

UNABLE TO DIVORCE: REGISTERED PARTNERSHIPS AND SAME-SEX MARRIAGE¹

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SUMMARY: I. *Introduction*. II. *Types of Registered Partnership Recognition*. III. *Assessing Debates About Registered Partnerships*. IV. *Conclusion*.

I. INTRODUCTION

In 2005, lesbian and gay marriages are being legally performed in four countries: The Netherlands,² Belgium,³ Canada⁴ and most recently, Spain.⁵ In addition, gay men and lesbians can also get married in Massachusetts in the United States.⁶ While all five states experimented with regis-

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¹ This is an updated and abbreviated version of a paper that was prepared in 2001 at the request of the Law Commission of Canada and submitted to it in the context of their project on close personal adult relationships: see Nicole LaViolette, "Registered Partnerships: A Model for Relationship Recognition", 5 August 2001, online: Law Commission of Canada, <http://www.lcc.gc.ca/pdf/LaViolette.pdf>. The larger study is also published in 2002. 19:1 Canadian Journal of Family Law 115.

² "Same-sex marriages", online: Justitie.nl in English, http://www.justitie.nl/english/Publications/factsheets/same-sex_marriages.asp.

³ Fiorini, Aude, "New Belgian Law on Same Sex Marriage and the PIL Implications," *International & Comparative Law Quarterly*, 52:1039-1049, 2003.

⁴ *An Act respecting certain aspects of legal capacity for marriage for civil purposes*, S. C. 2005, c. 33.

⁵ Congreso de los Diputados, *Proyecto de Ley 121/000018, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio*, *Boletín Oficial de las Cortes Oficiales*, 21 January 2005, online: http://estaticos.elmundo.es/documentos/2005/06/30/ley_matrimonio_hom.pdf.

⁶ "Massachusetts Legislature Rejects Gay Marriage Ban" *Associated Press*, 15 September 2005, online: *CCN.com* <http://www.cnn.com/2005/POLITICS/09/15/gaymarriage.ap/>.

tered partnerships, the final choice was in favour of extending marriage to gay men and lesbians. In many other countries, partnership registration schemes have been established which allow conjugal partners, including gay men and lesbians, to receive state recognition. For instance, in Denmark,⁷ France⁸ and New Zealand,⁹ lawmakers resisted granting marriage rights to gay men and lesbians, yet they were willing to establish registered partnerships.

Whether lawmakers opt for same-sex marriage or registered partnerships, the law reforms are in response to growing social pressures to expand the types of close adult and familial relationships recognized by the State. Specifically, the almost universal inability of same-sex couples to opt in to a state-recognized relationship is often the primary impetus for change. A lack of protective status has placed gay and lesbian families everywhere under considerable personal, economic and social constraint.¹⁰ Registered partnerships or marriage rights are established to remedy this lack of relationship status.

Those same pressures are being felt in many Latin American countries,¹¹ including Mexico. In April 2001, a bill legalizing registered partnerships was introduced in the legislature of the Federal District of Mexico City.¹² The bill would not have formally allowed gay and lesbian marriages; rather it would have extended specific legal rights to couples living in a *common law* relationship.¹³ While some of the opposition to the bill came from conservative and religious circles,¹⁴ others were concerned

⁷ *The Danish Registered Partnership Act*, online: Cybercity Denmark, <http://users.cybercity.dk/~dko12530/s2.htm> (date accessed: 16 July 2001).

⁸ *Loi no. 99-944 du 15 novembre 1999 relative au pacte civil de solidarité*, J. O., 16 November 1999, 16959.

⁹ *Civil Union Act (N.Z.)*, 2004/102, online: govt.nz http://www.legislation.govt.nz/libraries/contents/om_isapi.dll?clientID=333602&infobase=pal_statutes.nfo&record={A43C3050}&hitsperheading=on&softpage=DOC.

¹⁰ L. Poverny & W. Finch Jr., "Gay and Lesbian Domestic Partnerships: Expanding the Definition of Family" (1998) Soc. Casework: The J. of Contemp. Soc. Work 116 at 118.

¹¹ Landes, Alejandro, "Gays Make Unexpected Gains Although Legal Hurdles Remain" *The Miami Herald*, 17 September 2003, 1A.

¹² González, Román, "Dan la vuelta diputados a Ley de Sociedades de Convivencia", online: CimaNoticias.com <http://www.cimaNoticias.com/noticias/03may/s03050604.html>.

¹³ *Ibidem*, note 12.

¹⁴ "México: iglesia católica dice que ley de convivencia es 'aberrante'", (16 December 2003), online: mujeresShoy.com <http://www.mujeresShoy.com/secciones/1573>.

about the policy choice in favour of a complicated registered partnership scheme. It was argued that a better way to recognize gay and lesbian relationships was to substitute the words “man and woman” to “persons” in the legislation related to marriage.¹⁵ Debates on the bill have been suspended.¹⁶ However, the Mexico example confirms that in many jurisdictions the choice between same-sex marriage and registered partnerships remains contentious.

It is the aim of this article to examine the experiences of other jurisdictions to determine how controversial registered partnership schemes are as a law reform option. Academic and activist debates are examined to outline the benefits and pitfalls with registered partnerships as a model of legal recognition for either conjugal or non-conjugal relationships. This article argues that the most divisive political and social debates arise when registered partnerships schemes are pitted against the issue of same-sex marriage. The lessons from other jurisdictions confirm that registered partnerships are most successful when they are not seen as creating a second-class category of relationships, but rather as positive and flexible form of state recognition. This is difficult to achieve as registered partnerships are not easily divorced from the issue of same-sex marriage.

The article is divided into two main sections. Part II categorises and describes the various types of registered partnership models that have been established in different jurisdictions around the world. Different models are grouped into two categories, the “Marriage Minus” models and the “Blank Slate Plus” schemes. This classification highlights what motivated the establishment of the model, what interests were at stake at the time, what entitlements or obligations flow from the model, and what role the model continues to play today, particularly in relation to the issue of same-sex marriage. Part III reviews academic and activist debates surrounding registered partnerships models as a way of outlining the benefits and pitfalls of registered partnerships as a model of legal recognition for either conjugal or non-conjugal relationships.

shtml. See also: Peter Greste, “Mexico debates Law on Gay Couples” (19 December 2000) *BBC*, online: *BBC News* <http://news.bbc.co.uk/1/hi/world/americas/1077679.stm>.

¹⁵ Email from Gloria Careaga Perez, Facultad de Psicología, UNAM (23 September 2005).

¹⁶ *Ibidem*, note 15.

II. TYPES OF REGISTERED PARTNERSHIP RECOGNITION

1. *Terminology*

Many terms are used to designate the legal status established by relationship registration initiatives. “Registered Domestic Partnerships”, “Registered Partnerships”, “Domestic Partnerships”, “Declared Partnerships”, “Life Partnerships”, “Stable Relationships”, “Civil Unions”, “Legal Cohabitation”, “Reciprocal Beneficiaries” and “Unmarried Couples Registration” are all terms used in legislation, municipal ordinances, academic and activist writings, and the media.

Throughout this article, the term “registered partnerships” will be the expression used to describe the various methods which allow unmarried individuals to register their mutually dependent relationships in order to gain official state and societal recognition. The expression provides a simple but precise description of the initiatives examined herein. “Partnership” is a commonly used word referring to personal relationships, and is therefore an accurate representation of the interdependent relationships that are the subject of registration methods. The term “registration” aptly covers the fact that all the models reviewed are opt-in schemes in so far as they require partners to identify themselves to the relevant authorities, either through registration or the issuance of a licence.

2. *Existing Models*

There is more than one model of registered partnership recognition. Some are the product of law-making bodies at the local, regional or national level, while others are the product of the private sector.¹⁷ Moreover, the forms in which registered partnerships have been established depend on the constitutional, legal, social and religious contexts of each relevant jurisdiction. In addition, there are important differences in the level of benefits and obligations actually incurred through registration.

¹⁷ “Thirteen percent of all United States employers offer benefits to the domestic partners of their employees. Larger companies, with more than 5,000 employees, the figure is twenty-five percent...”: Zielinski, D., “Domestic Partnership Benefits: Why Not Offer Them To Same-Sex Partners And Unmarried Opposite Sex Partners?” (1998/99) 13 J. L. & Health 281 at 281-82.

Nevertheless, most models possess some common features. Their purpose is usually to recognize, validate and support committed, mutually supportive personal relationships between unmarried individuals. Most registered partnership policies define who may register, for instance by setting cohabitation or age requirements. Furthermore, an essential element of this new civil status is the fact that individuals consent to make an official record of their partnerships. This process allows individuals to register with various levels of government or private employers by completing a formal declaration or by obtaining an official licence. It is also true that the majority of registered partnerships confer a number of entitlements and obligations.¹⁸ In this fashion, registered partnerships regulate rights: between partners; entitlements and obligations involving third parties; and, in some cases, parenting rights. Finally, registered partnership programs define a process by which the partners may dissolve the formal relationship.

