is not the proper venue to do so as any case concerning discrimination delivered so far has largely relied on the voluntariness of the schemes being adopted, and has refrained from imposing such introduction on member states. Therefore, while the EU is not the appropriate forum for introducing

[152] ECtHR 8 December 2009, Appl. no. 49151/07, at par. 70 (*Muñoz Díaz v. Spain*) [*Muñoz Díaz*].

new regimes wholesale, the framework could be conducive to extending specific protections on a case-by-case basis, through a protection-driven approach.

By contrast, a comprehensive approach can be used in the ECHR context, albeit at a later stage and with cautious optimism. In the ECHR framework, if new families successfully get to enforce the prohibition on marital status discrimination and some domestic jurisdictions start introducing protections at the domestic level (thereby forming a so-called European consensus) it is not unconceivable that the same reasoning of the *Oliari* case could apply to them. There are clearly many steps to make before this becomes possible. However, only in the ECHR framework, once these preliminary conditions are met, there is a likelihood that Contracting Parties could be compelled to introduce a comprehensive scheme, ideally a registration scheme, to protect new families.[153]

3. Arguments resting on the Convention

The ECHR framework has added significant momentum to the development of family law at the domestic level. This holds especially true for states lagging behind in the recognition of non-traditional families. As a consequence to their accession to the ECHR framework, such states were forced to align with more progressive stances once a sufficient consensus around the issue was found present. The next sections will thus expound the relevant case law in the field of substantive family law. The aim is that of gathering some doctrinal material to build a case for new families and predicting possible patterns of recognitions that the Court could follow.

Preliminarily, it is to be noted that there is not just one way to protect new families. An obligation for the state to protect these families could either arise under:

(i) Article 8 alone (right to private and family life;)

(ii) Article 8 in conjunction with Article 14 (ban on discrimination;)

(iii) Article 1 of Protocol No. 1. (right to property) in conjunction with Article 14; or

(iv) Article 1 of Protocol No. 12 (general ban on discrimination.)

[153] A registration scheme is more suitable to the needs of new families than a mere contractual scheme, unless the latter allows parties to regulate matters other than property or maintenance, especially in the field of tax, social security and welfare law. I take the Dutch contractual scheme as an example for a contractual scheme whose introduction would fall short of protecting new families. *See supra* par. 1.1.1.

The decision as to which argument to make depends on the purpose that is been sought. If one seeks to allege that the exclusion of new families from a certain subsidy granted by the state is unlawful (protection-driven approach) then the approaches under (ii), (iii), and (iv) could be followed, either in combination with each other or otherwise. By contrast, if one seeks to compel the state to introduce a scheme that comprehensively recognizes new families, as a registration scheme would do, then the available approach is that under (i), centering around a violation of the right to family life.

Each approach is analyzed in turn below.

(i) Art. 8: Family life

Article 8 enshrines the right to private and family life. The right to family life is an autonomous concept, that hinges upon the existence of close family ties.[154] This is a major difference with the European Union framework, where the definition of family status is parasitic of that of member states. While the ECtHR does not ignore national definitions, it never refers to them to restrict the ambit of a Convention right. [155] It is the Convention itself that lays out the conditions under which the right can suffer restrictions. Restrictions, as laid out in the second paragraph, can be justified on several grounds: national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others.

The notion of family life is essentially aimed at enabling the family to live together so that a normal family relationship can develop,[156] and members of the family to enjoy each other's company.[157] Since it presupposes the existence of a family, it cannot be used prospectively and construed as encompassing a right to found a new family.[158] The right to found a family only exists under Article 12 in the ECHR framework and forms a pair with the right to marry. Yet, the potential for new

[154] ECtHR 24 January 2017, Appl. no. 25358/12, at par. 140 (*Paradiso and Campanelli v. Italy*).
[155] Vladimiro Zagrebelsky, *Famiglia e vita familiare nella Convenzione Europea*, in MARIA CLAUDIA ANDRINI, UN NUOVO DIRITTO DI FAMIGLIA EUROPEO 117 (2007).
[156] ECtHR 13 June 1979, Appl. no. 6833/74, at par. 31 (*Marckx v. Belgium*).
[157] ECtHR 24 March 1988, Appl. no. 10465/83, at par. 59 (*Olsson v. Sweden*).
[158] The applicant's request to develop a not-yet-existent "family life" with her nephew by becoming his legal guardian does not constitute "family life" and will not be satisfied. *See* ECtHR 17 April 2018, Appl. no. 6878/14, par. 65 (*Lazoriva v. Ukraine*).

families to employ an argument based on the right to found a family zeroes if one considers that the family Article 12 refers to is the marital family.[159]

This requirement that the family pre-exists should however not be overstated. Many judgments cast doubt on the pure retrospective nature of the right. For instance, even in the absence of an already established family the Court has been willing to protect the *potential* relationship between the biologic father and a child born out of wedlock.[160] This is especially so, when the lack of a pre-existing relationship is not attributable to the will of the applicant.[161]

Thus the "family" Article 8 refers to is not necessarily dependent on legal sanction or recognition. For instance, the lack of recognition of a (religious) marriage under national law is no bar to the finding of a right to family life.[162] However, this right cannot be construed as requiring the state to recognize such a marriage for purposes of private or public law entitlements, as inheritance rights or pensions benefits.[163]

It is extremely useful for purposes of our analysis the fact that Article 8 is more interested in the actual attributes of the family rather than formalistic ones. While married or registered couples *usually* fall within the scope of the law for the sole fact of being married or registered, the Court is still inclined to conduct a fact-driven inquiry into their (genuine) familyhood.[164] When by contrast there is a lack of legal recognition, the Court engages in an inquiry into the existence of *de facto* family ties.[165] Thus far the Strasbourg court has included within the scope of family life married couples and registered partnerships, provided that a genuine relationship exists.[166] It has also included unmarried couples, as long as they show some

[159] Zagrebelsky, *supra* note 115, at 118. *Contra see* Gilda Ferrando, *Il Contributo della Corte europea dei Diritti dell'Uomo*, in ANDRINI, *supra* note 155, at 139 (arguing that the right to found a family has a meaning independent of the right to family, so as to encompass *de facto* families).

[160] ECHR COUNCIL EUR., GUIDE ON ARTICLE 8 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS 45 (2018).

[161] ECtHR 22 June 2004, Applications nos. 78028/01 and 78030/01, at pars. 143 and 146 (*Pini and Others v. Romania*).

[162] ECtHR 28 May 1985, Appl. no. 9214/80; 9473/81; 9474/81, at par. 63 (*Abdulaziz, Cabales and Balkandali v. the United Kingdom*).

[163] ECtHR 2 November 2010, Appl. no. 3976/05, at pars. 97-98 and 102 (*Şerife Yiğit v. Turkey*) [*Şerife Yiğit*].

[164] ECtHR 12 March 2012, Appl. no. 25951/07, at par. 32 (*Gas and Dubois v. France*).

[165] ECtHR 18 December 1986, Appl. no. 9697/82, at par. 56 (*Johnston and Others v. Ireland*)*;* 3 April 2012, Appl. no. 42857/05, at par. 50 (*Van der Heijden v. the Netherlands*).

[166] Absence of a genuine relationship in marriage was derived by the lack of cohabitation. Cohabitation, while not essential, is a crucial index of the genuine relationship. *See* ECtHR 19 September 2017, Appl. no. 66297/13, at par. 52 (*Concetta Schembri v. Malta*).

functional attributes, such as long-term cohabitation and subsistence of the relationship.[167] Ultimately, it has protected close family members, such as siblings, uncles/aunts and nephews, and grandparents and children, whenever a functional inquiry shows that they live in a close relationship.[168] I will elaborate on each of these close relationships below, when parsing out the Strasbourg's case law on non-marital families.

In addition to the retrospective and *de facto* nature of family relationships, Strasbourg case law casts light on the negative liberty versus positive liberty approach enshrined in Article 8. Strasbourg has gone well beyond interpreting Article 8 as requiring mere non-interference with someone's family relationship. In the recent seminal case *Oliari v. Italy*, it has directed Italy to introduce a specific legal framework to protect same-sex couples. While the right is framed as one essentially negative in kind, and there is no doubt that the primary obligation for the state is to prevent arbitrary interferences, the right also includes positive obligations. To a minimum, it includes an obligation to ensure the effectiveness of the right[169] and to "secure respect for private or family life even in the sphere of the relations of individuals between themselves."[170] The intensity of the obligation will depend both on the discrepancy between social reality and administrative/legal practice, and on whether the obligation is narrow and precise as opposed to broad and indeterminate.[171]

The principles governing both types of obligations are the same: to discern whether the state has reached a fair balance between the interest of the individual(s) and that of the community, the aims set out in the second paragraph of Article 8 are of relevance.[172] When implementing positive obligations, as much as in the case of negative obligations, the state enjoys a margin of appreciation. Its breadth depends

[167] Fenwick, *supra* note 139; *Şerife Yiğit*. Yet, cohabitation is not essential for a family life to exist. *See* ECtHR 13 November 2013, Applications nos. 29381/09 and 32684/09, at pars. 49 and 73 (*Vallianatos and Others v. Greece*) [*Vallianatos*].
[168] *See infra* par. 3.1.3.
[169] ECtHR 26 March 1985, Appl. no. 8978/80, at par. 23 (*X and Y v. the Netherlands*); 6 December 2007, Appl. no. 39388/05, at par. 83 (*Maumousseau and Washington v. France*)*;* 12 November 2013*,* Appl. no. 5786/08, at par. 78 (*Söderman v. Sweden*); and 16 July 2014*,* Appl. no. 37359/09, at par. 62 (*Hämäläinen v. Finland*).
[170] ECtHR 21 July 2015, Appl. nos. 18766/11 and 36030/11, at par. 159 (*Oliari and others v. Italy*) [*Oliari*].
[171] ECtHR 24 February 1998*,* Appl. no. 21439/93, at par. 35 (*Botta v. Italy*).
[172] ECHR COUNCIL EUR., *supra* note 160, at 8.

on whether the issue concerns a particularly important facet of one's intimate life, and on whether consensus can be discerned either as to the importance of the interest at stake or the best measure to implement the obligation.[173] Accordingly, the more central to one's personhood the aspect impinged upon is, the narrower the margin gets. The Court recently added another factor: whether the claim concerns "core" as opposed to "supplementary" rights which might or might not arise from a union.[174] When the state action impinges upon core rights and thereby on "the general need for recognition," the margin being granted is narrow.

Ultimately, it is worth noting that if applicants fall short of enjoying a family life, they can still have a right to enjoy a private life. The latter is a broad concept that encompasses at the very least right to establish and develop relationships with other human beings,[175] the right to "personal development"[176] or to self-determination.[177]

(ii) Art. 8 and 14: Non-discrimination in matters concerning family life

The approach under (ii) adds the anti-discrimination layer to the argument that new families can enjoy a right to family life. While the approach under (i) focusing on family life, becomes relevant if the applicants will seek (at a later stage) access to comprehensive scheme, such an approach cannot disentangle inequalities in the distribution of benefits. The Court has repeatedly stated that Article 8, as such, does not guarantee unmarried partners a right to obtain benefits, *e.g.* the benefits deriving from a specific social insurance scheme.[178] Therefore, especially if the aim sought is that of extending the eligibility requirements for specific benefits, Article 8 should be taken in conjunction with Article 14.

Article 14 is not a free-standing right and it should always be linked to another substantive provision set out in the Convention. Hence, as a general matter, for an anti-discrimination claim to be upheld, it should fall within the ambit of one of the rights protected by the Convention.

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[173] *Id*.
[174] *Oliari,* at par. 177.
[175] ECtHR 16 December 1992, Appl. no. 13710/88, (*Niemietz v. Germany*).
[176] ECtHR 6 February 2001, Appl. no. 44599/98, (*Bensaid v. the United Kingdom*).
[177] ECtHR 29 April 2002, Appl. no. 2346/02, (*Pretty v. the United Kingdom*).
[178] ECtHR 12 April 2006, Appl. nos. 65731/01 and 65900/01, at par. 53 (*Stec and Others v. the United Kingdom*) [*Stec*].

It should be noted that once the Court finds a violation of the substantive right it will not move to the anti-discrimination claim, since the analysis would replicate that conducted with respect to the substantive provision.[179] Yet, it seems that anti-discrimination claims could maintain an autonomous role if one considers the following: (a) as noted above, the right to family life alone falls short of mandating an extension of social benefits and is thus unserviceable to that end; (b) the ECtHR can examine the anti-discrimination claim, even if there is no finding to the effect that the substantive provision has been violated, and (c) when it comes to the "linked" substantive provision, it is "sufficient that the facts of the case broadly relate to issues that are protected under the ECHR."[180]

As to the latter point, the scope of the anti-discrimination claim can thus extend well beyond the narrow boundaries of the substantive right, as long as the case broadly relates to the "issues" it covers.[181] This is a well-established principle in the Court case law.[182] To grasp how "broadly" the issues can be related to the right an example is illuminating: it has been held that the extension of an accident and sickness insurance cover under a statutory insurance scheme to unmarried couples falls within the ambit of the right, as it improves the personal and familiar life of the individual.[183] Thus, when the state goes *beyond* its obligations under Article 8 and grants new protections, it cannot do so in a discriminatory manner.

The ECHR anti-discrimination doctrine encompasses both direct discrimination and discrimination yielding indirect adverse effects on a specific group. It does not require proof of discriminatory intent. In the context of an anti-discrimination claim, first the claimant to should point to a different in treatment compared to a group in a relevantly similar situation (or that he has been treated in the same way as a group which is not in an analogous situation.) The first step thus embraces an Aristotelian conception of equality, with respect to which the choice of the comparator is of the utmost importance. Then the measure, if an infringement is found, should be

[179] EUAFR AND ECHR COUNCIL EUR, *supra* note 145, at 30.
[180] *Id*, at 30.
[181] *See e.g.,* ECtHR 17 January 2017, Appl. no. 6033/13 and 15 other applications, at par. 380 (*A.H. and Others v. Russia*) (with the Court addressing the claim notwithstanding the jury service duties, disproportionately affecting men, did not amount to "forced and compulsory labor" under Article 4).
[182] For further references *see* ECtHR 22 January 2008, Appl. no. 43546/02, at par. 48 (*E.B. v. France*).
[183] ECtHR 22 July 2010, Appl. no. 18984/02, at par. 33 (*P.B. and J.S. v. Austria*).

justified. The measure is not justified if it lacks an objective and reasonable justification, *i.e*. where it does not pursue a legitimate purpose or where a relationship of proportionality between the means employed and the purpose to achieve cannot be traced.[184]

(iii) Art. 1 of Prot. 1 and Art. 14: Right to property

The approach under (iii), alleging a violation of Article 1 of Protocol No. 1 in conjunction with Article 14, is a promising way to challenge an unreasonable exclusion of a group from a material benefit. As a preliminary matter, for a right to arise under Article 1 of the Protocol, the protection at stake should amount to an interference with a "possession." Notably, the Court has considered taxation to fall under this provision, since "it deprives the person concerned of a possession, namely the amount of money which must be paid."[185] Likewise, welfare and social security benefits could fall under the scope of the provision if enjoyed by legal right, not discretion.[186] This broad interpretation is consistent with the French version of "possessions" which speaks of "biens" and thus relates to all pecuniary rights.[187]

However, Article 1 does not grant a right to acquire property. Even if for a claim to be sustainable the claimant does not have to argue that the state is depriving her of an *existing* possession, she has at least to argue that she has a "legitimate expectation" to the possession (which should be more substantiated than a mere hope.)[188] Yet, it should be reminded that the Article does not grant a right to acquire property, and as such it does not place any principled restriction on the state's choice as to whether introduce or otherwise a benefits or social security scheme.[189] This is when Article 14 should come into play. If an alleged violation of both Articles is pressed for, then "if… a state decides to create a benefits or pension scheme, it must do so in manner

[184] *Id*, at par. 38.
[185] ECtHR 29 April 2008, Appl. no. 13378/05, at par. 59 (*Burden v. United Kingdom*) [*Burden*].
[186] *Stec*.
[187] AIDA GRGIĆ, ZVONIMIR MATAGA, MATIJA LONGAR & ANA VILFAN, THE RIGHT TO PROPERTYUNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS. A GUIDE TO THE IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS PROTOCOLS 7 (2007).
[188] *Id*, at 7.
[189] *Stec*, at par. 53.

which is compatible with Article 14…"[190] Put differently, it cannot do so in a discriminatory manner.