For the purposes of this article, the different models will be categorized to situate registered partnerships in relation to marriage. Under this approach, marriage is viewed as the ceiling, namely the model that offers couples the most extensive rights and obligations. The floor, on the other hand, is basically a blank slate, the level at which no rights or obligations are conferred on non-married partners.¹⁹

Using these two reference points, a simplified overview of the different types of registered partnerships can be offered. Indeed, registered partnerships can be grouped into two main categories. First, several jurisdictions have enacted registration schemes that will be referred to as “Marriage Minus” partnership schemes. These legislative models offer quasi-marital options while falling short of reaching the marriage ceiling, in that they exclude a small number of rights and responsibilities

¹⁸ There are a few municipal registered partnership schemes that confer no rights or obligations, and provide only a symbolic recognition. This is the case in Hamburg, Germany. See C. Hebling & R. Sass, “Symbolic Domestic Partnership in Hamburg” (1997) 55 Euro-Letter 14, online: Euroletter <http://www.steff.suite.dk/eurolet.htm>.

¹⁹ Robert Wintemute, in referring to different methods of allocating rights and obligations to same-sex couples, makes a similar distinction as the one I propose, namely that two models exist, the “subtraction” and “enumeration” models. Wintemute, R., “Conclusion” in Wintemute, R. & Andenæs, M., (eds.), *Legal Recognition of Same-Sex Partnership: A Study of National, European and International Law*, Oxford, Hart Publishing, 2001, 759 at 766 (*Conclusion*).

conferred to married couples. It is clear nonetheless that these registered partnerships “both functionally and socially reproduce marriage”.²⁰

The second major grouping of registered partnerships will be referred to as “Blank Slate Plus” schemes. These consist of initiatives designed to grant specific enumerated rights and obligations to two individuals in a partnership, without attempting to parallel marriage laws. Rather than subtracting from the marriage ceiling, these registered partnerships add a bundle of rights and obligations onto what was previously a blank slate. In some cases, the handout of rights and obligations is very modest indeed.

A. The “Marriage Minus” Model of Registered Partnerships

Quasi-marital models of registered partnerships include those established in the Nordic states of Denmark,²¹ Sweden,²² Norway,²³ Iceland,²⁴ the Netherlands,²⁵ and in Québec.²⁶ In addition, Vermont²⁷ and New Zealand²⁸ fall within this category, although it is arguable that the civil unions in both jurisdictions are really marriage under a different name.²⁹ However, given the existence of some differences

²⁰ Brumby, E., “What Is In A Name: Why The European Same-Sex Partnership Acts Create A Valid Marital Relationship” 28 Ga. J. Int’l & Comp. L. 145 at 168.

²¹ *The Danish Registered Partnership Act*, *supra*, note 7.

²² Swedish, Norwegian & Icelandic Registered Partnership Acts, 23 June 1994, online: France QRD <http://users.cybercity.dk/~dko12530/nordictx.htm>.

²³ *Ibidem*, note 22.

²⁴ *Act on Registered Partnership*, 12 June 1996, online: Icelandic Ministry of Justice and Ecclesiastical Affairs Homepage http://dkm.stjr.is/interpro/dkm/dkm.nsf/pages/eng_partnership. In Iceland, the institution is known as “confirmed cohabitation”: C. Forder, “European Models of Domestic Partnership Laws: The Field of Choice” (2000) 17 Can. J. Fam. L. 370 at 390.

²⁵ See Schrama, W. M., “Registered Partnership in the Netherlands” (1999) 13 Int’l J. L. Pol’y & Fam. 315. Finland is also considering enacting a registered partnership scheme. See “Finish Gays to Get Legal ‘Union’” *CNN* (30 November 2000), online: CNN.com <http://www.cnn.com/2000/World/Scandinavia/11/30/finland.gay/index.html>; A proposal to introduce a registered partnership system in the Czech Republic was rejected in 1999: Forder, *ibidem*, at 391.

²⁶ P. L. 84, *Loi instituant l’union civile et établissant de nouvelles règles de filiation*, 2nd session, 36th Leg., Quebec, 2002 (assented to 8 June 2002).

²⁷ *An Act Relating to Civil Unions*, 1999 Vt. Acts & Resolves No. 91, H.847 [*Civil Unions*].

²⁸ *Civil Union Act*, *supra*, note 9.

²⁹ For a discussion of the importance of the name attached to a registered partnership scheme, see *Conclusion*, *supra*, note 19 at 769. Wintemute argues that a decision

between marriage and civil unions, it appears useful to view civil unions as a far reaching registered partnership model.

These jurisdictions represent models of registered partnerships that come closest to mirroring the institution of marriage by offering marriage-like formalities and consequences. Indeed, in some jurisdictions, the differences between marriage and registered partnerships are relatively minor, or relate to matters outside the jurisdiction's legislative powers.

For instance, in Vermont, the newly created civil unions are equivalent to marriages in almost every way, with one major exception, namely the name of the civil status.³⁰ Indeed, the symbolic title "marriage" is reserved solely for the union of a man and a woman.³¹ Another difference is the fact that gay men and lesbians joined in a civil union cannot access federally regulated rights and obligations,³² and, further, that they cannot expect legal recognition of their relationship outside the state of Vermont.³³ Legal differences between registered partners and married couples are also relatively insignificant in the Netherlands, to the extent that both same-sex and different-sex couples can convert from one or the other by filing a conversion record with the appropriate state authority.³⁴

In other cases, the differences between marriage and registered partnerships are not considerable, but the limitations of registered partnerships are socially significant. In Sweden, registered partners have

of the European Court of Justice involving Denmark and Sweden suggests that registered partners will be denied recognition if the union is not called a marriage.

³⁰ For a detailed discussion of the Vermont civil union initiative, see Bonauto, M. L., "The Freedom to Marry for Same-Sex Couples in the United States of America" in Wintemute & Andenæs, *supra*, note 19, 177.

³¹ "Recent Legislation" (2001) 114 Harv. L. Rev. 1421 at 1424.

³² *Ibidem.* at 1423.

³³ Sneyd, R., "Le Vermont autorise les couples homosexuels à s'unir civilement" *Le Soleil* (26 April 2000), online: *Le National*, <http://le-national.com/breves45.html>. For a more detailed discussion of the recognition of same-sex civil unions and marriages by other states and the U.S federal government, see Bonauto, *supra*, note 30 at 202-06; and Partners Task Force for Gay and Lesbian Couples, "Civil Unions: The Vermont Approach" (2 July 2005), online: Partners <http://www.buddybuddy.com/d-p-verm.html>.

³⁴ *Wet Van 21 december 2000 tot wijziging van Boek I van het Burgerlijk Wetboek in Verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht (Wet Openstelling Huwelijk)*, Staatsblad van het Koninkrijk der Nederlanden 2001, nr. 9 (11 January), ss. 77a, 80f.

been granted the same entitlements as married couples, but until very recently they were denied critical rights relating to children, such as custody, adoption and medically assisted procreation.³⁵ The same is true for both Norway³⁶ and Iceland,³⁷ which prohibit registered domestic partners from adopting, or accessing medically assisted procreation. In Denmark, some gay men and lesbians have advocated against the existing legislative prohibition on registration celebrations taking place in the State Lutheran Church,³⁸ while in Sweden gay men and lesbians are denied the right to marry if they are younger than eighteen years old.³⁹

Except for the Netherlands, all “Marriage Minus” partnership schemes are open exclusively to same-sex partners. But even in the Netherlands, the law reform initiative was first considered as a remedy for the inequality suffered by lesbian and gay cohabitants.⁴⁰ In all jurisdictions, people who are close relatives, for instance relatives in the ascending or descending line, or siblings, cannot register a partnership intended for individuals in conjugal relationships, rather than all adults involved in an interdependent personal relationship.

In some cases, registered partnerships are easier to dissolve than civil marriages. For instance, in the Netherlands, registered couples can terminate the relationship by mutual agreement, and through the registration of a declaration stating their wish to end the partnership.⁴¹

³⁵ International Lesbian and Gay Association (ILGA), “Equality for Lesbians and Gay Men” (June 1998), online: ILGA <http://www.steff.suite.dk/report.htm>. See also H. Ytterberg, “‘From Society’s Point of View, Cohabitation Between Two Persons of the Same Sex is a Perfectly Acceptable Form of Family Like’: A Swedish Story of Love and Legislation” in Wintemute & Andenæs, *supra* note 19, 427 at 433. The Swedish government recently extended adoption and custody rights to same-sex partners. See “La Suède légalise l’adoption pour les homosexuels” Agence France-Presse (5 June 2002), online: Cyberpresse.ca http://www.cyberpresse.ca/reseau/monde/0206/mon_102060105754.html.

³⁶ Le pacte civil de solidarité, Sénat, online: Sénat français <http://www.senat.fr/lc/lc48/lc48.html>.

³⁷ Samtoekin ’78, “A Victory For Icelandic Lesbians and Gays” (August 1996) 43 Euro-letter 10, online: Euro-letter <http://www.steff.suite.dk/eurolet.htm>.

³⁸ Lund-Andersen, I., “The Danish Registered Partnership Act, 1989: Has the Act Meant a Change in Attitudes?” in Wintemute & Andenæs, *supra*, note 19, 417 at 417, 423.

³⁹ Ytterberg, *supra*, note 35 at 433.