If such an interference is found, then the state must show that it is pursuing a legitimate aim and that the measure is objectively justified. The justification stage is the point at which most claims fails. One is to be alert to the fact that when issues involving taxation and other social rights are at stake, the state enjoys a wide margin of appreciation, for these are general measures of social and economic strategy and national authorities are better placed to strike a balance between the public interest and competing interests. Thus, as a general matter, the Court will bow to the state's policy choices unless "manifestly without reasonable foundation."[191]

(iv) Art. 1 of Prot. 12: General ban on discrimination

Ultimately, the approach under (iv) refers to Article 1 of Protocol 12. This provision has a broader material scope compared to Article 14. It sets out a general prohibition on discrimination,[192] as it applies with respect to "any right set forth by *law*" and "by any public authority."[193] The ban on discrimination hence does not merely relates to one of the rights set forth in the Convention, as it is the case with Article 14, but to any right set forth under national law.

Notwithstanding the different scope, the meaning of discrimination in Protocol No. 12 was intended to be identical to that in Article 14.[194] Therefore, any interference will still need to be justified in terms of the aim pursued and as to the proportionality of the measure. The Article could be especially fit for disentangling discrimination in the distribution of benefits if one considers that the Explanatory Report of Protocol No. 12 states that discrimination can relate to a host of situations, amongst which is

[190] *Id*, at par. 53; *see also* ECtHR 16 September 1996, Appl. no. 17371/90 (*Gaygusuz v. Austria*) (concerning the availability of emergency assistance for the unemployed from which the applicant was excluded due to its nationality).
[191] ECtHR 21 February 1986, Appl. no. 8793/79, at par. 46 (*James and Others v. United Kingdom*).
[192] ECtHR 22 December 2009, Appl. nos. 27996/06 and 34836/06 (*Sejdić and Finci v. Bosnia and Herzegovina*).
[193] Although the primary purpose of the rule is to yield vertical effect and bind the public authorities, the Explanatory Report could not exclude that it might yield limited indirect horizontal effects in extreme situations ("For example, this question could arise if there is a clear lacuna in domestic law protection from discrimination. Regarding more specifically relations between private persons, a failure to provide protection from discrimination in such relations might be so clear-cut and grave that it might engage clearly the responsibility of the State …"). *See* EXPLANATORY REPORT OF PROTOCOL NO. 12, Rome, 4.XI.2000, Europ. T.S. 177, at par. 26.
[194] ECtHR 9 June 2016, Appl. no. 41939/07, at par. 40 (*Pilav v. Bosnia and Herzegovina*).

discrimination "by a public authority in the exercise of discretionary power (for example, granting certain subsidies.)"[195]

I believe that this argument, however, should only be used to supplement other claims. It is readily visible that Article 14 and Article 1 of Protocol 12 partly overlap and that claims could be brought under both umbrellas. However, Article 14, when used in conjunction with the right to family life (approach under (ii)) is *lex specialis*, unless one contends that new families are not entitled to a right to private or family life. Furthermore, the approach under (ii) can draw from a larger set of precedents compared to Protocol 12, and the major advancements in the field of family statuses and related rights have been achieved under the umbrella of Article 8 (either taken alone or in conjunction with Article 14.)

3.1. Relevant case law

The largest corpus of case law that I consider relevant for purposes of this analysis concerns the right to family life. Especially, the jurisprudence on same-sex couples and to a lesser extent gender reassignment has played a salient role in shaping the current notion of family life. A major case concerning the right to property will also be expounded.

3.1.1. Access to unmarried couples' rights for same-sex couples

Strasbourg has long refrained from recognizing that same-sex couples enjoy a right to family life, even when the relevant functional attributes of unmarried cohabiting couples were present. Starting from *Karner* v. *Austria,* it has equated unmarried same-sex couples to unmarried opposite sex-couples under the umbrella of Article 8 right to respect for one's home, yet not family life.[196] On that occasion, the Court held that the protection of a traditional understanding of family was a legitimate state interest. However, since the distinction was based on sexual orientation, the margin

[195] EXPLANATORY REPORT OF PROTOCOL NO. 12, *supra* note 193, at par. 22.

[196] ECtHR 24 October 2003*,* Appl. no. 40016/98 (*Karner* v. *Austria*) [*Karner*] (finding Austria in violation of Article 8 in conjunction with Article 14 for a failure to allow a succession in tenancy rights for unmarried same-sex couples on the grounds that their exclusion was meant to defend a traditional notion of family.)

left to the state was narrow. Accordingly, the state not only had to show a rational connection between the exclusion and the aim, but also that the measure was necessary (by providing "particularly convincing and weighty reasons.") In the case at bar, the state failed to do so.

The same reasoning led to find an incompatibility with the Convention when Croatia denied a residence permit to a same-sex unmarried partner. In *Pajić* c. *Croazia,* the Court could already rely on *Schalk and Kopf*[197] to affirm that same-sex couples enjoy a right to family rather than private life. The finding of incompatibility was further buttresses by a growing consensus toward recognition of same-sex families as of 2015 and by the fact that the parallel system of protection, the EU, had dropped any reference to gender in its provision setting forth the right to marry and to found a family (Article 9 of the Charter of Nice.)[198] The measure failed at the justification stage since it did not withstand the stricter scrutiny that the Xourt applies to situations where the distinction is based on sex or sexual orientation.[199] In particular, there was no reasonable justification for upholding what the Court called "a blanket exclusion of persons living in a same-sex relationship" from the possibility of enjoying family reunification.[200]

3.1.2. Access to married couples' rights for same-sex couples

As argued, Strasbourg organs fell short of articulating a right to same-sex marriage, as their American counterpart did in *Obergefell*. In *Schalk and Kopf*, the ECtHR finally ruled that same-sex couples are able to enjoy a right to family life. These couples were found to be just as capable as opposite-sex couples of entering into a committed and stable relationship.[201] However, this consideration alone was not deemed sufficient to find a right to family life. It was coupled with the finding that a growing European consensus around the issue could be traced.

Notwithstanding this significant advancement, the Court did not translate it into a positive duty to recognize same-sex marriage. When dealing with the issue of same-

[197] ECtHR 24 June 2010, Appl. no. 30141/04 (*Schalk and Kopf v. Austria*) [*Schalk and Kopf*].
[198] Article 9 of the Charter of Nice.
[199] ECtHR 23 February 2016*,* Appl. no. 68453/13, at par. 82 (*Pajić* c. *Croazia*).
[200] *Id*, at pars. 83-84.
[201] *Schalk and Kopf.*

sex marriage, it granted a wide margin of appreciation on the ground that the decision was one of "general social strategy."[202] Yet the finding that same-sex couples were in a relevantly similar situation to opposite-sex couples, paved the way for mandating in a subsequent case some form of legal recognition.[203]

In 2013, the ECtHR held that Greece violated Article 14 and 8 due to its decision to restrict access to civil unions to opposite-couples only.[204] On that occasion, it stressed that when a state introduces an alternative regime to marriage, it cannot do so on a discriminatory basis.

Then the Court, with the *Oliari* decision, went one step further in finding a breach of the mentioned rights in a case, involving Italy, where no specific legal framework at all was introduced to recognize same-sex couples.[205] Noting a growing *international* consensus around the issue of recognizing same-sex couples and accounting for some specific circumstances of the case, given that the Italian government repeatedly ignored its supreme and constitutional court rulings urging legal reform, it found a breach of the Convention.[206] However, one cannot easily discern whether the decision can only apply to Italy. An interpretation to this effect would place emphasis on the Court's choice to parse out at length the specific circumstances of the Italian case. A pending case involving Russia will clarify the *erga omnes* or *inter partes* effects of the decision soon.[207]

Importantly, the *Oliari* judgment, first traced a positive obligation on Italy to recognize these unions, relying on the conflict between the law and social reality, and on the inconsistent domestic approach that treats these couples differently across branches of government and even within the same branch (particularly, the judiciary.)[208] In affording a narrow margin of appreciation, it relied on the following factors: the fact that the claim pertained core rights as opposed to supplementary rights which might or otherwise attach to a status,[209] and the possibility at present of

[202] Fenwick, *supra* note 139, at 478.
[203] *Id*.
[204] *Vallianatos*.
[205] *Oliari*.
[206] *Id*, at pars. 178, 180-185.
[207] ECtHR, *Fedotova et al* v. *Russia,* communicated on 2 May 2016.
[208] *Oliari,* at pars. 172-73. *See al*so, ECtHR 30 giugno 2016, Appl. no. 51362/09 (*Taddeucci e McCall v. Italia*).
[209] The Court noted that Italy only allowed these couple to enter into cohabitation agreements that did not provide for the core needs of stable and committed same-sex couples, and that these agreements

discerning a European and international consensus on the need to recognize same-sex couples. Unlike the case *Schalk* decided in 2010, where a consensus could not be found, the legal landscape now shows that 24 out of 47 states have granted some form of recognition to same-sex couples, and a global trend in America and Australasia toward giving them official recognition. The Court then considered the margin overstepped and Article 8 violated due to a failure to put forward a prevalent community interest and due to the persistent non-compliance with domestic judgments calling for recognition.

It should be noted that while Strasbourg seems to be penchant to recognizing a right to access to civil partnerships, it is not as eager to recognize a right of choice between different regimes. The ECtHR has continuously rejected arguments to the effect that choice is a value *per se*, both when pled by same-sex couples willing to access marriage and by cross-sex couples willing to access registered partnerships opened to same-sex couples only (*i.e.* functional registration schemes.)[210]

First in 2006, it refused to uphold the argument that a couple, whose marriage was forcibly converted into a civil partnership upon the gender reassignment of the applicant, should be able to keep its marital status.[211] The Court reached this outcome both noting a lack of consensus around same-sex marriage and some unsurmountable limitations vis-à-vis enforcing positive obligations upon the state.[212] Upon closer examination of the decision, it seems apparent that *any* form of recognition, not necessarily marriage, is likely to satisfy the proportionality test.

Then, in *Chapin and Charpentier v France*[213] the lack of choice was apparent all the more. The *pacsée*[214] same-sex couple submitted that "s'ils avaient eu une orientation hétérosexuelle, ils auraient eu accès à *trois* régimes de protection du couple (le concubinage, le Pacs et le mariage) et … que la protection juridique offerte par le Pacs est inférieure à celle du marriage."[215] Yet the Court was not ready to overrule *Oliari* and *Schalk*, both denying the existence of a same-sex right to marry under

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where not a response to their lack of recognition, since all cohabiting couples, including flatmates where eligible to enter them. *Oliari,* at par. 169.

[210] For a definition of functional registration schemes *see supra* par. 1.1.

[211] ECtHR 28 November 2006, Appl. no. 35748/05 (*R and F v. United Kingdom*).

[212] Fenwick, *supra* note 139, at 482.

[213] *Chapin and Charpentier*.

[214] For a brief overview of PaCS *see supra* par. 1.1.1.

[215] *Chapin and Charpentier* (emphasis added).

Article 8 and 14 (and thus *a fortiori* in the case at bar, based on the Article 12 right to marry, which enshrines a traditional understanding of marriage.)

Yet the same conclusion with respect to opposite-sex partners defies any logic. In *Ratzenböck and Seydl v. Austria* the applicants sought access to the civil partnership scheme in that it conferred a lighter package of rights and obligations, such as maintenance obligations, and a shorter statutory period to obtain divorce, compared to marriage.[216] The Court laconically dismissed the question, reiterating that so long as one formalized status is available to same-sex couples that would satisfy the Convention. The judgment turned out to be very short due to the absence of a relevant comparator. Since the applicants were not in a relevantly similar situation, compared to same-sex couples, given that they could access marriage, the Court declined to move on to the infringement and justification stage. This outcome is quite absurd: the couple got stuck in marriage, since no other person had access to it and no comparator could be found. Yet, the comparator could have been more readily found in a same-sex couple that upon gender reassignment gets stuck in a registered partnership, despite being ideologically opposed to it, and seeks to keep the previous marriage alive.[217]

There is an increasing awareness that choice is valuable per se. Opposite-sex couples too can oppose marriage on several grounds. The case mentioned above epitomizes a need for flexibility, that marriage does not seem to adequately meet. In this sense, claimants are more interested in the "material" benefits of not being married. A second strand of cases features opposite-sex couples interested in alternative regimes to marriage, reserved to same-sex couples, as better fitted to their values and ideas about equality.[218] These couples are thus more interested in the "symbolic" benefits

[216] ECtHR 27 October 2017, Appl. no. 28475/12 (*Ratzenböck and Seydl v. Austria*).

[217] *See* Helen Fenwick & Andy Hayward, *Equal Civil Partnerships: Implications of Strasbourg's latest ruling for Steinfeld and Keidan,* UK HUMAN RIGHTS BLOG, November 21, 2017, quoting ECtHR 16 July 2014*,* Appl. no. 37359/09, at par. 62 (*Hämäläinen v. Finland*). The limits of an approach based on a comparator are obvious. The two groups of applicants would still differ on other respects. The ground on which the Court rejected *Hämäläinen* application was that the two regimes, marriage and registered partnerships, did not differ in a substantial way. In the Austrian case, by contrast, a difference exists and is the reason why the couple is seeking access to the alternative regime.

[218] *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development* [2018] UKSC 32 ("Personally, we wish to form a civil partnership because that captures the essence of our relationship and values. For us, a civil partnership best reflects who we are, how we see our relationship and our role as parents – a partnership of equals.").

of not being married. The reference is particularly to the kissing cousin case in the United Kingdom, *Steinfeld*.[219] Unlike the ECHR, the UK Supreme Court has delivered in July 2018 a declaration of incompatibility with Article 8 and 14 ECHR in a case concerning the exclusion of cross-sex partners from civil partnerships. However, this important result could be linked to the peculiarity of the English situation, which is one where cross-sex couples were allegedly subject to reverse discrimination: while same-sex couples could access both marriage and civil partnerships, cross-sex couples could only access the former (marriage.) After the declaration of incompatibility, it is now up to the Parliament to decide whether to remedy to this ascertained inconsistency or to keep the *status quo*.[220]

3.1.3. Case law on new families, beyond same-sex couples

The Strasbourg jurisprudence shows a favor for upholding a right to family life at least when close family ties are at issue, since close relatives can play an essential role in each others' life.