⁴⁰ Schrama, *supra*, note 25 at 316-18.

⁴¹ COC Nederland, *Registered Partnerships*, online: COC Nederland http://www.coc.nl/regpartner.html#_1.

Not surprisingly, all of the registered partnerships establishing marriage-like institutions were enacted by jurisdictions that have the constitutional power to regulate marriage. Thus, the registered partnerships in the Nordic countries were established at the national level whereas in the United States, where state governments have the power to define civil status, the Vermont state legislature had the legal authority to enact civil union legislation.⁴²

B. *The “Blank Slate Plus” Model of Registered Partnerships*

The registered partnership methods in this category include the ones established in France,⁴³ Belgium,⁴⁴ Germany,⁴⁵ Hawaii,⁴⁶ in several regions of Spain,⁴⁷ and in Nova Scotia.⁴⁸ In Vermont, the legislation on civil unions also provided for a separate scheme of reciprocal beneficiaries,⁴⁹ which also falls under this category of registered partnerships. Also included are the registration mechanisms set up at

⁴² Bowman, C. A. & Cornish, B. M., “A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances”, 1992, 92 Colum. L. Rev. 1164 at 1198.

⁴³ *Loi no. 99-944 du 15 novembre 1999 relative au pacte civil de solidarité*, *supra*, note 8.

⁴⁴ *Loi instaurant la cohabitation légale* (23 November 1998), online: Belgique, Ministère de la justice <http://www.ulb.ac.be/cal/Cohabitation.html> [*Cohabitation légale*]. Belgium has also opened up marriage to same-sex couples: Fiorini, *supra*, note 3.

⁴⁵ The first part of the German reform, adopted in 2001, provides for a limited number of rights and obligations. However, a second step is planned which would move German reform closer to the “Marriage Minus” category. See *Conclusion*, *supra*, note 19 at 763-64; R. Schimmel & S. Heun, “The Legal Situation of Same-Sex Partnerships in Germany: An Overview”, in Wintemute & Andenæs, *supra*, note 19, 575 at 588-90.

⁴⁶ *Reciprocal Beneficiaries Act*, Hawaii. Rev. Stat. § 572C (2000).

⁴⁷ Catalonia, Aragón, Navaro and Valencia have enacted reforms to recognized partnerships. See N. Pérez Cánovas, “Spain: The Heterosexual State Refuses to Disappear”, in Wintemute & Andenæs, *supra* note 19, 493 at 501-04; “Ley de Parejas en Catalunya y en Aragón” *Fundación Triángulo*, online: Fundación Triángulo Ley de Parejas en Catalunya y en Aragón <http://www.redestb.es/triangulo/leycates.html>; Unmarried Couples Law in Aragón, Fundación Triángulo, online: Fundación Triángulo <http://redestb.es/triangulo/leyarin.html>.

⁴⁸ *Registration of Domestic Partnerships Regulations*, N. S. Reg. 57/01.

⁴⁹ *Civil Unions*, *supra*, note 27, s. 29. The reciprocal beneficiaries scheme is limited to partners already related to one another by blood or adoption, and provides for rights to make decisions for the other if she/he is incapacitated, and imposes an obligation to act in the interest of the other beneficiary: Bonauto, *supra*, note 30 at 202.

the municipal level,⁵⁰ those created by private employers⁵¹ as well as the very first registered partnership, instituted by the City of Berkeley in 1984.⁵²

The registered partnerships schemes that can be considered “Blank Slate Plus” are very diverse, but their commonalities are significant. First, these partnerships initiatives do not seek to create marriage-like legal institutions. Rather, a new status is established, one that is an intermediary between married couples and de facto relationships. It is true that the range of rights and obligations are often far more limited than in marriage, and the conditions governing the formation and dissolution more flexible than civil marriage. But in contrast with legislation that ascribes to individuals the status of de facto cohabitants, the requirement of registration makes the partnership an opt-in model, based on the consent and knowledge of the partners.

Secondly, these partnership models “provide an entry point for official state and societal recognition”⁵³ of interdependent adult relationships. Essentially, these schemes focus on the creation of entitlements for non-married couples to rights or benefits offered by third parties, such as employment and health benefits, hospital and prison visitation privileges, and tenancy rights. In addition, some registration initiatives may confer reciprocal obligations for mutual basic support while the two individuals remain in the partnership. In many cases, the motivation to extend entitlements stems from anti-discrimination policies. For instance, many private employers concluded that to deny family benefits to gay and lesbian employees who were similarly situated

⁵⁰ “Political advocacy for lesbian and gay rights in the United States is the strongest at the municipal level, so it is not surprising that cities and towns are among the first to have agreed through local legislation to extend some degree of recognition to same-sex partners living or working within their borders”: A.S. Leonard, “Local Recognition of Same-Sex Partners Under US State or Local Law” in Wintemute & Andenæs, *supra*, note 19, 133 at 147.

⁵¹ Private employers often require registration, evidentiary support, and other eligibility requirements similar to municipal partnership programs: Zielinski, *supra*, note 17 at 291.

⁵² “Domestic Partnership Benefits, Philosophy and Provider List” (2002) Partners Task Force for Gay & Lesbian Couples, online: <http://www.buddybuddy.com/d-p-1.html>; Zielinski, *supra*, note 17 at 290.

⁵³ Juel, E. J., “Non-Traditional Family Values: Providing Quasi-Marital Rights To Same-Sex Couples” (1993) 13 B.C. Third World L. J. 317 at 319.

⁵⁴ *Ibidem*, at 325.

to married heterosexual employees was in fact a violation of their own anti-discrimination employment policy relating to sexual orientation.⁵⁴

The differences in the “Blank Slate Plus” models are, however, extensive. For instance, in Belgium,⁵⁵ Hawaii⁵⁶ and New York,⁵⁷ registration is open to all without regard to conjugality, sex, or family ties. In France, the “Pacte civil de solidarité” (“PaCS”) excludes people who are close relatives or lineal descendants or already married, but it is not restricted by sex.⁵⁸ In Nova Scotia,⁵⁹ Catalonia⁶⁰ and Aragon⁶¹ any two persons living in a conjugal relationship can register their partnerships, regardless of whether they are of the same-sex or of opposite sex. In Germany,⁶² Hamburg⁶³ and for a substantial number of private employers in the United States⁶⁴, registration programs are limited to same-sex couples living in conjugal relationships.

The opt-in process can also differ from one jurisdiction to the next. For instance, some regional authorities in Spain, rather than creating an administrative registry, require that couples execute a deed or other public document to indicate their intention to be governed by the partnership

⁵⁵ *Cohabitation légale*, *supra*, note 44. See also O. De Schutter & A. Weyembergh, “‘Statutory Cohabitation’ Under Belgian Law: A Step Towards Same-Sex Marriage?” in Wintemute & Andenæs, *supra*, note 19, 465 at 466.

⁵⁶ Brumby, *supra*, note 20 at 160.

⁵⁷ H. Gewertz, “Domestic Partnerships: Rights, Responsibilities and Limitations” (1994) Public Law Research Institute, online: Public Law Research Institute <http://www.uchastings.edu/plri/fall94/gewertz.html>.

⁵⁸ “Mode d’emplois” (2000) Virtual PaCS, online: Virtual PaCS <http://vPaCS.ooups.net/modedemploi.html>. See also D. Borillo, “The ‘Pacte Civil de Solidarité’ in France: Midway Between Marriage and Cohabitation”, in Wintemute & Andenæs, *supra*, note 19, 475 at 485.

⁵⁹ *Vital Statistics-Domestic Partnerships (2001)*, Service Nova Scotia and Municipal Relations, online: Government of Nova Scotia <http://www.gov.ns.ca/snsmr/vstat/certificates/domestic.stm>.

⁶⁰ C. Lestón, “Spain” in ILGA-Europe, *Equality for Lesbian and Gay Men: A Relevant Issue in the Civil and Social Dialogue* (Brussels: ILGA-Europe, 1998), online: <http://www.steff.suite.dk/report.pdf>.

⁶¹ “Unmarried Couples Law in Aragon”, *Fundación Triángulo*, online: Fundación Triángulo <http://www.redestb.es/triangulo/leyarin.htm>.

⁶² Schimmel & Heun, *supra*, note 45 at 589.

⁶³ See Zielinski, *supra*, note 17 at 282.

⁶⁴ Juel, *supra*, note 53 at 337.

laws.⁶⁵ In contrast, France requires couples to declare their union at the registry of the county court.⁶⁶

The level of benefits provided, and obligations incurred, varies significantly from one scheme to the next. There are several registration policies that grant significant benefits to registered partners. In the case of municipalities, the range of entitlements and obligations is obviously limited to areas under local jurisdiction. In New York, for example, registered partners are granted visitation rights in jails or hospitals, tenancy rights, and municipal employees may receive family employment benefits.⁶⁷ In the case of national schemes like the PaCS in France, and the “Cohabitation légale” in Belgium, the limitations are deliberate, since the national governments can legislate on many more marriage-like entitlements but decline to do so.