The Court has held that siblings enjoy a right to family life. In *Moustaquim v. Belgium*,[221] the government of Belgium violated such a right in deporting the applicant and separating him from his family, including his seven siblings. Likewise, in *Mustafa and Armağan Akın v. Turkey*,[222] the separation of the two siblings, that lived together until the divorce of their parents, amounted to an unjustified violation of the right to family life under Article 8. In *Boyle v. the United Kingdom*, the Court extended the right to family life to aunts/uncles and nieces/nephews, and found a violation of the mentioned Article in the refusal of the UK government to allow visitation rights for an uncle.[223] The same reasoning led the court to find a right to family life in favor of grandparents and grandchildren.[224]

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[219] *Id*.
[220] The declaration of incompatibility is a form of weak scrutiny whereby a court ascertains the compatibility or otherwise of a law with the parameter, and then leaves the last word to the Parliament to decide whether to repeal the law. This weak form of scrutiny is considered as being more respectful of the principle of Parliamentary sovereignty in force in the English legal system.
[221] ECtHR 18 February 1991, Appl. no. 12313/86, at par. 36 (*Moustaquim v. Belgium*).
[222] ECtHR 6 April 2010, Appl. no. 4694/03, at par. 19 (*Mustafa and Armağan Akın v. Turkey*).
[223] ECtHR 15 January 2008, Appl. no. 26269/07, at pars. 41-47 (*Boyle v. the United Kingdom*).
[224] ECtHR 13 June 1979, Appl. no. 6833/74, at pars. 31, 45 (*Marckx v. Belgium*).

However, the right tends as usual to be framed as a right to maintain a normal relationship through contact.[225] Thus, it is no surprise that its scope varies depending on the existence of natural parents. Where natural parents are absent, the Court is penchant to recognizing a right to family life.[226] By contrast, in "normal" circumstances "the relationship between grandparents and grandchildren is different in nature and degree from the relationship between parent and child and thus by its very nature generally calls for a lesser degree of protection."[227]

There is second point that directly derives from this conceptualization of the right to family life. A thus-construed right tends to exalt vertical family relationships as opposed to horizontal ones. In the cases mentioned above, the person being severed from a close relative is usually a minor. As a consequence, the denial of family life coincides with the denial of having persons willing or able to carry out parental-like duties toward minors. This role is especially apparent in the case of aunts/uncles and grandparents. Yet, I believe that the rationale is not so different in the case of siblings, since when the person being separated is a minor, such separation prevents the possibility of providing the typical emotional or material support that connotes rearing up caregiving activities (much more than typical duties in horizontal relationships.)

The recent ECHR jurisprudence supports this contention. When the person at issue is an adult, rather than a minor, the relationship attracts lower protection, unless the Court finds additional elements of dependency.[228] These elements cannot coincide with mere emotional dependency, but should rather be based on financial or physical dependency.[229]

Ultimately, this jurisprudence reflects the tension between positive and negative obligations. Be reminded that the right is one of mutual enjoyment of each other's company. Never did the court uphold a right under the Convention to enter a

[225] ECHR COUNCIL EUR., *supra* note 160, at 55.
[226] Particularly, the court has found a right to family life between uncles and aunts and nieces and nephews. *See* ECtHR 4 December 2012, Appl. no. 47017/09, at pars. 4 and 76 (*Butt v. Norway*); 25 November 2008, Appl. no. 14414/03, at par. 27 (*Jucius and Juciuvienė v. Lithuania*).
[227] ECHR COUNCIL EUR., *supra* note 160, at 55, quoting ECtHR 16 April 2015, Appl. no. 53565/13, at par. 50 (*Mitovi v. the Former Yugoslav Republic of Macedonia*).
[228] ECHR COUNCIL EUR., *supra* note 160, at 56.
[229] ECtHR 10 July 2007, Appl. no. 53441/99, at par. 36 (*Benhebba v. France*); 15 July 2007, Appl. no. 52206/99, at par. 33 (*Mokrani v. France*); 17 February 2009, Appl. no. 27319/07, at par. 45 (*Onur v. the United Kingdom*); 9 October 2003, Appl. no. 48321/99, at par. 97 (*Slivenko v. Latvia*); 12 January 2010, Appl. no. 47486/06, at par. 32 (*A.W. Khan v. the United Kingdom*).

horizontal relationship amongst close relatives, and/or to gain some of the legal protections of marriage.

In 2008, the Grand Chamber of the ECtHR has indeed been confronted with a thus-pled case, and has rejected it. The reference is to the "spinster sisters" case, *i.e. Burden v. United Kingdom* decision.[230] The case concerned two elderly sisters, which had been living in a house built on their jointly inherited property. The sisters argued under Article 14 (prohibition against discrimination) in conjunction with Article 1 of the First Protocol to the Convention (protection of the peaceful enjoyment of the right to property) that they were discriminated against as they could not enjoy the same exemption from the inheritance tax as couples which have married or entered a civil partnership. They further contended that should one of two sisters die, this unaffordable inheritance tax, payable on the estate passing to the survivor sister, would have forced the latter to sell the house.[231]

Although the claim was aimed at obtaining the legal protection they were being denied (the inheritance tax,) the central strand of their argument was that they were precluded from entering a civil partnership under the Civil Partnership Act of 2004 by reason of consanguinity.[232]

On that occasion, the Court of first instance[233] glossed over the question of whether the two sisters were similarly situated with respect to married couples (or parties in a civil partnership.) It focused its attention on the justification stage, where the question rather concerned whether, assuming that they were similarly situated, the differential treatment was justified. It thereto considered that the Contracting Party enjoys a wide margin of appreciation in taxation.[234] It then concluded that the justification put forward by the UK government was sufficiently related to the legitimate aim of incentivizing marriage as well as stable and committed

[230] *Burden*.
[231] Philip Backer, *Burden v Burden: The Grand Chamber of the ECtHR adopts a restrictive approach on the question of discrimination*, 4 BRITISH TAX REV. 329 (2008).
[232] *Id*.
[233] ECtHR 12 December 2006, Appl. no. 13378/05 (*Burden and Burden v. United Kingdom*).
[234] *Id*, par. 54 (the court argued that the margin is wide "as is usual when it comes to general measures of economic or social strategy… [since t]he national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds.").

relationships. Thereby, it confirmed that the policy goal to nudge people into marriage through government programs is a legitimate one.[235]

By contrast, the Grand Chamber answered the question of whether the sisters were similarly situated, albeit in the negative. It concluded that the relationship at issue was qualitatively different from that of spouses and civil partners in that it was founded on consanguinity, while marriage and civil partnerships expressly listed consanguinity as a disqualifying condition for entering the status.[236]

The decision further entrenched the marital privilege by stressing the "special status" conferred upon marriage. The "special status" argument finds its roots in the case law concerning unmarried cohabiting couples,[237] whose invisibility was initially upheld by the court precisely by reason of this special status. Furthermore, the Court extended the special status-based reasoning to civil partnerships since they come in the form of a public commitment deliberately entered into by couples, setting "these types of relationship apart from other forms of cohabitation."[238]

A second problem arises if one considers the approach adopted to deciding the breadth of the margin of appreciation. If the differentiation is based on sex or sexual orientation, the margin of appreciation is narrow and "the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people"[239]

However, when these grounds are not involved the margin of the state widens significantly. Even if one were to contend that discrimination is impermissibly based on marital status, which, as seen, is a prohibited ground, when the issues being raised touch upon taxation or public law benefits the problem is usually (re)framed as one of intrinsic rationality of the scheme that is being challenged. Therefore, when as in the case of the Burden sisters the claim is that the statute impermissibly excludes the two sisters, the focus immediately shifts onto the program. However, the margin

[235] *Id*, par. 59.
[236] *Burden*, at par. 62 ("The very essence of the connection between siblings is consanguinity, whereas one of the defining characteristics of a marriage or Civil Partnership Act union is that it is forbidden to close family members. The fact that the applicants have chosen to live together all their adult lives, as do many married and Civil Partnership Act couples, does not alter this essential difference between the two types of relationship.").
[237] ECtHR 27 April 2000, Appl. no. 45851/99 (*Shackell v. United Kingdom*).
[238] *Burden*.
[239] *Id*, at par. 41.

enjoyed by the Contracting Party in socio-economic issues is ample, and little room for an intervention of the Court exists. In matters concerning taxation and social benefits, the limit of this almost unfettered margin is that the policy/rule is "manifestly without reasonable foundation."[240]

3.2. Building an argument under the Convention

It seems fairly obvious that at present the chances of introducing a comprehensive scheme for these families through the ECHR are slim. The prognosis is negative since the advocacy of new families is still at an earlier stage.[241] A claim that a comprehensive regime is to be introduced would thus lack the "environmental" conditions that led same-sex couples to have such a claim eventually upheld. Upon bringing up the issue to the general public, same-sex couples made it to change the widespread societal perception of homosexual couples. As a result of an incessant activity on the part of LGB movements across Europe, same-sex couples went from being seen as social outcasts to being increasingly *known* and *accepted* as normal partners in a committee relationship. This acceptance translated into legal reform in the majority of the states of the Council of Europe. It is against this backdrop that in *Oliari* Strasbourg finally recognized a same-sex couples' right to access "a specific legal framework," although under the conditions seen above.

This is to say that an abrupt request for a specific legal framework from new families (provided that they can ever coalesce)[242] would not be grounded in doctrine nor in reality.

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[240] *See e.g.* ECtHR 21 February 1986, Appl. no. 8793/79, at par. 46 (*James and others v. United Kingdom*). *Burden*, at par. 60 ("The legislature could have granted the inheritance tax concessions on a different basis: in particular it could have abandoned the concept of marriage or civil partnership as the determinative factor and extended the concession to siblings or other family members who lived together, and/or based the concession on such criteria as the period of cohabitation, the closeness of the blood relationship, the age of the parties or the like. However, the central question under the Convention is not whether different criteria could have been chosen for the grant of an inheritance tax exemption, but whether the scheme actually chosen by the legislature, to treat differently for tax purposes those who were married or who were parties to a civil partnership from other persons living together, even in a long-term settled relationship, exceeded any acceptable margin of appreciation.").

[241] Nausica Palazzo, *The Strange Pairing: Building Alliances between Queer Activists and Conservative Groups to Recognize New Families*, forthcoming in 25 MICHIGAN JOURNAL OF GENDER & LAW (2018), *esp*. Part III.

[242] *Id.*

I thus contend that it is more likely that protections are extended through a piecemeal approach that gradually leads from the extension of specific entitlements to the introduction of a comprehensive regime.

At what I shall call stage 1, new families are able to argue that they should access these benefits, as being in a comparable situation with the committed and stable relationships that so far have been deemed worthy of recognition by the Court. Then, only at stage 2, and upon a significant number of states has introduced regimes to afford them protections (thereby giving rise to what is called an emerging consensus,) one could move on to demand a right of access to registration schemes, as same-sex couples did.

Stage 1

At first, new families can pursue the possibility of extending protections through a protection-driven approach. The *Burden* case warns that some doctrinal changes are neeeded before gaining legal protection. That case followed the route of Article 14 in conjunction with the right to property, and thus did not play the card of the right to family life. A first limit of the decision is its "discriminatory" emphasis on (pre-existing) official recognition as a proper marker of deserving families. From the reasoning of the Court it seems that official recognition is all that counts for purposes of obtaining a benefit and for setting unworthy relationships apart from good relationships:

> "[T]he legal consequences of civil partnership under the 2004 Act, which couples expressly and deliberately decide to incur, set these types of relationship apart from other forms of cohabitation. Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature."[243]

Thus, the "absence of such a legally binding agreement" appeared to be the real hurdle in finding that the applicants were discriminated against. Yet, this reasoning is

[243] *Burden,* at par. 65.

circular and makes wholly ineffective the prohibition to discriminate based on marital status. As aptly pointed out:

> "It is illogical and circular to distinguish a relationship between those who are legally prohibited from making the sort of legally binding public undertaking that spouses and civil partners make, on the basis that they have not done so. Indeed, making a distinction on this basis renders the prohibition of marital status discrimination under Article 14 completely ineffective in any case that seeks to compare the treatment of married and unmarried couples."[244]

Furthermore, this interpretation is not consistent with the underlying close ties-based notion of family in the ECHR, and if the Court is not willing to incorporate its Article 8 doctrine in other ambits, the applicants are only left with the option of pleading arguments based on Article 8 (in conjunction with Article 14.)

Such notion escapes formal definitions and is inherently functional. This contention is buttressed by the case law on unmarried couples, and should not change depending on the type of family claiming recognition. It is all the more coherent with an understanding of the Convention as a living instrument, that always accounts for the historical and social context in a democratic society.[245] It is thanks to this realistic and flexible approach that the Court could account for all sorts of family relationships, and include in the notion of family life *de facto* families, non-conjugal families made up of relatives, illegitimate families, etc. The effectiveness of family ties "among people who mutually support and care for each other from an economic, educational and emotional point of view"[246] has always been the linchpin of its case law on family life. If the Court is not willing to account for this doctrine, it is then necessary to plead the right to family life instead of the right to property.

Same-sex couples, after a long series of cases rejecting the argument to the effect that they could enjoy family life, were able to secure themselves the label. This achievement resulted from acknowledging that a rapid evolution in a significant

[244] Barker, *supra* note 144, at 1267.
[245] Suzan S. Caballero, *Unmarried Cohabiting Couples Before the European Court of Human Rights: Parity with Marriage?,* 11 COLUM. J. EUR. L. 152 (2004).
[246] *Id*, at 152.

number of states led to grant recognition to same-sex couples.[247] This passage should not be necessary for non-conjugal families made up of relatives since there is extensive case law finding that they enjoy a right to family life. Other new families, by contrast, bear the burden of proving that a trend toward recognizing them is under way. This is the case of polyamorous relationships and of non-conjugal families made up of friends. While polyamorous relationships are barred at present from showing this consensus, as it seems that nowhere in Europe they are recognized as such, the latter could show an emerging, albeit very slow, trend toward recognition.

Any reference to an emerging consensus could now rely on a handful of states that so far have enacted protections for new families. As seen, at present these states Belgium, the Netherlands, and to a lesser extent Norway and the UK (and other states with an ascriptive system for assigning specific entitlements.)[248] While these examples widely differ in terms of personal and material scope of the regime, they all point to an evolution, albeit slow, in the understanding of who is a deserving family member. This feeble emerging consensus could be paired with an international consensus that can point to legal reforms enacted in the Canadian Province of Alberta and in several states in the United States, along with the important reforms enacted in Australia and New Zealand, which however are not included in the scope of this dissertation.[249]

If not sufficient to find a right to family life, new families can still act at the national level so as to introduce new protective regimes and to enlarge and consolidate the mentioned consensus.

Once the new family has been able to prove that it deserves the label, despite a lack of recognition in the case under scrutiny, the question arises as to whether discrimination exists.

(a) difference in treatment of persons in relevantly similar situations

Finding the right comparator is crucial. In the Burden case, the plaintiffs argued that they were in a relevantly similar situation compared to married and civil partners. The Grand Chamber, however, concluded that their relationship differed from that of

[247] *Schalk and Kopf.*
[248] *See supra* section 1.1.1.
[249] SCHERPE, *supra* note 30, at 411-38, 439-67.

spouses and civil partners in that it was founded on consanguinity, while marriage and civil partnerships expressly listed consanguinity as a disqualifying condition barring access to the status.[250]

However, as argued, the reasoning of the Court is unsatisfactory and circular. Instead of focusing on the functional attributes of the two types of relationships, as a proper inquiry of the relevant similar situation requires, it focused on the formal conditions for entering marriage or civil partnerships. This argumentative move is tautological since nowhere is denied that consanguinity prevents the sisters from formalizing their relationship, and makes devoid of significance the prohibition to discriminate based on marital status. It thus merely puts a rubber stamp on the *status quo* by refusing to move ahead to question of whether the difference in treatment falls within the acceptable margin of appreciation (as the Court of first instance aptly did.)

A recent case shows what kind of comparator new families legally unable to marry, as the Burden sisters were, should find. The *Taddeucci* decision, handed down in 2016, concerned the denial of a residence permit to the same-sex partner of the applicant.[251] In Italy same-sex couples are unable to marry (and back then to enter a civil union.) In any such case the comparison should hence focus on difference rather than sameness. The comparator group was an unmarried heterosexual couple. Yet, the Court found that the position of unmarried heterosexual couples in Italy was not analogous since they could have married, had they wished to do so. By contrast, same-sex partners could never make that choice. As a consequence, Italy failed to treat two qualitatively different situations in a reasonably different way.[252]

Different considerations apply to a polygamous marriage. In such a case the state enjoys a wide margin to either extend or exclude those couples from marital protections. However, if the state treats for any reason the parties as married then it cannot deny public benefits. This conclusion emerges from the case *Muñoz Díaz v. Spain*.[253] There the Court found that the refusal to recognize the applicants' Roma

[250] *Burden*, at par. 62 ("The very essence of the connection between siblings is consanguinity, whereas one of the defining characteristics of a marriage or Civil Partnership Act union is that it is forbidden to close family members. The fact that the applicants have chosen to live together all their adult lives, as do many married and Civil Partnership Act couples, does not alter this essential difference between the two types of relationship.").
[251] ECtHR 30 giugno 2016, Appl. no. 51362/09 (*Taddeucci e McCall v. Italia*).
[252] *Id*, at pars. 82-83.
[253] *Muñoz Díaz*.

marriage and in turn to grant survivor's pensions, despite recognizing in the past the couple as if the marriage was valid for other purposes, breached Article 14 in conjunction with Article 1 of Protocol 1. On that occasion, the Court maintained that while there was no discrimination in declining to recognize the validity of the marriage, it was discriminatory to exclude the Roma family from social security benefits. The same reasoning could apply to polyamorous marriages validly contracted abroad.

By contrast when the new family does not suffer any impediment to marriage but does not chose to marry, think about two cohabiting and committed friends, the comparison should focus on sameness. This family could claim that it deserves the specific benefit as much as married couples, due to the committed and stable nature of the relationship. Yet, the picture here becomes a bit complicated. As the case law concerning cross-sex unmarried conjugal partners willing to access marital rights shows, the Court does not seem to be eager to uphold these arguments and is likely to dismiss them at the justification stage, especially when they relate to taxation or public benefits.[254] The applicants will always face the objection that they could have married to reach the desired outcome. This of course does not account for either the lack of interest that friends have toward marriage or their overt opposition to the institution, as being unfit to their situation and unable to fulfil their expectations (ask yourself, would you marry your committed friend to acquire some protections under the law?) Furthermore, reasoning after the *Muñoz Díaz* judgment, if the prohibition against marital status discrimination is to have any significance, the parties should not be compelled to alter one of the factors in question, *i.e.* their non-marital status, to eschew discrimination.[255]

(b) legitimate aim

If the state fails to justify the discrimination by providing a legitimate state interest and that the measure is proportionate it has breached its negative obligation not to

[254] ECtHR 30 August 1993, Appl. no. 21173/93 (*G.A.B. v. Spain*) (concerning the request of a divorced woman who had cohabited with a man outside of wedlock for more than 14 years to obtain survival's pension upon the death of her partner). The court is particularly unlike to accept these arguments when the respondent state allows divorce (and marriage is thus not a choice for life). *See Caballero, supra* note 245, at n.40.

[255] *Muñoz Díaz*, at par. 70.

discriminate. Many legitimate state objectives have been put forward with a view to excluding same-sex couples or unmarried cohabitants from official recognition. They are often circumstance-specific and focus on the purpose of the scheme whose eligibility requirements are being challenged. As to state aims of general applicability the chief one is the purpose of strengthening a traditional understanding of family.[256]Other interests put forward focus on vertical relationships and go something like this: protecting children born outside of wedlock and single-parent families,[257] responding to the needs of families willing to raise children that do not want to marry.[258]

The most important state interest of general applicability for purposes of our analysis is the protection of the family in the traditional sense. The Court affirmed as early as 1979 that "support and encouragement" of the traditional family was in principle a legitimate state interest and was even "praiseworthy."[259] Not even the acknowledgment in 2000 that an increasing social acceptance of unmarried relationships was underway made it doubt the salience of this interest.[260] Importantly, on that occasion the protection of the special status of marriage was the doctrinal justification for denying that heterosexual unmarried and married couples were in a comparable situation, and for halting any further inquiry.

The rocky consensus about the weighty nature of the interest vacillated a bit in *Karner*, when the Court found it to be "rather abstract,"[261] as being able to encompass a wide variety of concrete measures. This reasoning affected the necessity stage and led to deem the exclusion of the same-sex partner from tenancy rights unnecessary to achieve the aim. In so doing, *Karner* set the bar very high, by noting that granting rights to another group "does not result in the group who already had those rights and benefits losing them,"[262] nor in diluting such rights.[263]

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[256] ECtHR 30 August 1993, Appl. no. 21173/93 (*G.A.B. v. Spain*); *Karner*, at par. 35.
[257] *Valliantos,* at par. 80.
[258] *Id*.
[259] ECtHR 13 June 1979, Appl. no. 6833/74, at par. 31 (*Marckx v. Belgium*).
[260] ECtHR 1 November 1986, Appl. no. 8367/78 (*Lindsay v. United Kingdom*).
[261] *See also Valliantos,* at pars. 83-84.
[262] *Karner*.
[263] Jens M. Scherpe, *Legal Recognition of Same-sex Couples in Europe and the Role of the European Court of Human Rights*, 10 EQUAL RIGHTS REV. 83, 92 (2013); Geoffrey Willems, *Private and Family Life versus Morals and Traditions in the Case Law of the ECHR*, in BOELE-WOELKI, DETHLOFF & GEPHART, *supra* note 32, at 313.

While remaining a legitimate and weighty interest, the preservation of a special status for marriage could not lead, in the ECHR jurisprudence, to privilege illegitimate and adulterous children over marital children. In the recent case law on same-sex couples willing to access formal recognition, the Court kept acknowledging the importance of protecting marriage and yet put language to the effect of limiting the incidence of a generalized use of this interest by the government. In the *Valliantos* case the Court urged that the Convention be interpreted dynamically to account for the shifting social perceptions of family relationships, "including the fact that there is not just one way or one choice when it comes to leading one's family or private life."[264]

The position of the Court is usually permissive at this stage. It is likely that it will "concede" that the protection of the family in the traditional sense is, in principle, a legitimate (and even weighty!) reason which might justify a difference in treatment. Yet, it then will steadfastly move to the next prong to ascertain whether the measure is proportional.

(c) proportionality and margin of appreciation

The analysis then proceeds to accord either a narrow or broad margin of appreciation to determine whether differential treatment is justified. This part of the justification stage is highly fact-driven. However, I intend to provide some theoretical background to predict the kind of margin that the Court could employ and hence how pervasive its scrutiny is likely to be.

Of course, as a matter of law, the narrow margin that the Court applies in cases of differences based on sex or sexual orientation cannot apply here. We should thus focus on consensus. While the application of the doctrine has been inconsistent in the ECHR, it seems that the existence or lack thereof of a European consensus frequently plays a key role in the decision on the use the margin. The issue of consensus can be raised either defensively (when the respondent state argues that no such consensus exists, or when it argues that consensus exists and the state is not parting from it) or offensively on the part of the court/applicant to reject the application of the margin.

[264] *Valliantos*, at par. 84.

Regardless, what counts is that consensus is regarded as the key factor in this field, and that the broader the consensus the less the room for departures.

The European consensus is an essential tool allowing for an evolutionary interpretation of the Convention (so-called living tree doctrine,) since it favors the adoption of a teleological interpretation over an interpretation focusing on the intention of the Contracting Parties. The doctrine is in the turn the most effective tool to entrench such consensus, where formed, and to outlaw attempts to part from it, with a view to mitigate the risk of undermining it.[265]

While consensus is potentially relevant vis-à-vis all the rights enshrined in the Convention, its use is especially warranted when it comes to balancing exercises involving morals,[266] sexuality, equality interests,[267] and, as a general matter, when it comes to rights at a transitional stage.[268]

While the Court had no trouble to finding in 2013 that a consensus around recognition of same-sex couples could be traced, this analysis is not applicable to new families. The considerations outlined above as to the importance of stressing an emerging European consensus and international consensus around the issue apply. However, the consensus at present is very "thin" and further work is needed on the part of new families to enact protective measures at the domestic level so as to enlarge it.

If no consensus can be discerned, the preferred approach is that outlined in the dissenting opinion in the gender reassignment case *Hämäläinen.* Thereto, Justices Sajo, Keller, and Lemmens maintained that the consensus-based approach is flawed, and that a European consensus is but one factor to consider in deciding over the breadth of the margin.[269] The Justices took the stance that strict scrutiny should be triggered, even if no consensus can be traced, when the issue touches upon a significant aspect of one's private life. The *Goodwin* precedent was but one example

[265] James A. Sweeney, *Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era*, 54 INT'L & COMP. L.Q. 459, 469 (2005) ("In respect to original states the Court balanced human rights against state sovereignty more warily.").
[266] ECtHR 7 December 1976, Appl. no. 5493/72 (*Handyside v. the United Kingdom*).
[267] *See* ECtHR 22 May 2008, Appl. no. 15197/02 (*Petrov v Bulgaria*) (allowing a broad margin in determining to what extent married and unmarried couples can be treated differently, while stricking down the impossibility of maintaining phone contact while a party is held in custody).
[268] ECtHR 26 February 2002, Appl. no. 36515/97 (*Frette v France*).
[269] The Justices cited to, amongst the others, Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards,* 31 NYU J. INT'L L. & POL. 483 (1999).

the dissenting opinion could rely on to buttress this conclusion, without venturing to find a consensus around the acceptance of transsexualism in Europe.

Furthermore, a second viable approach could be that outlined in the *Mazurek*, whereby the Court did not go to the trouble of finding a consensus but was merely content with "une *nette tendance* à la disparition des discriminations à l'égard des enfants adultérins."[270] Such "nette tendance" is no synonym with existing consensus, and thus allows more flexibility in carrying out the proportionality assessment. It leaves claimants room for arguing that an emerging trend exists, which clearly points to a direction (that in our case would be the increasing family legal pluralism and recognition of non-normative families.)

Ultimately, the decision over the breadth of the margin can be based on the type of right. Even though there is no principled way of applying the doctrine based on the type of right, some considerations can be flagged. Measures that interfere with weak rights such as property or socio-economic rights, enjoy an ample margin of appreciation, "unless they give rise to results which are so anomalous as to render the legislation unacceptable."[271] In this sense, the doctrine only allows the ECtHR to protect individuals against anomalous outcomes.

This consideration should weight in favor of employing from the outset an argument based on Article 8, given that interferences with family life usually enjoy a narrower margin of appreciation, as opposed to an argument based on Article 1 of Protocol 1, given that property is categorized as a weak right warranting a lower protection.

Stage 2

At stage 2, the applicants can contend that new families deserve legal recognition through a comprehensive approach. In doing so, they could rely on Article 8, along the lines of what the applicants did in *Oliari*. Thereto, the applicants stressed that:

> "the recognition in law of one's family *life* and *status* was crucial for the existence and well-being of an individual and for his or her dignity. In the absence of marriage the State should, at least, give access to a recognised union by means of a solemn juridical

[270] ECtHR 1er février 2000, Requête n° 34406/97 (*Affaire Mazurek c. France*).
[271] ECtHR 30 August 2007, Appl. no. 44302/02, at par. 83 (*J A Pye (Oxford) Ltd v The United Kingdom*).

> institution, based on a public commitment and capable of offering them legal certainty."[272]

The passage on marriage is not applicable and should be omitted. But the reference to status applies with equal force to new families. In addition, the emphasis placed on dignity and well-being, as well as the contention that recognition is integral to their achievement is wholly applicable.

The *Oliari* judgment is the decisions where the ECtHR's favor for a comprehensive approach reaches its peak. As seen, the decision is likely to be the gateway to a generalized right to access registered partnerships for same-sex couples,[273] that abstracts itself from the concrete circumstances of the Italian case. Importantly, in upholding this right, the Court explained how a case-by-case approach whereby partners must resort to domestic courts to have some core rights recognized, and which inevitably will expose their life and intimate relationship to the personal convictions or sensitivity of judge, creates too much uncertainty. It thus falls short of solving the problem of non-recognition.[274]

Likewise*, Vallianatos*, dealing with a registration scheme opened to opposite-sex couples only, seems to place emphasis on the importance of official recognition. The reasoning of the Court does not focus on private and public law entitlements as such. Same-sex couples under ordinary law could enter into contracts and gain some form of protection. However, what counts for the Court is that these couples, being in a relevantly similar situation to opposite-sex couples, should be able to formalize their relationship and gain official recognition. Clearly, only a comprehensive approach could meet this need.

[272] *Oliari,* at par. 107.
[273] Fenwick maintains that the court is likely to recognize this right in the near future, and to overlook the two context-specific conditions laid out in *Oliari*. Namely, a discordance between social reality and the legal and administrative treatment of these couples, and the repeated attempts of the highest courts to bring about a legal reform, which however were left unheeded. Fenwick, *supra* note 139, at 492-496.
[274] *Oliari,* at par. 170.

3.3. Conclusion

By way of concluding this brief analysis, it can be noticed that the functional notion of family life is fairly useful for purposes of protecting new families. At the first stage these families can either trace a growing emerging consensus toward recognition of their family life or downplay the importance of consensus so as to focus on the salience of the interest in their personal life. Of course, at this stage each type of new family warrants special considerations. The arguments concerning families virtually able to marry will differ from those concerning families unable to marry. Yet, it seems that besides polyamorous relationships, whose worthiness is "universally" disregarded in Europe, other relationships should be able to warrant a protection of their family life, by pleading arguments along the lines of what same-sex couples did.