It is obvious from the preceding survey that there is not one single model of reform in the area of registered partnerships. The ways in which unmarried individuals can be granted state and societal recognition are extremely diverse. One feature that distinguishes registered partnership models is the state’s policy objective: in “Marriage Minus” models, the main policy objective is to confer quasi-marital rights to gays and lesbians. In the case of “Blank Slate Plus” initiatives, jurisdictions are more interested in creating a lesser civil status, one that falls between marriage and *de facto* relationships, and one which is often open to heterosexual couples or non conjugal relationships. In addition, the choice of a particular model of registered partnership depends directly on the constitutional, political, social, religious and economic context of a specific jurisdiction. Nevertheless, there is little distinction to be made with regard to the social and political factors that impact on the legitimacy and popularity of both types of registration models. It is these factors, and their surrounding debates, that are outlined in the next section.

⁶⁵ For instance, this is the case in Catalonia. See Canovás, *supra*, note 47 at 501-04; F. Jaurena I Salas, “The Law on Stable Unions of Couples in the Catalonia Autonomous Community of Spain” in Wintemute & Andenæs, *supra*, note 19, 505 at 508.

⁶⁶ Borillo, *supra*, note 58 at 485.

⁶⁷ Lenoard, A. S., “Mayor Giuliani Proposes His Domestic Partnership Policy”, (May/June 1998), 4 City Law 49 at 51, online: LEXIS (City Law).

III. ASSESSING DEBATES ABOUT REGISTERED PARTNERSHIPS

1. *Introduction*

The fact that same sex couples have been traditionally barred from marriage, and have few legal means to recognize their relationships continues to be a driving force behind domestic partnerships. It helps to explain why the most extensive debates surrounding the value and legitimacy of registered partnerships have often taken place within the lesbian and gay communities. In addition, debates about registered partnerships have often been seen in contradistinction to the issue of same-sex marriage. However, the larger societal implications of partnership recognition have also meant that the debates have extended beyond the lesbian and gay communities.

This section will attempt to summarize and evaluate the range of social, political, and economic issues that have been debated in various jurisdictions in relation to registered partnerships. In surveying the various arguments for and against registered partnerships, it becomes apparent that the debates are multi-layered and complex, and that views cannot be easily categorized into pro and con arguments. Instead, I will look at the spectrum of views on these issues.

2. *Registered partnerships vs. marriage*

A. *Are registered partnerships a “Distracting Impediment”?*⁶⁸

As previously mentioned, debates surrounding the value of registered partnerships tend to be voiced most often in the context of discussions surrounding same-sex marriage. Some of these debates have been most pronounced in the United States where there is no consensus on whether marriage or domestic partnerships are the best route for the legal recognition of same-sex relationships.⁶⁹ Similar debates have occu-

⁶⁸ Mohr, R. D., “The Case for Gay Marriage” (1995), 9 Notre Dame J. L. Ethics & Pub. Pol’y 215 at 239.

⁶⁹ See Hunter, N. D., “Marriage, Law, and Gender: A Feminist Inquiry” (1991), 1 Law & Sexuality 9. See also Rotello, G. & Graff, E. J., “To Have and To Hold: The Case for Gay Marriage” (1996), 262: 25 The Nation 11; W.N. Eskridge, Jr., “The Ideological Structure of the Same-Sex Marriage Debate (And Some Postmodern Arguments for Same-Sex Marriage)” in Wintemute & Andenæs, *supra* note 19, 113 [*Ideological Structure*];

red in other jurisdictions like Canada,⁷⁰ Australia,⁷¹ France⁷² and the Netherlands.⁷³ For the most part, the debates focus on political strategy and political values.

Certainly for many, registered partnerships distract from the more important goal of including same-sex partners in marriage. Proponents of this view argue that anything short of marriage is accepting inequality, discrimination, or even a form of apartheid.⁷⁴ In Vermont, Representative Hingten had the following to say about the Civil Union Bill:

[It] does more than validate [bigotry]. It institutionalizes the bigotry and affirmatively creates an apartheid system of family recognition in Vermont.⁷⁵

E. Wolfson, "Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique" (1994), 21 N.Y.U. Rev. L. & Soc. Change 567.

⁷⁰ See K.A. Lahey, "Becoming 'Persons' in Canadian Law: Genuine Equality or 'Separate But Equal?'" in Wintemute & Andenæs, *supra*, note 19, 237.

⁷¹ See R. Graycar & J. Millbank, "The Bride Wore Pink... To the Property (Relationships) Legislation Amendment Act 1999: Relationships Law Reform in New South Wales" (2000) 17 Can. J. Fam. L. 227; J. Millbank & W. Morgan, "Let Them Eat Cake and Ice Cream: Wanting Something 'More' from the Relationship Recognition Menu" in Wintemute & Andenæs, *supra*, note 19, 295.

⁷² D. Borrillo, M. Iacub & E. Fassin, "Au-delà du PaCS: pour l'égalité des sexualités" *Le Monde* (16 February 1999).

⁷³ K. Waaldijk, "Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands" in Wintemute & Andenæs, *supra* note 19, 437 at 443-53 [*Small Changes*].

⁷⁴ Partners Task Force for Gay and Lesbian Couples, "Marrying Apartheid: The Failure of Domestic Partnership Status" (23 June 2005), online: Partners <http://www.buddybuddy.com/mar-apar.html> [*Marriage Apartheid*]. See also M. A. McCarthy & J.L. Radbord, "Family Law for Same Sex Couples: Chart(er)ing the Course" (1998) 15 Can. J. Fam. L. 101 at 123: [registered domestic partnerships] create a second class category of relationships for those deemed less worthy of recognition. See also Hunter, *supra*, note 69; B. J. Cox, "'The Little Project': From Alternative Families To Domestic Partnerships To Same-Sex Marriage" (2000) 15 Wis. Women's L. J. 77; B. J. Cox, "The Lesbian Wife: Same-Sex Marriage as an Expression of Radical and Plural Democracy" (1996) 33 Cal. W. L. Rev. 155 [*Lesbian Wife*]. In a recent constitutional challenge to the prohibition on same-sex marriage, eight lesbian and gay couples in Ontario have argued that "marriage has different social, psychological and political meanings and consequences than a partnership registry of some other name, which would only replicate the discredited "separate but equal" doctrine": EGALE Canada, "Toronto Equal Marriage Challenge: Legal Backgrounder", online: EGALE http://www.egale.ca/documents/TO_Backgrounder.htm.

⁷⁵ W. N. Eskridge, Jr., "Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions" (2001) 64 Alb. L. Rev. 853 at 854 [*Equality Practice*].

Evan Wolfson rejects any scheme that will create “two lines at the clerk’s office segregating couples by sexual orientation”.⁷⁶ Kathleen Lahey echoes this sentiment when she states that registered partnerships are “the form of relationship that is reserved for subjected and regulated classes, who are expected to be so eager for the benefits of recognition that they will comply voluntarily, even eagerly”.⁷⁷ Speaking about the PaCS in France, one gay man stated the following: “[l]e PaCS est un sous-mariage. On a accepté d’être traités comme des demi-portions...”⁷⁸ In Canada, EGALÉ, a gay and lesbian national lobby group, argues that anything less than full civil marriage is “similar to the segregated schools that used to exist in the U.S.”⁷⁹ Finally, speaking about the context of New Zealand legislative reform, Nigel Christie worries that registered partnerships set apart same-sex relationships even further from their heterosexual counterparts.⁸⁰

Interestingly, individuals express this view on both ends of the political spectrum. Liberal gay activist Thomas Stoddard favours focussing on marriage because it is:

...the political issue that most fully tests the dedication of people who are not gay to full equality for gay people, and also the issue most likely to lead ultimately to a world free from discrimination against lesbians and gay men.⁸¹

Yet there are completely different rationalizations from within the gay community when it comes to supporting marriage and opposing registered partnerships.⁸² Conservative gay columnist Andrew Sullivan contends that gays and lesbians should not embark of any legisla-

⁷⁶ E. Wolfson, “The Hawaii Marriage Case Launches the US Freedom-to-Marry Movement for Equality” in Wintemute & Andenæs, *supra*, note 19, 169 at 174.

⁷⁷ Lahey, *supra*, note 70 at 274.

⁷⁸ P. Krémer, “Les premiers récits des PaCSés de l’an I” *Le Monde* (27 November 1999) 6 [*Les premiers récits*]; Borillo, *supra*, note 58 at 487-89.

⁷⁹ EGALÉ Canada, “Equal Marriage: Q & A”, online: EGALÉ <http://www.egale.ca/documents/EqualMarriageQandA.htm>.

⁸⁰ N. Christie, “The New Zealand Same-sex Marriage Case: From Aotearoa to the United Nations” in Wintemute & Andenæs, *supra*, note 19, 317 at 320.

⁸¹ T. B. Stoddard, “Why Gay People Should Seek the Right to Marry (1989) *Out/* Look 8 at 10.

⁸² Eskridge acknowledges the different perspectives on the issue: “[s]tate recognition of same-sex partnerships as marriages is a sensible idea that is simultaneously radical and conservative”: *Ideological Structure*, *supra*, note 69 at 113.

tive reform that would “destroy or diminish the status of marriage”.⁸³ For Sullivan, the very “concept of domestic partnership chips away at the prestige of traditional relationships and undermines the priority we give them”.⁸⁴ Sullivan suggests that marriage is preferable to registered partnerships because marriage encourages long-term monogamous relationships.⁸⁵ For proponents of this view, gays and lesbians need to be influenced in that direction.⁸⁶

But even gay social conservatives are not unanimous. While sharing Sullivan’s support of traditional marriages, others are more reluctant to condemn registered partnerships. Registration initiatives are seen as valuable because they also achieve the goal of encouraging individuals to embark upon long-term monogamous unions. In fact, it has been suggested that monogamous, marriage-like registered partnerships should be embraced as a measure to combat HIV and AIDS.⁸⁷

At the other end of the continuum, there are many writers and activists who see registered partnerships as a positive alternative to marriage,⁸⁸ and who suggest that the struggle for same-sex marriage does not preclude “the creation of other institutions for recognition of same-sex unions”.⁸⁹ In Australia and New Zealand, a survey of lesbian and gay couples showed they preferred registered partnerships to same-sex marriage, according to sociologist Sotirios Sarantakos.⁹⁰ The sur-

⁸³ See A. Sullivan, “Here comes the Groom: A (Conservative) Case for Gay Marriage” in B. Bawer, ed., *Beyond Queer: Challenging Gay Left Orthodoxy* (New York: Free Press, 1996) 252 at 254.

⁸⁴ A. Sullivan, “Here Comes the Groom: A (Conservative) Case for Gay Marriage” (1989) 201:9 *The New Republic* 20.

⁸⁵ *Ibidem*.

⁸⁶ *Ibidem*; Eskridge, W. N., Jr., *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* (New York: Free Press, 1996) at 8: “...same-sex marriage is good for gay people and good for America, and for the same reason: it civilizes gays and it civilizes America.”

⁸⁷ Closen, M. L. & Heise, C. R., “HIV-AIDS and the Non-Traditional Family: The Argument for State and Federal Judicial Recognition of Danish Same-Sex Marriages” (1992) 16 *Nova L. Rev.* 809 at 814-15.

⁸⁸ B. Findlen, “Is Marriage The Answer” (1995) *Ms Magazine* 86. See also P.L. Ettlbrick, “Since When is Marriage a Path to Liberation?” (1989) 6 *Out/Look National Lesbian and Gay Quarterly* 8 at 14; N.D. Polikoff, “We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not ‘Dismantle the Legal Structure of Gender in Every Marriage’” (1993) 79 *Va. L. Rev.* 1535.

⁸⁹ *Ideological Structure, supra*, note 69 at 120.

⁹⁰ S. Sarantakos, “Legal Recognition of Same-Sex Relationships” (1998) 23 *Alternative L. J.* 222 at 224 [*Legal Recognition*].

vey indicated that marriage was not the preferred option of over eighty percent of gays and lesbians, the majority choosing registered partnerships as the best form of partnership recognition. In France, a heterosexual man who took out a PaCS with his female partner thought that the registration system was very progressive because it allows same-sex partners to register as well.⁹¹ American lesbian rights activist Paula Ettelbrick counters that opting for marriage over registered partnerships would force gay men and lesbians to assimilate into the mainstream, moving them further away from the goals of gay liberation.⁹² Halley sums up this position by asserting that marriage substitutes; like a registered partnership scheme, “when it is equally available to cross-sex and same-sex couples, may render marriage a little bit less paradigmatic”.⁹³

Those who favour registered partnerships tend to denounce marriage as a “most restrictive, gendered and regressive institution”.⁹⁴ In the survey conducted by Sarantakos, many of the Australians and New Zealanders characterized marriage as “antiquated,” as an institution that “oppresses and brutalizes women” and “not a step to liberation but subjugation”.⁹⁵ Domestic partnerships, on the other hand, were seen as offering increased freedom of choice, sufficient legal support and protection, and easy entry and exit.⁹⁶ Sarantakos suggested that, “cohabiting gays and lesbians experience problems in their relationships not because they cannot marry but rather because their relationship is not legally recognized”.⁹⁷ Thus, a system of registered partnership would meet the needs of gay and lesbian cohabitants.

While many gay and lesbian activists argue that registered partnerships are a poor substitute for marriage, some commentators from

⁹¹ “...il est très différent du mariage dans la philosophie qui permet aux ignobles homosexuels de se marier! C’est un texte progressiste!”: *Les premiers récits, supra*, note 78.

⁹² Ettelbrick, *supra*, note 88 at 17.

⁹³ Halley, J., “Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-sex Marriage Debate” in Wintemute & Andenæs, *supra*, note 19, 97 at 103.

⁹⁴ *Lesbian Wife, supra*, note 74 at 161. See also K.L. Walker, “United Nations Human Rights Law and Same-Sex Relationships: Where to from Here?” in Wintemute & Andenæs, *supra*, note 19, 743 at 748-50.

⁹⁵ *Legal Recognition, supra*, note 90.

⁹⁶ *Ibidem*, at 224.

⁹⁷ Sarantakos, S., “Same-Sex Marriage: Which Way To Go?” (1999) 24 *Alternative L. J.* 79 at 80 [*Same-Sex Marriage*].

socially conservative and religious perspectives do not make such a distinction. Instead, they have equated registered partnerships with marriage, specifically same-sex marriage. For instance, anti-gay, evangelical Chuck McIlhenny, claims that registered partnerships and same-sex marriage are identical.⁹⁸ In Hawaii, the Alliance for Traditional Marriage had the following comment on the state's proposed registered partnership legislation:

While we tolerate homosexuals, the people of Hawaii do not want to grant social approval to homosexual unions by allowing them to marry, even if it's called by a different name: domestic partnerships.⁹⁹

Indeed, for social conservatives who value marriage as a "bedrock institution, unique among all other forms of interpersonal relationships",¹⁰⁰ registered partnerships will only undermine family values.¹⁰¹ Hermina Dykxhoorn, president of the Alberta Federation of Women United for Families argues that registered partnerships, "would be a dumping down of marriage".¹⁰²

B. *The Natural Order of Things: Registered Partnerships as a Stepping Stone*¹⁰³

Another aspect of the debates over registered partnerships centres on the value of establishing registration schemes prior to opening up same-sex marriage.

As outlined previously, for advocates of same-sex marriage, registered partnerships allow governments to make an end run around same-sex marriage. In Hawaii, after the courts in that state ruled that the prohibition against same-sex marriage violated the state constitution,

⁹⁸ Donovan, J. M., "An Ethical Argument to Restrict Domestic Partnerships to Same-Sex Couples" (1998) 8 *Law & Sexuality* 649 at 649, n. 1.

⁹⁹ Barillas, C., "Hawaii's Marriage Foes Take Aim at DP Proposal" *The Data Lounge* (2 December 1998), online: *The Data Lounge* http://www.dataounge.com/data_lounge/news/record.html?record=3702 [on file with author].

¹⁰⁰ Donovan, *supra*, note 98 at 652.

¹⁰¹ Frum, D., "The Fall of France: What Gay Marriage Does to Marriage" *National Review*, 51:21 (8 November 1999) 26.

¹⁰² McLean, C., "Similar but Separate: The 'Gay Benefits' Question Pushes the Distinction Between Household and Family", *Alberta Report*, 26:13 (22 March 1999) 37.

¹⁰³ Mohr, *supra*, note 68 at 239.

the government introduced the *Reciprocal Beneficiaries Act*.¹⁰⁴ For many observers, this was an attempt by the state government to diffuse the push for same-sex marriage.¹⁰⁵ In Vermont, the state government opted to create a separate but apparently equal institution, the civil union, when it was ordered by its judiciary to provide gay men and lesbian with marriage-like entitlements. William N. Eskridge characterizes this move as “a concession to moral and religious traditionalists who seek to preserve the ‘sanctity’ of marriage as the organising institutions in western society”.¹⁰⁶

For some commentators, registered partnerships are an acceptable compromise when viewed as a political strategy. Robinson, speaking about the *Civil Union Act* in Vermont, puts it this way:

We’re finally on the bus. We have a legal status. But we’re at the back of the bus. If I know Vermonters, then as the bus rolls along, the passengers will get to know one another. And as they chat, they will swap seats. And the distinctions will fall.¹⁰⁷

In the case of Hawaii, Thomas F. Coleman argues that establishing registered partnership legislation “would distance the state from a volatile religious dispute”¹⁰⁸ over marriage and, at the same time, the policy would be “the appropriate political remedy for eliminating unjust discrimination against same-sex couples”.¹⁰⁹ It is also suggested that the longer registered partnerships exist without same-sex marriage, the more inclusive the definition of marriage will be:

Domestic partnerships practices are expanding and will become a much larger body of law and policy. By the time equality finally gets won universally, we’ll be in a whole other place about the definition of family, and gay marriage may be become almost irrelevant.¹¹⁰

¹⁰⁴ 1997 Haw. Sess. Laws 383.

¹⁰⁵ *Marrying Apartheid*, *supra*, note 74.

¹⁰⁶ Eskridge, W. N., Jr., “The Emerging Menu of Quasi-Marriage Options” FindLaw’s Writ-Legal Commentary, online: FindLaw http://writ.news.findlaw.com/commentary/20000707_eskridge.html [*Emerging*].