At a second stage, that is after specific protections have been incrementally extended to new families, the need for introducing a comprehensive regime could be put forward. In doing so, the reasoning of the *Oliari* and *Vallianatos* case is central and should be emphasized. However, it seems almost unavoidable that for stage 2 arguments to be successful a clear emerging consensus should be traced. The hope is thus that more and more domestic legal systems will be amenable to introduce schemes to recognize non-traditional families, as Belgium, and the Netherlands did.

4. Arguments resting on EU law

Preliminarily, I shall notice that I put little trust in arguments grounded in EU law. This skepticism derives from some structural facets of the system. Amongst the structural limits are:

(i) the lack of any EU competence or power over substantive family law;

(ii) the functionalization of the Union to the achievement of its institutional goals, *i.e.* economic freedoms;

(iii) the limited personal scope of the principles of equality and anti-discrimination enshrined in EU primary law.

It bears reminding that there is no power to regulate substantive family law within the European Union. There is only a competence to harmonize private international law rules relating to families under Article 81(3) of the TFEU. This direct competence has been exercised in the Bruxelles IIa Regulation,[275] which provides for jurisdictional rules concerning divorce (yet not dissolution of a registered partnership.)[276] The competence has also been exercised in two subsequent regulations implementing enhanced cooperation in the field of property and registered partnerships[277] and in matters of matrimonial property regimes.[278] Only an indirect competence to regulate family law comes from the employment context, where the Union can assess whether work-related benefits are offered in a non-discriminatory manner, and the free movement of persons, enabling family members to move alongside their working partner in a EU member state.

The main criticism to the contention that family law should be reformed within the EU framework thus lies on the fact that there is no institution vested with such power. Initiatives so far, such as the work of the Commission on European Family Law (CEFL,)[279] could only elaborate principles that are not binding upon the states. However, as aptly pointed out,[280] the lack of power to enact a comprehensive code dealing with the matter does not entail that family law cannot be influenced or amended through a piecemeal approach at the EU level. This holds true if one considers the host of legal instruments, including directives, non-binding recommendations or the courts' purposive use of the preliminary reference under

[275] Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, OJ L 338, 23.12.2003, 1–29.
[276] Lamont, *supra* note 59, at 501.
[277] Council Regulation (EU) 2016/1104 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183, 8.7.2016, 30–56. This regulation currently binds 23 out of the 27 member states of the Union.
[278] Council Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183, 8.7.2016, 1–29. This regulation currently binds 23 out of the 27 member states of the Union.
[279] On which *see* Katharina Boele-Woelki & Dieter Martiny, *The Commission on European Family Law (CEFL) and its Principles of European Family Law Regarding Parental Responsibilities*, 8 ERA FORUM 125 (2007).
[280] SCHERPE, *supra* note 14, at 1-2.

Article 267 TFEU, that have actively shaped the domestic family law of the member states.[281]

As to the point under (ii), the functionalization of the system to the achievement of market freedoms, it clearly does not entail that the protection of human rights is not on the agenda. It would be grossly misplaced to overlook the increasing expansion of the Union toward the achievement of goals that go beyond market freedoms. The most significant aspect of the European citizenship is its evolution from the citizenship of the economically active persons to the citizenship of the nationals of the member state as such.[282] Both case law[283] and secondary sources[284] make clear that the EU confers what Advocate General La Pergola came to define "a new legal standing."[285]

This evolution is apparent if one examines the jurisprudence on the "genuine enjoyment formula." The Union has gradually extended its reach from cross-border situations,[286] where the protection of the family mingles with and is justified upon the need to protect the freedom of movements of the persons, to the static citizen,[287] where the reasons for applying EU law are in principle much less obvious.

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[281] *See, e.g., the* European Parliament, Resolution of 8 September 2015 on the situation of fundamental rights in the European Union 2013-2014 (2014/2254(INI)), A8-0230/2015 (condemning the discrimination that LGBTI people suffer due to exclusion from legal instruments, as cohabitation, registered partnerships and marriage,) on which *see* SYBE DE VRIES, HENRI DE WAELE & MARIE-PIERRE GRANGER (EDS.), CIVIL RIGHTS AND EU CITIZENSHIP: CHALLENGES AT THE CROSSROADS OF THE EUROPEAN, NATIONAL AND PRIVATE SPHERES 35-36 (2016).

[282] Kaesling, *supra* note 3, at 294.

[283] Case C-184/99 *Rudy Grzelczyk contro Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECLI:EU:C:2001:458, par. 31; Case C-413/99 *Baumbast e R contro Secretary of State for the Home Department* [2002] ECLI:EU:C:2002:493, at par. 82.

[284] *See, e.g.,* Recital 3 of Directive 2004/38/EC, *supra* note 22.

[285] AG La Pergola's opinion in Case C-85/96 *María Martínez Sala contro Freistaat Bayern* [1998] ECLI:EU:C:1998:217, at par. 20.

[286] Directive 2004/38/EC, *supra* note 22. The Directive only applies to genuine cross-border situations. However, the Court of Justice of the Union has applied the Directive by way of analogy to situations lacking a cross-border element: see the recent case on the family reunification of the same-sex partner, validly married in another member state: Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [2018] ECLI:EU:C:2018:385 [*Coman*].

[287] The static citizen is a national of a member state which seeks family reunification with a family member with a national of a third country (non-member state), without "moving across" the EU. *See* Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm*) [2011] ECLI:EU:C:2011:124; Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* [2011] ECLI:EU:C:2011:734.

According to this formula, introduced in the case *Ruiz Zambrano*,[288] domestic measures cannot pass muster if they deprive the EU citizen of the genuine enjoyment of the substance of their rights as EU citizens.[289] However, a recent case shows the limits inherent in the approach, and how the functionalization of the system gets back on track at the argumentative and justification level.

The reference is to the pivotal decision in the *Coman* case.[290] The Court of Justice of the European Union has recently released a preliminary ruling[291] on the free movement of a same-sex couple in the Union. It has for the first time ruled that the third-country same-sex partner of the applicant (Mr. Coman,) with whom he concluded a valid marriage in a member state (Belgium,) enjoys a derivative right of residence in the member state of which the Union citizen is a member (Romania,) upon his return. The Court has adopted to this effect an autonomous definition of the term "spouse," under Article 2(2)(a) of the citizens' rights directive,[292] that encompasses same-sex marital couples within its scope. Thus, the ruling has the practical consequence of precluding Romania from denying such right of residence to the third country national on the ground that Romania does not recognize same-sex marriage.

This decision is likely to mark a watershed in the *acquis* of the Court on same-sex couples' recognition. Its holding is doctrinally coherent with precedents conferring freedom of movement rights upon static citizens, to enhance the "effective" enjoyment of the freedom of movement.[293] Pursuant to the reasoning of the court, if no such right of residence were granted, the static citizen would be "discouraged"

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[288] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm*) [2011] ECLI:EU:C:2011:124.

[289] Kaesling, *supra* note 3, 297. According to Kaesling, there is no guidance over the application of the formula: thus far, the principal criterion seems to be the need for the EU citizen to leave the Union, due a the denial of the family reunification. Also, the formula seems to favor vertical relationships as opposed to horizontal ones. As a consequence, the impression is that it operates under the assumption that separating parents and children is less tolerable than separating the adults in a horizontal relationship. However, the application of the doctrine has not been consistent so far.

[290] *Coman*.

[291] The preliminary ruling is a judgment on the proper interpretation or validity of the law of the European Union, issued upon the request (or reference) of a member state's tribunal or court. While national courts are often called upon to applying EU law, the CJEU retains the power to issue interpretative decisions on the material and personal scope of the law of the Union (as well as to their validity), which are binding on the requesting authority.

[292] Directive 2004/38/EC, *supra* note 22.

[293] *See* the genuine enjoyment formula jurisprudence from *Ruiz Zambrano* to *Dereci*, accompanying notes to text 241-243.

from moving to another member state, as returning to the home state would risk endangering his family life. The case was therefore decided based on Article 21,1 TFEU, enshrining the right of residence in another member state for the Union citizen.[294]

Yet, the decision epitomizes the limits of the law of the Union. The Court, while applying the holding to the static citizen, had to justify its intervention resting on the fact that the parties had contracted a valid marriage in *another member state of the Union*, where they *developed and consolidated* a family life.[295] The holding, thus, could not apply to a EU citizen that has validly contracted a marriage in a non-member country, nor to a citizen that has moved to Belgium for the sole purpose of circumventing the ban on same-sex marriage in Romania (hence the reference to the consolidation of their family life in Belgium.)

In this sense, the margin of action of the Court of Justice cannot be unfettered and the functionalization of the system to the achievement of market freedoms calls for self-restraint and for a constant effort to justify its intervention under canonical paths (*i.e.* by reference to the cross-border nature of the claim, be it genuine or construed.) It is no coincidence that the case was pivoting on the freedom of movement of the claimants and that there was no reference to the principle of equality and non-discrimination, pursuant to Article 21 of the Charter of Nice, which expressly prohibits discrimination on grounds of sexual orientation in the actions of the EU and in the actions of the states in their capacity to implement EU law.

As to the final point (under (iii)), while in principle the Charter has numerous provisions governing family law, unlike the ECHR which contains only two provisions in Articles 8 and 12, this EU instrument has a more limited personal scope. The Charter enshrines a right to equality before the law (Article 20,)[296] recognized as a basic principle of the Community long ago,[297] and a non-discrimination principle (Article 21.)[298] It also protects the private and family life of

[294] Article 21(1) of the Treaty of Lisbon.
[295] *See Coman*, at par. 56.
[296] Article 20 of the Charter of Nice.
[297] Case C-283/83 *Firma A. Racke v Hauptzollamt Mainz* [1984] ECLI:EU:C:1984:344; Case C-15/95 *EARL de Kerlast v Union régionale de coopératives agricoles (Unicopa) and Coopérative du Trieux* [1997] ECLI:EU:C:1997:196; Case C-292/97 *Kjell Karlsson and Others* [2000] ECLI:EU:C:2000:202.
[298] Article 20 of the Charter of Nice.

the members of the family in Article 7 and a right to marry and found a family under Article 9.[299] In Article 33 it expressly provides that "[t]he family shall enjoy legal, economic and social protection" and that the reconciliation of familiar and professional life should be fostered.[300] Other rights of relevance are those protecting the rights of the children, the elderly, and the disabled.[301]

It is well-known that both the Charter of Fundamental Rights and the Treaties only apply to the institutions and bodies of the Union, when exercising the powers entrusted to them by the Treaties, and to the member states when implementing EU law. Thus, while it is true that the Charter enshrines a right to equality before the law (Article 20,) and a non-discrimination principle (Article 21,) nonetheless their application is subject to the conditions set out above. The same limit applies with respect to the Charter right to family life and right to marry and found a family.

4.1. The relevant notion of family in EU law

The relevant notion of family can be mainly extrapolated from the secondary sources and the case law concerning the free movement of persons and workers under the EU Treaties (*see* Figure 2,) and the EU staff cases.

FIGURE 2.

Legal framework for family reunification

Scenarios	Applicable law
1. third-country national residing lawfully in the EU reunifying with a third-country national	Directive 2003/86/EC
2. a mobile EU citizen reunifying with a third-country national	Directive 2004/38/EC
3. a static EU citizen residing in the member state of origin with a third-country national	CJUE jurisprudence on the genuine enjoyment formula applying the rights under the Lisbon Treaty, where applicable
4. non-mobile EU citizen reunifying with a third-country national	Member state's domestic law

Source: EMN Report

[299] Articles 7 and 9 of the Charter of Nice.
[300] Article 33 of the Charter of Nice.
[301] Respectively, Articles 24, 25 and 26 of the Charter of Nice.

Under the original regulation on migrant workers,[302] the right to install oneself in another member state and bring along a person applies to the members of the nuclear family. Family members include:

(i) the spouse, and qualified descendants;[303] and

(ii) qualified ascendants of the worker or the spouse.[304]

"Other" members of the family, whose access needed only be "facilitated" included the family members "who might also be dependent on the worker or were living under the same roof in the country from where the worker came."[305] Ever since, the term spouse had been interpreted in a robustly traditional way. The notion of spouse only encompassed the marital heterosexual partner,[306] including the separated (yet not divorced) spouse.[307]

While the struggle of same-sex marriage came about much later,[308] unmarried partners went to the trouble of challenging the marital privilege enshrined in this provision. Yet, in the famous *Reed* case,[309] the Court of Justice held that the Regulation does not apply to their situation, and rejected the application of an unmarried woman seeking to join her life-long partner that moved to the Netherlands for job-related reasons. The resulting formal construction of the notion of family has been widely criticized in scholarship, as going not only to the detriment of unmarried and divorced families, but also to the detriment of all "atypical" families, including single parent families.[310]

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[302] Council Regulation (EEC) No. 1612/68 on Freedom of Movement for Workers within the Community, OJ L 257, 19.10.1968., 2–12 [Regulation No. 1612/68].

[303] The Regulation No. 1612/68 applied to "Descendants under the age of 21 years or dependents over that age."

[304] The Regulation No. 1612/68 applied to "Dependent ascendants of the worker or his spouse."

[305] Eugene Buttigieg, *The Definition of 'Family' Under EU Law*, in THE FAMILY, LAW, RELIGION AND SOCIETY IN THE EUROPEAN UNION AND MALTA 99 (2006).

[306] Joined cases C-122/99 P and C-125/99 *P*, *D and Kingdom of Sweden v Council of the European Union* [2001] ECLI:EU:C:2001:304.

[307] Case C-267/83 *Aissatou Diatta v Land Berlin* [1985] ECLI:EU:C:1985:67.

[308] *See supra* par. 3.

[309] Case C-59/85 *State of the Netherlands v Ann Florence Reed* [1986] ECLI:EU:C:1986:157.

[310] Tamara Hervey, *Migrant workers and their families in the European Union: the pervasive market ideology of Community law* in JO SHAW & GILLIAN MORE (EDS.), NEW LEGAL DYNAMICS OF EUROPEAN UNION 91, 106 (1996) ("[T]he Community's formal construct of 'family' is based upon a traditional model which excludes 'atypical' families, for example single parent families. These families are predominantly headed by women…; *where that woman is not a worker, let alone a Community 'migrant worker', then the family is unable to benefit from the provisions of Community law*. If the woman is a worker some form of childcare is necessary and will generally be carried out by

This concern that a formalistic approach could undermine the free movements of citizens was later embraced by the European Parliament. Mentioned Directive 2004/38/EC, concerning the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amended the foregoing Regulation. While keeping in Article 2 a definition of family member, as encompassing the spouse and qualified descendants and ascendants (descendants under the age of 21 or dependents, and ascendants if dependents,) it added another category. Namely: "the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State."[311]

The addition only concerns registered partnerships, as long as contracted in a member state and recognized in the host state (*i.e*. where the citizen intends to move.) Furthermore, the definition of family member does not extend to the unmarried heterosexual or homosexual partner, as initially proposed by the European Commission.[312]

As to the "other family members," the differential treatment, imposing a mere obligation to facilitate the entrance, is kept. These family members include:

"(a) … dependants [either financially or physically] or members of the household of the Union citizen …;

(b) the partner with whom the Union citizen has a durable relationship, duly attested."[313]

Their entrance need only be facilitated in the sense that the decision on whether to grant the derivative right of residence should be made upon an extensive examination and that a denial should be thoroughly justified.