¹⁰⁷ Bonauto, cit. B. Robinson, *supra*, note 30 at 207.

¹⁰⁸ Coleman, T. F., “The Hawaii Legislature Has Compelling Reasons To Adopt A Comprehensive Domestic Partnership Act” (1995) 5 *Law & Sexuality* 541 at 561.

¹⁰⁹ *Ibidem*, at 551.

¹¹⁰ Findlen, *supra*, note 88 at 90.

Another view suggests that same-sex marriage will in fact undermine the progress made through registered partnerships. In jurisdictions that have already established registered partnership systems, some activists fear that the opening up of marriage will spell the end of registered partnerships. If anyone can get married, then governments may decide to restrict entitlements to married spouses.¹¹¹ Ettlbrick fears that, “[w]e will be told, ‘Get married.’ What does that say about the notion that we can choose not to get married?”¹¹² Donovan, who supports same-sex marriage, takes exactly that position. He argues that, “when marriage becomes an option for same-sex couples, then domestic partner benefits should immediately terminate ... those who can marry, should, if they want the benefits of marriage”.¹¹³ The Netherlands offers a case in point: the existence of registered partnerships alongside with gender neutral marriage will be re-evaluated in 2006, and abolishing the partnership scheme is one option to be considered.¹¹⁴

While some fear marriage and registered partnerships are mutually exclusive, academics such as Kees Waaldijk and William N. Eskridge share the view that recognition of same-sex partnerships “comes through a step-by-step process”.¹¹⁵ Waaldijk argues that in Europe, the path to partnership recognition was preceded by a standard sequence of law reform: decriminalisation, anti-discrimination and partnership recognition. In his view, shared by the American scholar Eskridge, registered partnerships and same-sex marriage will only be attained in jurisdictions that have first succeeded in decriminalizing homosexuality, and then in turn provided anti-discrimination protections for sexual mino-

¹¹¹ *Ibidem*, at 86.

¹¹² *Ibidem*, at 86-91.

¹¹³ Donovan, *supra*, note 98 at 667.

¹¹⁴ Waaldijk is of the view that it will be very difficult to abolish the registered partnership status because of the thousands of couples who opted for registration: “The existence of registered partnerships and gender-neutral marriage alongside each other will be evaluated in 2006. I suppose it would then be very difficult to abolish registered partnerships, because of the thousands of couples have that civil status. It seems more likely (and wiser) that by that time it will be decided to make a greater difference between the legal consequences of marriage and those of registered partnership. Already the expression “marriage light” is being used.” Letter from K. Waaldijk to N. LaViolette (26 July 2001) [on file with the author] [*Waaldijk Letter*].

¹¹⁵ See *Equality Practice*, *supra* note 75 at 876; K. Waaldijk, “Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe” (2000) 17 *Can. J. Fam. L.* 62 at 66 [*Civil Developments*]; *Small Changes*, *supra*, note 73.

rities. Partnership recognition, whether in the form of registered partnerships or same-sex marriage is the third step in the sequence. In fact, Waaldijk suggests that, as was the case in the Netherlands, registered partnerships paved the way for same-sex marriage.¹¹⁶ Ivers, President of the Calgary-based Gay and Lesbian Community Services Association, shares this assessment, characterizing registered partnerships as “a step in the right direction” on the road to full marriage rights.¹¹⁷ Thomas B. Stoddard also believes that registered partnerships move society further along the path to equality, but that the ultimate goal remains marriage.¹¹⁸

Finally, Richard D. Mohr suggests that it is difficult to know whether “domestic partnership legislation is a stepping-stone or a distracting impediment to gay marriage”.¹¹⁹ In his view, this will depend on “the specific content of the legislation, the social circumstances of its passage, and the likely social consequences of its passage”.¹²⁰

3. *Registered partnerships vs. other forms of recognition*

A. *Having a say: Registered partnerships vs. de facto recognition*

In Australia, debates have mainly focussed on the value of presumption-based approaches as a model of relationship recognition.¹²¹ Reg Graycar and Jenni Millbank ascribe this tendency to three factors: past law reform assimilated the treatment of cohabiting heterosexual relationships with married couples, constitutional realities, and the influence of gay and lesbian lobby groups.¹²² The concerns of Australian gay and lesbian communities seem to centre on the fact that opt-in systems like registered partnerships do little for vulnerable individuals who have not formalized their relationships and legal affairs.¹²³ Moreover, gays and

¹¹⁶ *Civil Developments, ibidem*, at 87.

¹¹⁷ McLean, *supra*, note 102. See also C. Tobisman, “Marriage vs. Domestic Partnership: Will We Ever Protect Lesbians’ Families” (1997) 12 *Berkeley Women’s L. J.* 112.

¹¹⁸ Stoddard, *supra*, note 81 at 13.

¹¹⁹ Mohr, *supra*, note 68 at 239.

¹²⁰ *Ibidem*.

¹²¹ Graycar & Millbank, *supra*, note 71 at 228. In fact, legislative reform in New South Wales has assimilated same-sex partners with the de facto heterosexual relationship provisions of various laws.

¹²² *Ibidem*, at 229. See also Millbank & Morgan, *supra*, note 71 at 295.

¹²³ Graycar & Millbank, *supra*, note 71 at 258. See also *Legal Recognition, supra*, note 90 at 225.

lesbians express a reluctance to create yet another level in the hierarchy of relationships.¹²⁴

In light of these views, Graycar and Millbank suggest that any registered partnership scheme in Australia “should operate in tandem with comprehensive presumptive recognition, rather than as the only method of relationship recognition”.¹²⁵ Another reason why the two options should be offered in tandem is the fact that governments will want to avoid partners choosing not to formalize their relationships in order to avoid public obligations.¹²⁶

But ascribing a civil status on unmarried cohabitants raises different concerns. As Sarantakos points out, legal status is established without the knowledge and consent of the partners.¹²⁷ Ascription legally binds two individuals without their consent, thus depriving cohabitants of a level of self-determination and personal independence, and in some cases resulting in the forcible outing of gay and lesbian couples.¹²⁸ Registered partnership, on the other hand, has the advantage of requiring the consent of the partners. Moreover, legislative provisions ascribing rights and obligations to individuals in a personal relationship usually require a minimum period of cohabitation. Registered partnerships have the advantage of allowing partners to opt-in to a civil status at any time they wish.¹²⁹

B. *Sign on the dotted line: Registered partnership vs. contract*

In assessing the value of registered partnerships, some authors contrast this option with domestic contracts that allow individuals to legally structure their relationships. Cooper suggests that:

...contract—with its widest element of choice and capacity or differentiation— provides the best way of blurring relational boundaries, challen-

¹²⁴ Graycar and Millbank, *supra*, note 71 at 258, 263.

¹²⁵ *Ibidem*, at 264. The British Columbia Law Institute made a similar recommendation in their Report Respecting the Need to Enact Domestic Partner Legislation: T.G. Anderson, “Models of Registered Partnership and their Rationale: The British Columbia Law Institute’s Proposed Domestic Partner Act” (2000) 17 Can. J. Fam. L. 89 at 94.

¹²⁶ N. Bala, “Alternatives for Extending Spousal Status in Canada” (2000) 17 Can. J. Fam. L. 169 at 194.

¹²⁷ *Same-Sex Marriage*, *supra*, note 97 at 82.

¹²⁸ *Ibidem*.

¹²⁹ Bala, *supra*, note 126 at 185.

ging the notion that only certain relationships—for example, the intimate spousal partnership—constitute the proper location for particular benefits and powers.¹³⁰

However, most agree that the drawback of contracts is the fact that parties can only affect rights between the parties; they cannot bestow the full range of third party entitlements and obligations that may come along with a registered partnership system.¹³¹ In addition, registered partnerships offer a simplified process, and they are not as costly as contracts since they do not require the advice of a lawyer.¹³² However, contracts have the advantage of allowing couples to opt out of statutory regimes.¹³³

Christine Davies, in her analysis of contract and registered partnerships schemes, concludes that contracts remain an important method for individuals to determine their mutual rights and obligations *inter se*. However, she suggests that the “contract is not a sufficient remedy in and of itself”,¹³⁴ and that registered partnerships should also be made available.¹³⁵

4. *Widowed Sisters, Army Buddies, Priests and their Housekeepers: The Issue of Eligibility*¹³⁶

The issue of whether registered partnerships should be restricted to specific classes of individuals, or open to all, can also be divisive.

¹³⁰ Cooper, D., “Like Counting Stars? Re-Structuring Equality and the Socio-Legal Space of Same-Sex Marriage” in Wintemute & Andenæs, *supra*, note 19, 75 at 90, n. 44.

¹³¹ Bala, *supra*, note 126 at 192. See also Davies, C., “The Extension of Marital Rights and Obligations to the Unmarried: Registered Domestic Partnerships and Other Methods” (1999) 17 C.F.L.Q. 247 at 251; Juel, *supra*, note 53 at 327.

¹³² Davies, *supra*, note 131 at 251. See also Kaplan, M., “Intimacy and Equality: The Question of Lesbian and Gay Marriage” (1994) 25:4 *The Phil. F.* 333 at 353.

¹³³ Bala, *supra*, note 126 at 192.