Even narrower is the approach under Council Directive 2003/86,[314] on the right to family reunification of third countries citizens, residing lawfully in a member state

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another woman, for example a grandparent, aunt, or an unrelated close associate … *That unpaid woman carer will only fall within the Community definition of 'family' if she is a dependent ascendant*.") (emphasis added).

[311] Article 2(b) of Directive 2004/38/EC, *supra* note 22.

[312] Buttigieg, *supra note* 305, 104.

[313] Article 3 of Directive 2004/38/EC, *supra* note 22.

(so-called "sponsor.")[315] The Directive leaves it to the discretion of the host state the decision as to whether to allow the entrance of the dependent ascendants and of registered partners (as well as that of the unmarried partner and their children.) The notion of family, and its reliance on the nuclear married family, is thus largely shaped by national states, on which EU definitions are parasitic, with little room for innovation at the EU level.

Yet, the interpretation of the notion of family recently underwent a significant evolution. The staff cases give some valuable guidance over the inclusion of unmarried couples. The Staff Regulation[316] included within its scope the "non-marital partner."[317] In *Roodhuijzen*,[318] a worker of the Eurostat had entered a cohabitation agreement under Dutch law and intended to have his same-sex partner recognized under the Joint Sickness Insurance scheme. The nature and scope of a cohabitation agreement has been described in par. 1.1.1. Suffice it to remind that it is a contractual agreement entered before a notary conferring a pared-down set of rights and obligations, which differs both from marriage and registered partnerships.[319]

The Commission rejected the applicant's claim on the ground that the agreement was essentially private in nature and that it did not bind third parties. The stance adopted by the Commission was rather narrow and adverse to new families. The most problematic part of the reasoning was that requiring that the non-marital status be construed as meaning a partnership "which, under national law, is designed to have effects *similar* to those of a marriage."[320] Problematically, the lack of equivalence was indeed derived from the fact that the scheme was also open to non-conjugal

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[314] Council Directive 2003/86 of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003, 12–18.

[315] Pursuant to the European Migration Network Glossary, a "third-country national" is: "any person who is not a citizen of the European Union within the meaning of Article 20(1) of the Treaty on the Functioning of the European Union and who is not a person enjoying the Union right to freedom of movement, as defined in Article 2(5) of the Schengen Borders Code." Therefore, nationals of Norway, Iceland, Liechtenstein and Switzerland are not considered to be third-country nationals. EUR. MIGRATION NETWORK, GLOSSARY: THIRD-COUNTRY NATIONAL (2018), https://ec.europa.eu/home-affairs/content/third-country-national_en (last visited Oct 25, 2018).

[316] Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, OJ P 045 14.6.1962, 1385.

[317] Article 1(2) of Annex VII to *Id*.

[318] Case T-58/08 *Commission of the European Communities v Anton Pieter Roodhuijzen* [2009] ECLI:EU:T:2009:385.

[319] Lamont, *supra* note 59, at 515.

[320] Case T-58/08 *Commission of the European Communities v Anton Pieter Roodhuijzen* [2009] ECLI:EU:T:2009:385, at par. 51.

relationships, *i.e.* to partnerships that are "not … intended exclusively for persons wishing to form a 'couple.'"[321]

On appeal, the Court of Justice reached the opposite conclusion. Mr. Roodhuijzen's claim was upheld since there is no need to find an equivalence between the alternative regime and marriage in terms of type of relationships covered by them, nor for the partners to be bound by specific rights and obligations under national law equivalent to marriage. Pursuant to the reasoning of the Court, the relevant definition is an autonomous one and does not encroach upon the member states' competence over regulating civil status and the rights flowing from it. The Staff Regulations themselves define the conditions under which these relationships will be covered, namely: the agreement must be entered by two unrelated people and evidence of formalities shall be provided.

Two considerations follow. Since there is no reference in the Staff regulation to registered partnerships, there is a mere need for the parties to satisfy the two eligibility requirements set out above. Second, given the reference to two unrelated people, a non-conjugal couple made up of friends entering a cohabitation agreement with the required formalities would qualify, while a non-conjugal couple made up of relatives would not. This is a patchy picture that yet offers some form of protection to a subset of non-conjugal families, provided that under national law they can formalize their relationship.

With the *Coman* decision,[322] the Court goes one step much further in extending the autonomous definition under EU law to external matters such as the cross-border recognition of same-sex marriages. As seen above, the Court included same-sex spouses in the definition of spouse, independent of whether same-sex marriage is recognized in the host state. Before this ruling, it was settled that "according to the definition generally accepted by the member states, marriage means the union of a men and a woman."[323] The only exception to this interpretation being the definition

[321] *Id*, at par. 52 ("A partnership such as the 'samenlevingsovereenkomst', however the details of it are arranged contractually, could never be deemed equivalent to a marriage and confer entitlement under Article 1(2) of Annex VII to the Staff Regulations, since it was not intended by the Netherlands legislature to have effects similar to those of a marriage. Indeed, from the legal point of view it is not a partnership intended exclusively for persons wishing to form a 'couple.'").

[322] *Coman*.

[323] Joined cases C-122/99 P and C-125/99 *P*, *D and Kingdom of Sweden v Council of the European Union* [2001] ECLI:EU:C:2001:304.

of spouse "for the purpose of EU law," that is in cases regarding the status of the EU staff and other issues purely internal to the EU.[324]

The extension of the autonomous definition to cases of family reunification is notable because it is hardly conceivable that, at the time of the drafting of the Directive, the member states intended to include same-sex marriages. At that time, only the Netherlands had introduced same-sex marriage, and the notion had a robust traditional understanding amongst member states. The wording of Article 2(2) of the Directive also seemed to warrant this narrow interpretation. In addition to spouses, the provision recognizes as family members registered partners. Yet, it does so through a host-state rule, *i.e.* registered partners qualify only if recognized at the domestic level in the country where the person is moving and "in accordance with the conditions" of domestic legislation. By contrast, no such *renvoi* exists for term spouse and thus one could argue that, pursuant to the linguistic canon of interpretation *ubi lex voluit dixit* (or *expressio unius,*) the omission is intentional.

While the decision is a pivotal stepping-stone to furthering equality for same-sex marital couples, it leaves aside the question of whether other functional families, such as non-conjugal unions could qualify for family reunification. The Court indeed declined to answer questions 3 and 4, where the applicants asked whether they constituted "dependents on members of the household" (under a financial or physical point of view)[325] or the partner in a durable relationship under Article 3 of the Directive.[326] In particular, first the Advocate General, then the Court seemed to strategically play the card of formal definitions, by adopting the presumption that marital families necessarily enjoy a family life regardless of their functional attributes.[327] This is understandable, again, under a strategic perspective and sits well with the argumentative strategies adopted by LGB movements in Western legal

[324] Giulia Rossolillo, *Corte di Giustizia, matrimonio tra persone dello stesso sesso e diritti fondamentali: il caso Coman*, SIDIBLOG, http://www.sidiblog.org/2018/07/08/corte-di-giustizia-matrimonio-tra-persone-dello-stesso-sesso-e-diritti-fondamentali-il-caso-coman/ (last visited June 20, 2018).

[325] *See* also Recital 6 of the Directive 2004/38/EC, *supra* note 22, speaking of a family "in the broadest sense."

[326] Be reminded that the entrance of the family member under Article 3 shall be merely "facilitated," in the sense that the host-state has to conduct a thorough investigation and explain why it intends to refuse/grant entrance.

[327] *See* the opinion of the Advocate-General at the CJEU states the term 'spouse' includes spouses of the same sex, Case C-673/16, Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne [2018] ECLI:EU:C:2018:2, at par. 59.

systems, as Europe, the United States, and Canada. It is easier for Mr. Coman and his partner to plead the argument that they should be recognized as they entered a lawful marriage abroad, rather than reasoning around the attributes of their familyhood.

However, guidance over the relevant facets of non-marital relationships, as provided the EU staff cases, could have been beneficial for new families. It would have especially benefitted those families unable to seek a broad interpretation of the term "spouse."

At present one can foresee that only parties to a polygamous marriage could be willing to plead the marriage equality card. However, Directive 2003/86 expressly prohibits the recognition of polygamous marriages, preventing the reunification of more than one spouse. Less drastic is the position of the Commission in the Communication on the transposition of Directive 2004/38.[328] The Commission takes a more permissive stance and states that member states are not obliged to recognize polygamous marriage contracted in a non-member state, that are in contrast with the domestic legal system. Therefore, it does not in principle object to the recognition of these relationships, as long as they are not in contrast with domestic law. This is not much. Thus, a clarification over the meaning of non-marital families in the context of the free movement of persons is very much needed.

4.2. Building an argument based on a protection-driven approach

It should be anticipated that the prognosis is that the EU is not the forum where one can expect that far-reaching family law reforms be pursued. The EU is not the appropriate forum for introducing new regimes, whilst it could be conducive to extending specific protections on a case-by-case basis.

[328] Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member State*s*, COM (2009) 313 final, 2.7.2009, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0313:FIN:EN:PDF (last visited July 30, 2018).

The abandonment of dignity-based arguments in the CJEU's jurisprudence[329] sits well with the protection-driven approach. This is not to say that a survivor's pension benefit will not confer dignity upon the claimant. It is merely to say that dignity is much easier to disentangle from claims concerning material benefits than from claims concerning new statuses. While some statuses are "lighter," as they are less loaded with dignity arguments (think about reciprocal beneficiary schemes in the United States,) the majority of status-based schemes as marriage and civil unions were sought in that they confer *inter alia* the symbolic benefits of recognition.

Second, there is an important passage in the *Coman* case regarding the objection that alleged a violation of the national identity.[330] The objection had not been raised by the member states lodging written comments in the proceeding, but only by Latvia, acting as an intervener, during a previous hearing. Yet, the Court took pain to clarify that "an obligation to recognize such marriages for the sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity."[331] It also repeatedly underlined that the recognition of the derivative right of residence (the single protection) cannot be equated to imposing same-sex marriage on the member state. The implication being that while granting a protection (whose denial is not motivated by "a genuine and sufficiently serious threat to a fundamental interest of society")[332] does not run counter the national identity of the state, the imposition of a status does.

This might seem quite trivial. However, the existence of Article 4(2) TFEU, setting forth the need to respect the national identity of the member states, gives special weight to objections based on the state's fundamental political structures, most notably its constitution.[333] The analysis conducted in section 1.2. seems to show that marriage has almost everywhere constitutional aegis and it is one of the pillars of

[329] The *Coman* decision disregards the reference to dignity made in the second paragraph of the Advocate General Opinion. *See* AG La Pergola's Opinion in *Coman*, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016CC0673 (last visited July 30, 2018).
[330] *Coman*, at par. 43 ("European Union is required, under Article 4(2) TEU, to respect the national identity of the Member States, inherent in their fundamental structures, both political and constitutional.").
[331] *Id*, 46.
[332] *Id*, 44.
[333] Elke Cloots, *National Identity, Constitutional Identity, and Sovereignty in the EU*, 2 NETHERLANDS J. LEGAL PHIL. 82-98 (2016).

said structure. Therefore, it is unlikely for the EU to impose a status wholesale without impinging on the core identity of member states.

Finally, the parasitic definition adopted by the CJEU, which relies on national definitions, suggests that national approaches are all the most relevant. Domestic courts have been willing to extend marriage to same-sex couples in due respect of the principle of anti-discrimination. It is to be noted that even domestic courts fell short of mandating the introduction of a wholesale *new* regime, being it a "broad and indeterminate" matter falling within the discretion of the government. Unlike constitutional courts, the government is better placed to introduce new schemes and balance the delicate policy choices underlying their adoption.

By contrast, many courts have embraced a protection-driven approach that led to extend specific benefits beyond their narrow and discriminatory eligibility requirements. As recalled by Prof. Wintemute, acting as a third-party intervener in the *Oliari* judgment, this has been the approach adopted in Slovenia, Germany, and Austria. The Slovenia's constitutional court extended in *Blažic & Kern v. Slovenia* the same inheritance rights as different-sex spouses to same-sex registered partners.[334] The Germany's federal constitutional tribunal extended the same survivor's pensions as opposite-sex spouses to same-sex registered partners.[335] Finally, since 2011, Austria's constitutional court has delivered five decisions holding that same-sex registered partners should have the same rights as cross-sex spouses.[336] This is to say that a protection-driven approach at the EU level is more aligned with the *modus operandi* of member states, and that in turn member states could be less likely to argue that the extension of a single protection runs counter their core national identity.

However, the possibility for new families to challenge discriminatory practices through a protection-driven approach at the EU level should come to grips with many doctrinal limits.

[334] Ustavno Sodišče [Constitutional Court of the Republic of Slovenia], Blažic & Kern v. Slovenia, U-I-425/06-10.
[335] Bundesverfassungsgericht [Constitutional Federal Tribunal], 07.07.2009 - 1 BvR 1164/07.
[336] *Oliari,* at par. 136.

A first and major strand of jurisprudence that deals with employment laws shows that the Court can only act if it links the discrimination to a prohibited ground. And marital status and family status are not included in this exhaustive list of grounds.

The directive on equal treatment in employment and occupation prohibits discrimination on several basis in the employment context: sexual orientation, religion or belief, age, and disability.[337] Unlike the race directive,[338] the former only applies to the employment context and does not extend to social and welfare benefits, education and healthcare. A proposal to further extend its reach to these fields was rejected.[339] Notwithstanding this exclusion, social benefits can fall within the reach of the directive if equivalent to a "pay." A progressive interpretation of the notion of pay has led ever since 1970 to encompass within the scope of the law pensions under two conditions: if they are a general scheme under the law, and if they are obligatory for a category of workers.[340]

Before the employment directive[341] and the ECHR's *Karner* decision, the Court of Justice fell short of extending both specific and comprehensive protections to same-sex couples. For instance, in *Grant,*[342] it held that differential treatment of the same-sex partner of a worker with respect to travel benefits did not amount to sex discrimination. A few years later, it found that the differential treatment between civil unions and marriage in Sweden did not amount to discrimination on the basis of sex nor sexual orientation.[343] In *Karner*,[344] the ECtHR made clear that a civil union should be *voluntarly* adopted by member states.

After the decision, the Court seemed eager to align itself to the more progressive stance of the ECtHR. In the *Maruko* case, the Court of Justice applied Article 2 of the employment directive, prohibiting sexual orientation-based discrimination, to

[337] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, 16–22.
[338] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, 22–26.
[339] European Commission, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426 final.
[340] Case C-80/70 *Defrenne v. Belgium* [1971] ECLI:EU:C:1971:1:55.
[341] Council Directive 2000/78/EC, *supra* note 337.
[342] Case C-249/96 *Grant* v. *South-West Trains* [1998] ECLI:EU:C:1998:63.
[343] Joined cases C-122/99 P and C-125/99 *P*, *D and Kingdom of Sweden v Council of the European Union* [2001] ECLI:EU:C:2001:304.
[344] *Karner*.

argue that if same-sex registered partners are found to be in a comparable situation to opposite-sex spouses as regards the professional pension scheme, there would be a direct discrimination for which no justification could be accepted.[345] The conclusion was reached upon considering that:

(i) Germany voluntary adopted life partnerships;[346]

(ii) the regime placed partners of the same sex "in a situation comparable to that of spouses so far as concerns that survivor's benefit."[347]

The inquiry is thus two-fold and requires first to assess whether the member state has voluntarily introduced a regime to guard over same-sex families. This entails that the judgment cannot apply to European states lacking a general legal framework as Bulgaria, Latvia, Lithuania, Poland, Romania, Slovakia. Secondly, an inquiry into the equivalence between the regime and marriage should be undertaken, in the absence of which the parties will not be deemed to be in an analogous position.

Unlike the ECHR framework, where it is up to the national authorities to determine the material scope of the scheme, as long as core rights are conferred, the CJEU takes a more aggressive stance with respect to such scope. The CJEU has determined that it is up to domestic courts to assess whether the entitlements of registered partnership are equivalent to marriage (*i.e.* whether the applicants are in a comparable, yet not identical, situation.) However, if such a finding is made no discrimination as to the benefit at issue is tolerated (in the *Maruko* case, employment benefits.)

Likewise, in a recent case regarding France, the Court determined that a marriage bonus and paid leave where both "pay" for purposes of the Directive.[348] Interestingly, the decision provides guidance over the comparability assessment. This guidance is valuable in that there is no doubt that PaCS provide a much narrower cluster of rights and obligations compared to marriage, especially as far as property and parenthood rights are concerned. The Court thereto clarified that for purposes of the comparability analysis the differences between marriage and the alternative

[345] Case C-267/06, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECLI:EU:C:2008:179.

[346] Registered life partnerships (*Gesetz über die Eingetragene Lebenspartnerschaft*) of 16 February 2001 (BGBl. 2001 I, p. 266).

[347] Case C-267/06, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECLI:EU:C:2008:179, at par. 80.

[348] Case C‑267/12, *Frédéric Hay contro Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* [2013] ECLI:EU:C:2013:823.

regime are irrelevant.[349] The analysis only concerns the specific benefits at issue, namely the bonus and the paid leave. The laconic reasoning held that the exclusion was impermissible due to marital status discrimination: "The difference in treatment based on the employees' marital status and not expressly on their sexual orientation is still direct discrimination because only persons of different sexes may marry and homosexual employees are therefore unable to meet the condition required for obtaining the benefit claimed."[350] I believe this reasoning rips apart the marriage equivalence prong of the inquiry and is likely to lead the Court to make a finding of discrimination whenever the couple at issue is prevented from marrying.

The main limit of this jurisprudence is its reliance on an exhaustive list of grounds for discrimination. Nowhere is marital status or family status listed as a prohibited ground. These statuses can only be relevant if linked to a listed ground, as it has been the case with sexual orientation. Family and marital status have from times to times also been linked to sex discrimination. However, the limits of this approach cannot be overstated. To mention one case, in *Teuling* the Court found that

> "a system of benefits in which, as in this case, supplements are provided for which are not directly based on the sex of the beneficiaries but take account of their marital status or family situation *and in respect of which it emerges that a considerably smaller proportion of women than of men are entitled to such supplements* is contrary to article 4(1) of the directive."[351]

It is clear that the adverse impact of the measure on women was crucial to upholding a finding of discrimination. This case law is thus of little help for new families, unable to link their discrimination to any of the listed grounds.

The case law on discrimination in employment parsed out above suggests that the EU could be only conducive to extending some family law benefits, as opposed to

[349] *Id*, at par. 39 ("the differences between marriage and the PaCS, noted by the Cour d'appel de Poitiers in the dispute in the main proceedings, in respect of the formalities governing its celebration, the possibility that it may be entered into by two individuals of different sexes or of the same sex, the manner in which it may be broken, and in respect of the reciprocal obligations under property law, succession law and law relating to parenthood, are irrelevant to the assessment of an employee's right to benefits in terms of pay or working conditions such as those at issue in the main proceedings.")

[350] *Id*, at par. 44.

[351] Case C-30/85, *J. W. Teuling v Bestuur van de Bedrijfsvereniging voor de Chemische Industrie* [1987] ECLI:EU:C:1987:271, at par. 10.

introducing a comprehensive scheme. This possibility is, however, severely curtailed by the reference to an exhaustive list of prohibited grounds, amongst which marital and family status do not feature.

The same problem arises in other contexts as well. The Charter of Nice applies to all EU institutions and bodies and to member states when implementing EU law. However, again, the list of prohibited grounds for discrimination under Article 21 of the Charter is exhaustive[352] and includes sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. It does not include family or marital status.

A further limit in the context of free movement rights is the court's reluctance to cite to Article 21. Even though sexual orientation is a listed prohibited ground in the Charter, the Court continues to ground its decisions in the freedom of movement.[353] Therefore, the availability of marital or family status as grounds would not be the panacea of all evils in this context either.

Concluding remarks

This chapter has dealt with a third case study, Europe. It has started by examining the current legal landscape, both at the constitutional and sub-constitutional level in 27 countries. It has then evaluated the possibility of introducing legal protections for new families through two meta-national frameworks, namely the ECHR framework and the European Union.

[352] *See* Explanations, *supra* note 135.

[353] In the mentioned *Coman* case, the overruling of previous case-law restricting the term spouse to heterosexual spouses has been done by means of market freedoms: The Court did not reason in terms of discrimination nor cited Article 21 of the Charter of Nice, expressly prohibiting sexual orientation-based discrimination. Henceforth, some passages of the reasoning which are a bit of a stretch, with their emphasis on the place where the marriage has been entered (another member state), and the genuine consolidation of their family life in that member state. As a consequence of this market-driven narrative, the case cannot apply to purely internal situations such as a case where Mr. Coman never left Romania, or where the marriage was contracted in a third-country, rather than a member state. This point emerged throughout the keynote speech of Robert Wintemute at the conference "Riconoscimento e libera circolazione delle famiglie same-sex nella giurisprudenza della Corte Europea dei Diritti Umani e della Corte di Giustizia," hosted by the University of Trento, 17.07.2018, Trento.

The likelihood of introducing protections through the ECHR is higher, compared to the EU, in the sense that there is a chance for new families to improve the societal perception of their fundamental caregiving activities and to push for reform in domestic jurisdictions so as to enable a European consensus to emerge. This consensus is at present too thin and the options for new families are either to enlarge it or to push for a non consensus-based theory to warrant a narrow margin of appreciation upon the state in drawing distinctions between marital (and registered) families and new families.

The chances are even lower at present if one wants to compel the introduction of a comprehensive regime, namely a registration scheme, of which Belgium provides a valuable example. However, the chances grow if these families are able to have their right to family life recognized (as at present only close relatives undoubtedly enjoy one,) and to have inequalities disentangled as to specific benefits. Put differently, if these preliminary steps are taken, new families should be able in the span of a few decades to follow the same progression that same-sex couples followed in gaining legal recognition, and eventually they should be able to have alternative regimes introduced to guard over them.

The EU, by contrast, is not the proper venue to seek change. The institutional and doctrinal limits impeding change have been analyzed at length in par. 4. However, since there is a dynamic interplay between the ECHR and the CJEU that leads the latter to follow along after the ECtHR makes major doctrinal advancements, one can foresee the possibility of pursuing change through the EU after such advancements are made in the parallel system of the Convention.

EPILOGUE

The focus of this dissertation changed several times throughout my doctoral studies. Digging into the realm of non-traditional families convinced me that reality reaches peaks of complexity that imagination cannot reach. I thus continued adding layers to the methodology while attempting to balance due respect for complexity with methodological clarity.

The vastness itself of the adopted definition of non-traditional family might at first be striking. For instance, there was an awareness that addressing the issue of polyamorous relationships was problematic since at present there seems to be a quasi-universal consensus that this kind of relationships falls short of deserving recognition. Regulations and case law to the contrary is non-existent or at best should be twisted to allow an interpretation favorable to polyamorous relationships. However, the decision to include them stems from an acknowledgement that a different approach would have yielded a negative impact over excluded families, thereby entrenching exclusion and pushing recognition one step further away. By "different approach" I especially refer to the piecemeal approach aimed at recognizing only a subset of non-traditional families, which has been adopted, for instance, when same-sex couples were recognized at the domestic level.

This conclusion is grounded in reality since the setbacks the recognition of same-sex couples produced are for all to see. To mention a few, recognition of same-sex couples in Canada was the result of a deliberate choice of courts to emphasize conjugality as the litmus test for familyhood in marital status discrimination claims at the constitutional level.[1] This was probably the most straightforward way for courts to set these relationships aside from the potentially infinite landscape of new families, so as to assure legislators, and probably the general public, that the extension of the definition of family was not unfettered.

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[1] *See, e.g.,* Nova Scotia (Attorney General) v. Walsh, [2002] 4 SCR 325, 2002 SCC 83 (CanLII), at par. 43.

Likewise, in the U.S. marriage equality was achieved at the cost of assimilating same-sex couples into the archetypal marital norm. Starting from the pivotal *Lawrence* decision on the decriminalization of sodomy, until the recent *Obergefell* case on same-sex marriage recognition, what is clear is that these decisive achievements were a function of the emphasis placed on love, sex, dyadic nature, exclusivity, and often the willingness to raise children.[2] However, these characteristics do not necessarily apply to new families, whose complex features lead them to often be fluid, non-exclusive, non-dyadic, and not necessarily interested in raising children.[3]

Ironically, but for the emphasis on the dyadic nature, this strand of case law is more conducive to plural marriage, than to furthering the cause of non-conjugal families. This aspect of the marriage equality saga has been conjured up by two dissenting Justices in *Obergefell* (and I think on point,) since the romanticized, trascendent, loving union described in the judgment is wholly applicable to polyamorous relationships but for the number of persons in the relationship. By contrast, the majority opinion in *Obergefell* put language to the effect of making recognition of non-conjugal families even less likely to be achieved.

This pernicious entrenchment of the marital norm also reflects upon a second aspect, *i.e.* the means for recognition. One could argue that the case law on same-sex marriage does not pose hurdles to the recognition of non-normative families as long as they do not seek access to marriage. A reply to this argument shall stress that marriage equality has struck a fatal blow to alternative regimes to marriage in many cases. The California Supreme Court decision *In re Marriage Cases* and the Connecticut Supreme Court decision in *Kerrigan*, in assessing the compatibility with the constitution of domestic partnerships and civil unions for same-sex couples, put a black mark on these schemes by conveying the idea that they fall short of conferring the same *dignity* as marriage did and that alternative schemes institutionalize a separate but equal regime. In emphasizing marriage as a historical, transcendent institution, they both ended up rendering alternative regimes as second-class regimes.

[2] Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472 (2003).

[3] Laura A. Rosenbury, *Friends with Benefits*, 106 MICH. L. REV. 189, 229 (2007); I summarized these features in a previous script: Nausica Palazzo, *The Strange Pairing: Building Alliances Between Queer Activists and Conservative Groups to Recognize New Families* (University of Michigan Public Law Research Paper No. 615, 2018).

Thus, the irony is that if new families were to successfully introduce such schemes, they would run the risk of being struck down as in violation of the state constitution's equal protection clause.

Given the many dangers associated with a piecemeal approach that seeks recognition at the cost of further marginalizing already marginalized groups in society, it has been preferable to adopt a more inclusive approach that potentially encompasses *all* non-traditional families, both conjugal and non-conjugal.

Still, the breadth of the definitional section had to come to grips with the practical needs that should be taken into account when implementing a model. Administrability reasons require that some eligibility conditions should be set. The incidence of these requirements varies depending on the model for recognition. If a state is to adopt a formal model of recognition, requiring parties to take affirmative steps to recognize their union, then the incidence of eligibility requirements is relatively low. The two formal models of recognition can rely on self-authorship and thus the state can restrict its role to setting forth how many people can enter the scheme, and the type of qualifying relationships. Hence, the suggestion was to draft these requirements as broadly as possible so as to not sacrifice the variety of personal relationships that nowadays exist. In particular, Chapter I suggested that a reference be made to the horizontal nature of the relationship and to the willful decision to take responsibility, which is neutral vis-à-vis the type of relationship that is performed.

In contrast, functional schemes ascribing status (ascription) should also define a minimum duration of the relationship. This requirement will always be to some extent arbitrary, but a minimum requirement that is not too stringent could be a good approximation for a serious rather than extemporaneous commitment. However, Chapter III shows that there are many pitfalls associated with this model for recognition, particularly if one considers the negative impact it yields over people's freedom not to be ascribed a status, when they do not wish to gain it.

These considerations about matching abstract definitions with models of recognition are applicable across the board. However, the goal of the dissertation is not that of providing abstract truths, but rather finding the model that might be regarded as more aligned with each specific jurisdiction. This aim has inspired the Special Part on the U.S., Canada, and Europe, where I conducted a comparative analysis based on the

functionalist conviction that one could and should find the most suitable solution to a common problem (the scant recognition of new families in comparative perspective.)

I previously demonstrated through a case-study approach that new families are invisible or insufficiently recognized before the law. Chapter II has provided an emblematic example of the complexity of the current mechanisms for allocating government benefits, which suggests that even when recognized (not very often indeed,) new families receive a worse treatment as compared to married couples. Reference is especially made to the non-applicability to new families of the host of presumptions that attach to the marital families, and that thus forces new families to shoehorn their partner(s) into existing legal categories, where possible, or to strive to be recognized by showing financial dependence in the few cases where they are allowed to do so.

What counts for purposes of the present analysis is the demonstration that the so-called invisibility should not be based on an assumption, but should rather be empirically grounded, although I concede that these searches are time-consuming and require a substantial effort. Once demonstrated that new families are not sufficiently accounted for by the law, then the analysis moved to the *pars construens* where new families seek an extension of legal protections either before courts or on the part of the legislature.

This phase is the most delicate one, which is the reason why I attempted to supplement it with a thorough analysis of the constitutional dimension of the family. To do otherwise, would risk enacting precarious reforms that do not align with the fundamental values of the selected jurisdiction. This is also to say that the shortcomings associated with a de-contextualized functional inquiry can only be avoided by contextualizing the inquiry against the backdrop of the fundamental values that each society enshrines in its legal system, particularly its constitution and constitutional doctrine.

The Special Part thus always attempts to build a constitutional argument. Even in the context of Europe, where I provide a "surrogate" of constitutional arguments, namely an argument resting on the Convention and an argument resting on EU law, an analysis of the constitutional landscape of the nation states is provided. Again, this methodological choice is aimed at mitigating the risk of "rejection," a term employed

in comparative legal scholarship to denote the risk that an insufficient compatibility of a reform with the background societal and legal norms will hinder its implementation and ultimately its survival.

The chapters in the Special Part, hence, are devoted to building arguments to introduce legal protections for new families. In many cases the existing legal framework is hostile to the recognition of these families, partly for the reasons set out above, concerning the entrenchment carried out by the marriage equality movements, partly because there is little awareness that new families are precisely families. This unawareness clearly hindered the development of doctrines favorable to their recognition even in cases where schemes open to new families were introduced.

It is for instance surprising to find out that non-conjugal couples so far have not brought lawsuits under the Adult Interdependent Relationships Act enacted in Alberta. This scheme, albeit being open to conjugal and non-conjugal couples alike, has attracted few non-conjugal units. There could be many reasons for the stunning disappearance of these families from the application of the law. My hypothesis is that there is little awareness around the possibility of gaining recognition through this innovative scheme. A second hypothesis concerns the Canadian family courts' insistence on conjugality which might either discourage these families from bringing claims or induce them to qualify their relationship as a conjugal one, so as to have courts more sympathetic to their claims. Both options are discouraging. Hence, for a reform to be successfully implemented, awareness should be raised when reforms that apply to new families are enacted, and courts should be trained to loosen their grip on traditional markers of familyhood, such as conjugality and exclusivity.