¹³⁴ Davies, *supra*, note 131 at 257. See also Juel, *supra*, note 53 at 327.

¹³⁵ Davies, *supra*, note 131 at 257.

¹³⁶ Frum, D., believes that the registered partnership policy in France extends to “widowed sisters living together, even to priests and their housekeepers”: *supra*, note 101 at 26. In opposing registered partnerships in Canada, S. Robinson, M.P. indicated that it was “unacceptable to diminish the significance of [his relationship to his male partner] by suggesting we be lumped in with army buddies and brothers”: N. Greenaway, “Family Values: Reform MP Ian McClelland Was Caught Between Love for his Gay Son and Loyalty to His Party” *The Ottawa Citizen* (31 October 1999) A14.

In Canada, when Ian McClelland, a Member of Parliament of the Alliance Party, proposed a form of registered partnerships for any two people living in relationships of economic dependence, Svend Robinson of the NDP denounced the idea, characterizing the proposal as a half measure that denied gays and lesbian full equality.¹³⁷ Robinson is quoted as saying:

My relationship with my sister is not qualitatively the same as my relationship with my partner. It is unacceptable to diminish the significance of it by suggesting we be lumped in with army buddies and brothers.¹³⁸

Lahey echoes this sentiment when she states that including other pairs of adults “actually trivialises the effort it has taken to gain recognition for same-sex couples”.¹³⁹ Another commentator suggests that the inclusion of unmarried heterosexual couples in registration schemes allows these couples to “seek the economic benefits of marriage without the social responsibilities”.¹⁴⁰ It is interesting to note that most private sector policies in the United States restrict registered partnerships to same-sex couples, arguing that opposite sex couples can marry should they want access to family employment benefits.¹⁴¹

On the other hand, several writers suggest that the opening up of registered partnerships to more than just gays and lesbians moves society further along the path of recognizing a broader definition of family. This view contends that marriage marginalizes people who are outside that unit, while registered partnerships are more inclusive of evolving forms of families.¹⁴² In denouncing the fight for same-sex marriage, Paula Ettelbrick states the following:

Marriage runs contrary to two of the primary goals of the lesbian and gay movement: the affirmation of gay identity and culture; and the validation of many forms of relationships.¹⁴³

¹³⁷ Greenaway, *ibidem*.

¹³⁸ *Idem*.

¹³⁹ Lahey, *supra*, note 70 at 275.

¹⁴⁰ Donovan, *supra*, note 98 at 657.

¹⁴¹ Juel, *supra*, note 53 at 337, 342-43.

¹⁴² Findlen, *supra*, note 88 at 87.

¹⁴³ Ettelbrick, *supra*, note 88 at 12.

She adds the following with regard to registered partnerships:

The lesbian and gay community has laid the groundwork for revolutionizing society's views of family. The domestic partnership movement has been an important part of this progress insofar as it validates non-marital relationships. Because it is not limited to sexual or romantic relationships, domestic partnership provides an important opportunity for many who are not related by blood or marriage to claim certain minimal protections.¹⁴⁴

From that perspective, many argue that registered partnerships should not ignore the reality of the millions of heterosexuals who cohabit as a family and should have access to similar rights and obligations.¹⁴⁵

It is possible to go even further, to question whether registered partnerships should be based on conjugality altogether. It is argued that broadening the category beyond conjugality is the only approach that conforms to the social justice view of the family:

Part of our struggle is to fight for a broader definition of family. Domestic partners shouldn't have to be gay or lesbian. They shouldn't have to be having sex. They can be two adults sharing a home and sharing commitment, responsible to each other.¹⁴⁶

Nicholas Bala contends that, should two people choose to register their relationships and undertake mutual obligations:

Why should individuals be denied this benefit because they do not have a particular kind of emotional commitment or do not have a sexual relationship?¹⁴⁷

Bala adds that the obligations entailed would probably deter nonconjugal partners, but it would still be preferable to give the choice to all.¹⁴⁸

¹⁴⁴ *Ibidem*, at 17.

¹⁴⁵ Juel, *supra*, note 53 at 343.

¹⁴⁶ Findlen, *supra*, note 88 at 87, citing Paras of the National Gay and Lesbian Task Force. See also *Lesbian Wife*, *supra*, note 74 at 163 for a discussion of the domestic partnership initiative in Madison, Wisconsin.

¹⁴⁷ Bala, *supra*, note 126 at 188.

¹⁴⁸ *Ibidem*.

Interestingly, in some jurisdictions, the inclusion of unmarried heterosexual couples constitutes the most contentious issue. For instance, in Massachusetts, Acting Governor Paul Cellucci vetoed the City of Boston's plan to extend health benefits because the policy extended to unmarried opposite sex couples. Cellucci claimed that he could not sign a bill that "would undermine his support for strengthening traditional marriage".¹⁴⁹ In France, any attempt to include non-conjugal relationships was set aside when the Conseil constitutionnel "construed the new law to require sexual attachment as an essential element of the PaCS relation".¹⁵⁰

5. *Toaster ovens and silverware: The issue of entitlements*

The debates around registered partnerships are also shaped by the issue of the entitlements and obligations the state confers on specific kinds of relationships.

In the United States, registered partnerships have sometimes been viewed as a remedial legal construct, one that provides compensation to individuals who have been denied the economic benefits of marriage.¹⁵¹ Attaining the same basic family benefits as those conferred on married couples is therefore often a goal of those advocating registered partnerships. For instance, in the context of the private sector, the pursuit of domestic partnership benefits

...establishes a civil rights remedy to the pervasive practice of disproportionately providing married employees with health insurance, paid bereavement, family sick leave and other "family" based benefits that are denied to unmarried employees and their families.¹⁵²

David L. Chambers outlines how, when the AIDS crisis hit North America, gay men and lesbians realised the social and legal costs of the lack of recognition of their relationships:

¹⁴⁹ Donovan, *supra*, note 98 at 650.

¹⁵⁰ Halley, *supra*, note 93 at 101. See also Borillo, *supra*, note 58 at 484.

¹⁵¹ Donovan, *supra*, note 98 at 655-56.

¹⁵² Kubasek, N. K. Jennings & Browne, S. T., "Fashioning a Tolerable Domestic Partners Statute in an Environment Hostile to Same-Sex Marriage" (1997) 7 *Law and Sexuality* 55 at 78.

That price revealed itself when the biological families of gay men with AIDS tried to exclude their sons' partners from hospital visitation or from participating in decisions about medical treatment. Conflicts continued after death, with struggles over burial and property. Most urgently, many gay men faced difficulty in gaining access to medical insurance.¹⁵³

Chambers argues that this denial of entitlements played an important role in finally securing a registered partnership policy in San Francisco.¹⁵⁴ Given the lack of medical coverage in the United States, for some there is an added urgency to the issue of partner recognition for same-sex benefits. It is therefore suggested that, in the United States at least, "domestic partnership initiatives have proven to be the most successful option thus far in giving same-sex couples the opportunity to attain some quasi-marital rights".¹⁵⁵ In Canada government and private benefit plans are an added incentive for many.

Yet it is the very issue of entitlements that makes some activists oppose registered partnerships. In the United States, it is argued that registered partnerships do not work as a model of legal recognition because they are impractical:

To be comparable to legal marriage, a domestic partnership policy would need to provide for 150-to-350 rights and responsibilities, depending on the couple's state of residence. Further, it would need to activate at least 1,049 federally regulated rights and responsibilities that are triggered by legal marriage. Furthermore, these benefits would need to be portable so that partnerships remain valid when crossing state lines.¹⁵⁶

The argument is presented somewhat differently by social conservative and religious opponents of registered partnerships. Concerns are voiced about the cost of extending entitlements to same-sex partners, some even suggesting that this is unwise "in the time of AIDS".¹⁵⁷ Indeed, in the United States, opponents of registered partnerships have suggested

¹⁵³ Chambers, D. L., "Tales of Two Cities: AIDS and the Legal Recognition of Domestic Partnerships in San Francisco and New York" (1992) 2 *Law and Sexuality* 181 at 184. See also Bonauto, *supra*, note 30 at 178.

¹⁵⁴ Chambers, *ibidem*, at 184.

¹⁵⁵ Juel, *supra*, note 53 at 322, 344.

¹⁵⁶ *Marrying Apartheid*, *supra*, note 74.

¹⁵⁷ Chambers, *supra*, note 153 at 186.

that extending benefits to unmarried cohabitants could result in massive insurance burdens.¹⁵⁸

For others, the issue of entitlements is not as important as the symbolic societal recognition that comes with registered partnerships. The very fact that the state would provide a forum by which people could make a public commitment to their relationship and hold themselves out as something different than what they were before the registration is of fundamental value in and of itself.¹⁵⁹ This might explain why certain municipalities, such as Hamburg, Germany, would adopt a registration scheme that is essentially symbolic since no rights or obligations are granted.