The unfavorable environment in which new families craft legal arguments should be taken into account when skimming through this dissertation. At times, some arguments might seem unconvincing or not entirely convincing. For instance, I am aware that when it comes to polyamorous relationships, the legal arguments to protect them are shaky. Again, Canada is an illustrative example of this. There is a criminal ban on polygamy in Canada (much like elsewhere.) However, the relevant case law distinguishes between polygamous units, which mimic a ceremony whereby it can be said that their union is constituted at a specific point in time, and polyamorous relationships that unfold throughout the time. The difference could be

exploited to recall that these relationships are not covered by the criminal prohibition and that when the time is ripe to seek recognition, polyamorous families should argue that none of the criteria of familyhood under the *Molodowich* test are inherently unsuitable to their situation.[4] Perhaps this is not much. Yet, it is the best one can rely on so far.

Hence, it is not my aim to offer a full-fledged menu of convincing legal arguments. My aim is far humbler and consists in gathering material to "lay the ground" for arguing in the future convincing legal arguments.

Each of the chapters in the Special Part starts out by listing the potential remedies that could be pursued. These are the remedy of non-intervention, that is the preservation of the *status quo*; the marriage option; a protection-driven (or area specific) approach, whereby new families seek recognition before courts on a case-by-case basis through ascription; and, finally, a comprehensive approach whereby they advocate for the introduction of a comprehensive scheme, which should ideally come in the form of a registration scheme.

The preservation of the *status quo* is easily rejected since it pivots on the objection that these families can already be recognized under the law. Yet, this contention is misplaced. Particularly, it overlooks that a subset of new families can never marry, think about polyamorous relationships or non-conjugal assemblies made up of more than two persons.

It also disregards that many new families virtually eligible to marry do so at their own risk. This is the case, in all the three case-studies under review, of relatives outside the prohibited degrees of consanguinity and of committed friends. In the U.S. and in Europe these families could respond to the objection that they could have married by showing that a thus-contracted marriage is precarious and it would make them liable for fraud. By contrast, in Canada their marriage would be valid since there is a much narrower doctrine on sham marriages (that only applies in the context of immigration and that does not invalidate the marriage *per se*, but only clutches back the residence permit.) Yet, this point far from being problematic is exploited in the section on constitutional arguments to argue that this subset of families should be able to say, along the lines of what cohabiting conjugal couples did, that they are

[4] Molodowich v. Penttinen, 1980 CanLII 1537 (Ont. Dist. Ct.).

discriminated against based on marital status.[5] This is a powerful example of my attempt to pay homage to the maxim "nothing is created, nothing is destroyed, everything is transformed." This is especially so in this field of research where all gaps or interpretations are to be exploited to lay claim that new families should be recognized.

Second comes the remedy of marriage. This is a fully unsatisfactory remedy for the reasons set out above, concerning the undesirability for new families of being assimilated into the marital norm, as same-sex couples did, the peculiar features of non-normative families that are structurally unfit for marriage, and the disinterest that such families show toward the institution of marriage. Furthermore, in the European context many exegetical hurdles exist, since the EU has no competence over family law, and in the ECHR framework the right to marry under Article 12 has not been subject to a dynamic interpretation. Thus, in both cases the two systems bow to national definitions vis-à-vis marriage with little room for judicial updating. A notable exception to this is the recent CJEU *Coman* case, recognizing same-sex marriages for purposes of family reunification.[6] Notwithstanding this recent overture, the EU does not seem to be eager to further open marriage to new families, given the institutional and doctrinal constraints that still exist.

Next comes the protection-driven approach (or ascription) which I employed in several instances. First, in the context of a policy argument in the U.S. Remember that policy arguments address the legislature. My contention was that an area-specific approach is not desirable *per se*, but serves as an instrument to understand which rights, obligations and benefits should be included in a registration scheme. Thus, the final aim is still that of pushing for the introduction of a comprehensive scheme on the part of the legislature later in time.

The broad section on policy arguments in the U.S. has attempted to exalt many revolutions that family law is undergoing so as to maintain that new families could finally slip under the radar of the law. These revolutions include the recent developments in marriage as a legal regime, which is increasingly a regime informed by a utilitarian approach, which in turns carries an unprecedented baseline of

[5] *See* Chap. V, par. 4.3.1.

[6] Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [2018] ECLI:EU:C:2018:385.

nondiscrimination. Next, comes the observation that family legal pluralism is on the rise. The U.S. are a great example for this. As a common law jurisdiction, the U.S. is acquainted with family law regimes that develop outside of wedlock. The main reference is to the doctrine of common law marriage, that, albeit on the decline, conjures up the longstanding tradition of recognizing *de facto* relationships independent of a civil blessing of their "marriage." More importantly, the section has outlined the many civil unions, domestic partnerships and reciprocal or designated beneficiary schemes that end up including within their scope non-traditional families. The most notable example for this is the designated beneficiary scheme in Colorado, which is open to any two unmarried people, consenting adults, of sound mind and which includes the broadest array of benefits, including workers' compensation benefits, social security and tax benefits. The scheme comes also as a form that is easy to fill out, without requiring the assistance of an attorney. It is furthermore extremely flexible in that it allows a person to decide which rights to confer by checking a box, without duty of reciprocity. Ultimately, this argument has drawn from extensive case law to argue that marriage is not the most suitable vehicle to allocate benefits as it ends up being underinclusive and overinclusive in many instances.

The last remedy is a comprehensive remedy that aims at recognizing new families through a formal mechanism that confers a cluster of protections. This type of remedy has many perks, amongst which is that it exalts autonomy, since parties must take affirmative steps to gain recognition. It also exploits the possibility of saving time and money by benefitting from a comprehensive default regime. Yet, I contend that in the ideal registration scheme, such a set of default rules should be supplemented by a robust opting out regime so as to allow parties to tailor the relationship to their needs. In designing such a system, one could again use the Colorado Act as a model, and allow parties to check the box corresponding to the right, obligation, or benefit she intends to confer upon the other party.

The composite policy argument in Canada aims at introducing a thus-framed comprehensive regime. The argument is fairly long and articulated, since it is likely that Canada will be on the forefront in the recognition of non-traditional families (as it has been on the forefront in the recognition of cohabiting relationships and same-

sex couples.) It tries to pivot on an increasing awareness and acceptance of progressive ideas in the field of family legal pluralism, epitomized by the Law Commission report; the fluidity and unsettled nature of the main concepts employed in case law to confine protections to marital or marital-like couples; and finally, again, on the introduction of schemes showing an increased family legal pluralism, as the Adult Interdependent Relationships Act in Alberta, and a similar albeit less comprehensive scheme in New Brunswick.

This extensive material, particularly that included in the section on the case law on the main markers of familyhood, flows into that set of materials that researchers can draw from to lay claim to recognition. Conjugality is such a blurry, fact-driven concept that one could easily argue that it should be discarded, particularly if the totality of circumstances test under *Molodowich* is adopted. Also, the cohabitation requirement is no longer synonym with co-residence. This point could be exploited to advance a claim that cutting-edge networks of care, such as people leaving apart together (LATs,) should one day gain recognition.

Finally, the scheme in Alberta constitutes an extremely interesting model for protecting new families. It is a mixed system adopting both ascription and a contractual system whereby two adults, regardless of conjugality, can sign an agreement and assign to each other an extensive set of protections. The Alberta case, as seen above, acts also as a warning to future reforms in the sense that the disappearance of non-conjugal families from the application of the law must be studied and its consequences understood, if one wants to implement a successful model for protecting for new families.

A second set of arguments are those pled before courts. Reference is here made to the constitutional argument in the U.S., to the constitutional argument and to the argument resting on human rights codes in Canada, and ultimately to the two arguments in Europe respectively resting on the Convention and on EU law. These arguments are *stricto sensu* legal. In most cases, they adopt a protection-driven approach in the sense that recognition is not sought by claiming the introduction of a new comprehensive scheme but merely with respect to a specific entitlement. This type of pleading is most suitable to the posture of judicial cases, where applicants usually challenge the exclusion from an existing entitlement. This is necessarily the

case in the context of human rights codes that shield individuals from acts of misconduct by governmental and non-governmental actors. This is not necessarily the case in the constitutional context. Yet, based on *id quod plerumque accidit,* applicants tend to attack eligibility requirements of governmental benefits rather than comprehensive statuses (*e.g.*, marriage.) This methodological choice thus allowed the research to draw on a larger set of cases.

Furthermore, although a comprehensive scheme presents many merits, it needs to come to grips with reality. Both in Canada and the U.S., the constitutional liberalism permeating constitutional law severely curtails the possibility of upholding affirmative rights. I believe that the jurisprudence on same-sex marriage is special, and that since new families' claims cannot be backed by the doctrine on the fundamental right to marry, any such claim would risk colliding with the reluctance to uphold affirmative rights.[7]

Europe deserves its own comment. It is not the reluctance to enforce positive rights that should hold new families back from pressing such arguments. The problem rather lies in the inherent features of the two meta-national systems. On the one hand is the EU, which lacks competence over family law, which is functionalized to the achievement of market freedoms, whose relevant primary law only applies in the implementation of EU law and which features many more institutional constraints that severely hinder the possibility of pursuing change. By contrast, the problem with the ECHR is that its relevant case law is at an early stage of development. Yet, in the ECHR context it is far more likely that one could plead protection-driven arguments to the effect of introducing single benefits and then, at a later stage, even seek recognition trough a comprehensive scheme, along the lines of what same-sex couples did.

A brief recap of the constitutional arguments follows. Thus, in the U.S a comprehensive approach-based constitutional argument was put forward. While this might contradict what it has been said earlier, the decision to aim at a comprehensive approach lies in the fact that one should put no trust in constitutional arguments in the U.S. Thus, I decided to merely examine whether the *Obergefell* decision changed

[7] As to the U.S., *see* Chap. IV, par. 2 "A weak constitutional argument." As to Canada, *see* the settled Canada Supreme Court's case law declining to recognize poverty or economic status as an analogous ground in Chap. V, par. 5.1.2.

the current constitutional doctrine on barring claims vis-à-vis affirmative rights. Since it did not, at least in my view, it seems that no constitutional argument can be successful at present. New families cannot plead a violation of Due Process since the scheme whose enactment is sought is "new," nor an Equal Protection violation, since they do not fall within any of the prohibited grounds for discrimination.

In Canada, the prognosis is more optimistic, since the constitutional doctrine on families' recognition and the prohibition on marital status discrimination is richer. However, this doctrine is also convoluted and fast-changing. This might impair attempts at crafting successful arguments. However, at present it seems that the marital status ground can be pled by all dyadic couples that, notwithstanding their non-conjugal nature, are virtually eligible to marry, such as cohabiting friends. By contrast, other new families could seek the introduction of a family status ground that better captures the source of their discrimination, or discard the ground-based approach to discrimination altogether as some Justices attempted to do. Thereafter, the section has argued that all the relevant factors to establish discriminatory treatment apply to new families, particularly the current interpretation of historical disadvantage (which focuses more objectively on the treatment received,) the fundamental nature of the affected interest, and the stereotypical view that new families cannot function as such, although they are economically and emotionally interdepended.

Last comes Europe. Again, the relevant analysis shows that the EU is not the proper setting to push for reforms. By contrast, new families could exploit the potential of the European Convention on Human Rights. There, many routes for pursuing change exist. At stage 1, the prohibition against discrimination (Article 14) could be taken in conjunction either with the right to family life (Article 8) or the right to peaceful enjoyment of property (Article 1 Protocol 1.) Particularly, the right to family life is useful since it escapes formal definitions vis-à-vis family and is inherently functional. Strong reasons buttress the recognition of at least non-conjugal units. First, under the ECtHR settled case law, relatives enjoy a right to family life. Thus, unlike same-sex couples they need not strive to be preliminarily recognized as a family. Other family units, could still pivot on consensus to show that a slow consensus is emerging. Currently Belgium, the Netherlands, and to a lesser extent

Norway and the UK recognize new families.[8] While these examples differ in terms of personal and material scope of the regime, they all point to a slow evolution in the understanding of who is a deserving family member. This feeble emerging consensus could act in tandem with an international consensus pointing to legal reforms enacted in Alberta, the United States, Australia and New Zealand.[9]

As to the choice of the relevant comparator, if the prohibition against marital status discrimination is to have any significance, the parties should not be compelled to alter one of the factors in question, *i.e.* their non-marital status, to eschew discrimination. Thus, one should eschew the tautological reasoning of the court saying that new families are different from married and civil partnered couples because they cannot marry or enter a civil partnership. This is obvious!

When it comes to the legitimate aim, it is likely that the Court will "concede" that the protection of the family in the traditional sense by member states is, in principle, a legitimate reason which might justify a difference in treatment. The bulk of the argument could thus focus on the third and last stage, where the proportionality of the measure is assessed. This is the stage where new families will have to show an emerging consensus so as to impose a narrow margin of appreciation on the state. A failure to do so will still allow them to plead alternative promising approaches, such as that under *Hämäläinen,* discarding the consensus-based approach altogether, or under *Mazurek*, merely requiring "une nette tendance" toward the emergence of such consensus, a lower threshold they could be able to satisfy in a few years.

Again, this is what we have. One could contend that it is not much. Yet, this preliminary census of what we do have is the essential stepping-stone to building more convincing arguments in the future. Please consider that the future this dissertation refers to is not a Uchronia – a fictional time-period in a remote future. This challenge will become pressing in the span of a few years, considering the steadfast evolution in modern family patterns. Hence, it would be highly misplaced to relegate this problem to a remote and distant future.

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[8] *See* Chap. VI, par. 1.1.1.

[9] Australia and New Zealand fall outside the purview of this dissertation. However, they provide valuable models for recognizing new families. For both systems *see generally* LORRAINE JOHNS, RECOGNIZING NON-CONJUGAL RELATIONSHIPS IN NEW ZEALAND: SHOULD WE EXTEND THE RIGHTS AND RESPONSIBILITIES OF MARRIAGE AND MARRIAGE-LIKE RELATIONSHIPS TO OTHER CARING RELATIONSHIPS?, LLM Research Paper, Law 591 Thesis, University of Victoria (2010).

Owing to the fast-growing changes in family patterns, states can no longer shield themselves behind the contention that there is a predominant way of living familyhood that as such warrants special protection. This contention is less and less grounded in reality.

Furthermore, the marital ideal, while integral to the architecture of an orderly living, is precisely an ideal. The introductory note referred to queer experiences that endanger the survival of systems of ordering and that being perceived as deviant from the mainstream conception are being concealed, marginalized, ostracized. Yet, it is undeniable that these experiences are coming to the fore, challenging narrow and outdated notions of proper familyhood. This dissertation has attempted to be the voice for those who have none, for marginalized experiences that often even lack the awareness of being a family, rather than a "weird" formation of mutual support people drift into.

If there is anything weird today, it is our obsession with the normal.

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