Yet another view is the one that suggests that no rights or benefits should be based either on marriage or registered partnerships:

Domestic partnership ...is curiously tied to health care ...If universal health care were available, no one would be forced to say, "I want to be able to get married to take advantage of my partner's health insurance benefits".¹⁶⁰

Speaking specifically of same-sex marriage, Nancy Polikoff states:

Advocating lesbian and gay marriage will detract, even contradict, efforts to unhook economic benefits from marriage and make basic health care and other necessities available to all.¹⁶¹

This is perhaps why the Gay and Lesbian Rights Lobby of New South Wales called on governments to disentangle rights and obligations from personal relationships.¹⁶² In Canada, the Law Commission recommended that the federal government re-evaluate the need to tie bene-

¹⁵⁸ Juel, *supra*, note 53 at 335.

¹⁵⁹ *Ibidem*, at 344. Bowman & Cornish, *supra*, note 42 at 1185, make the following argument in relation to marriage: "[i]f marriage conferred no legal rights or obligations, it seems likely that the state would continue to solemnize marriages because that is what people want—a public commitment and a right to hold themselves out as something different than they were before the marriage."

¹⁶⁰ Findlen, *supra*, note 88 at 89. See also "IGLHRC Policy on Marriage" (7 October 1995) IGLHR, online: IGLHR, http://www.iglhrc.org/news/factsheets/marriage_policy.html.

¹⁶¹ Polikoff, *supra*, note 88 at 1549. See also Eitelbrick, *supra*, note 88 at 16-17, where the argument is made in relation to marriage; Walker, *supra*, note 94 at 750-51.

¹⁶² Graycar & Millbank, *supra*, note 71 at 255, 276-77.

fits and obligations exclusively to conjugal relationships.¹⁶³ These critics are therefore wary of any recognition reform, including registered partnerships, which would undermine the redistribution of economic well-being.¹⁶⁴

6. *A slow march to the registration altar: Registered partnership Utilization Rates*

According to Kees Waaldjik, at the end of 2000, more than 30,000 Europeans had opted to register their partnerships.¹⁶⁵ In the Netherlands, it is reported that “there have been two same-sex registrations for every hundred different-sex weddings”,¹⁶⁶ a number that Waaldjik considers quite high. Indeed, in the Netherlands, registered partnerships appear to be the preferred mode of couple recognition for those who have an “aversion to marriage as a traditional institution [sic]”.¹⁶⁷ In France, a study indicates that 43,970 civil unions were entered into between 15 November 1999 and 30 September 2001.¹⁶⁸

However, many contend that most registered partnership schemes suffer from low participation rates, and that this in turn raises concerns about the legitimacy of this new civil status, thereby lending support to the view that registered partnerships are a less than perfect mode of relationship recognition. In France, while many couples opted for the new PaCS, marriage, on the other hand, is two times more popular.¹⁶⁹ In Hawaii, as of October 1999, “only 435 reciprocal beneficiary relationships were on file with the Hawaii Health Department”,¹⁷⁰ leading

¹⁶³ See *Beyond Conjugalilty: Recognizing and Supporting Close Personal Adult Relationships*, (Ottawa: Law Commission, 2001) [*Beyond Conjugalilty*].

¹⁶⁴ See S. B. Boyd, “Family, Law and Sexuality: Feminist Engagements” (1999) 8 Soc. & Legal Stud. 369.

¹⁶⁵ *Small Changes*, *supra*, note 73 at 464.

¹⁶⁶ *Ibidem*, at 449.

¹⁶⁷ *Idem*, at 450.

¹⁶⁸ France, Assemblée nationale, Rapport d’information sur l’application de la loi no 99-944 du 15 novembre 1999 relative au pacte civil de solidarité, No 3383, (13 November 2001) at 10; P. Krémer, “Le premier bilan du nombre de PaCS signés est sensiblement inférieur aux prévisions” *Le Monde* (30 January 2001) [*Premier bilan*].

¹⁶⁹ *Ibidem*, Yet a recent poll taken in France reveals that 70 percent of individuals questioned were very supportive (“très favorables”) of the new PACS: P. Krémer, “En moins d’une année, le PaCS est entré dans les mœurs” *Le Monde* (28 September 2000) 11.

¹⁷⁰ N.G. Maxwell, “Opening Civil Marriage To Same-Gender Couples: A Netherlands-United States Comparison” (2000) 4: 3 E.J.C.L. 1 at 32 online: Electronic Journal

one media outlet to describe the reciprocal beneficiary law as “a bust”.¹⁷¹ In Denmark, it is reported that in the 9 years from 1990 to 1998, a total of 4337 partnerships were registered.¹⁷² This number represents only 0.8 percent of the number of marriages.¹⁷³ In comparison, it is reported that 31,000 marriages are contracted annually.¹⁷⁴ In Belgium, the “cohabitation légale” system is reportedly unpopular. As of June 2000, few couples had registered in the whole of the country, with only eight couples having done so in Brussels.¹⁷⁵

If it is in fact true that registration numbers are low, several authors suggest the following explanatory factors: the reluctance to disclose a same-sex relationship,¹⁷⁶ benefits already received from another source,¹⁷⁷ the unwillingness to take on financial responsibility for a partner,¹⁷⁸ or discouraging formalities.¹⁷⁹

A note of caution: it is difficult to draw firm conclusions as to the popularity of registered partnerships given that statistics are often non-existent or incomplete. For instance, while some states may record the number of unmarried heterosexual cohabitants, statistics of same-sex couples are rarely, if ever, recorded in the majority of the relevant jurisdictions. If one does not know with any degree of certainty what percentage of the population is homosexual, and how many gays and lesbians are cohabitants, it is difficult to assess the popularity of registration.

of Comparative Law <http://www.ejcl.org/43/abs43-1.html>. See also C. Barillas, “Hawaii Beneficiaries Law Languishes in Ambiguity” The Data Lounge (23 December 1997), online: The Data Lounge <http://www.datalounge.com/datalounge/news/record.html?record=2616>.

¹⁷¹ Barillas, *ibidem*.

¹⁷² Lund-Andersen, *supra*, note 38 at 419.

¹⁷³ J. Eekelaar, “Registered Same-Sex Partnerships and Marriages —A Statistical Comparison” (1998) 28 Fam. Law 561 at 561. Interestingly, in Denmark, the stability of registered partnerships is remarkably similar to that of marriages, especially for men: *ibidem*.

¹⁷⁴ Lund-Anderson, *supra*, note 38 at 419.

¹⁷⁵ Wocker, R., “Belgian Partner Law Unpopular” (2000) 80 Euro-Letter 6, online: ILGA <http://www.steff.suite.dk/eurolet.htm>.

¹⁷⁶ Juel, *supra*, note 53 at 335: “...same-sex couples in particular may be likely to feel some apprehension about their relationship becoming a matter of public record”.

¹⁷⁷ *Ibidem*, at 334-35.

¹⁷⁸ Zielinski, *supra*, note 17 at 293.

¹⁷⁹ *Premier bilan*, *supra*, note 168.

V. CONCLUSION

This paper has examined existing models of registered partnerships. There are two principal categories of registration models. The “Marriage Minus” model confers quasi-marital rights and obligations to conjugal partners. The “Blank Slate Plus” models create a new intermediary civil status; registration confers a bundle of entitlements and obligations that does not equate to the one available to married couples, but is often more extensive than the one ascribed to *de facto* cohabitants.

Both models are the subject of multi-layered and complex debates, and diverse views cannot be easily categorized into pro and cons arguments. For instance, the views of gay and lesbian activists and scholars are extremely diverse. Differences of opinion can also be found among socially conservative writers and commentators. One reason for this is the fact that jurisdictions that have enacted registered partnership schemes differ tremendously in terms of their historical, constitutional, political, social, economic and religious contexts. In fact, the popularity of registered partnerships as a law reform option depends significantly on these factors.

However, this discussion has revealed that much of the controversy regarding registered partnerships has centred around continued bans on same-sex marriage. The most divisive debates arise when registered partnerships are pitted against the issue of same-sex marriage. The Law Commission of Canada appears to have come to the same conclusion in its report entitled *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships*. Indeed, the Law Commission links very closely both types of legal reforms:

The introduction of a registration scheme should not be seen as a policy alternative to reforming marriage. Registration schemes in lieu of allowing same-sex couples to access marriage are seen, by those in favour of same-sex marriage, as creating a second-class category of relationships.¹⁸⁰

Furthermore, even with a lifting of the ban on same-sex marriage, registered partnerships as a form of relationship recognition remains a relevant one. As stated in the Canadian Law Commission report, “it is

¹⁸⁰ *Beyond Conjuality, supra*, note 163 at 130.

important to recognize that the removal of restrictions on same-sex marriages does not eliminate the need for the enactment of registration schemes".¹⁸¹ Registered partnerships models could be used to create another relationship recognition option for individuals who reject marriage or who are not in a conjugal relationship, but who nevertheless wish to undertake mutual obligations. The Canadian report therefore recommends both an end to the ban on same-sex marriage as well as the establishment of a partnership registration scheme.

In an increasing number of jurisdictions, public and policy discussions are under way regarding the appropriate way to recognize the spectrum of adult personal relationships. This article has attempted to show that a choice in favour of a registered partnership scheme is unlikely to steer debates away from the larger issue of same-sex marriage. In reforming family law, policy makers should be forewarned that same-sex marriage and registered partnerships are intimately related, and not easily divorced.

¹⁸¹ *Ibidem*, at 130-31.