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FROM CONTRACT TO STATUS: COLLABORATION AND THE EVOLUTION OF NOVEL FAMILY RELATIONSHIPS

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FROM CONTRACT TO STATUS: COLLABORATION AND THE EVOLUTION OF NOVEL FAMILY RELATIONSHIPS[±]

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The past decade has witnessed dramatic changes in public attitudes and legal status for same-sex couples who wish to marry. These changes demonstrate that the legal conception of the family is no longer limited to traditional marriage. They also raise the possibility that other relationships—cohabiting couples and their children, voluntary kin groups, multigenerational groups and polygamists—might gain legal recognition as families. This Article probes the challenges faced by aspiring families and the means by which they could attain their goal. It builds on the premise that the state remains committed to social welfare criteria for granting family status, recognizing as families only those categories of relationships that embody a long-term commitment to mutual care and interdependence and, on that basis, function well to satisfy members' dependency needs. Groups aspiring to legal recognition as families must overcome substantial uncertainties as to whether they meet these criteria if they are to obtain the rights and obligations of legally recognized families. Uncertainty contributes to a lack of confidence in the durability and effectiveness of novel relationships on the part of the aspiring family members themselves, the larger social community and, ultimately, the state. We develop an informal model to illustrate the nature of these uncertainties, as well as the solutions to the possible obstacles they create. Using a hypothetical group consisting of two adult men and two adult women in a polyamorous relationship, we show how legal family status for novel groups can result from an evolutionary process for overcoming uncertainties that uses collaborative techniques to build trust and confidence. Collaborative processes have been shown in other settings to be effective mechanisms for creating trust incrementally and thus appear to offer a way forward for novel families. We show that the successful movement to achieve marriage rights for LGBT couples has roughly conformed to the collaborative processes we propose, and the absence of meaningful collaboration is one factor explaining the stasis that characterizes the status of unmarried cohabitants. This evidence supports the prediction that the future progress of other aspiring family groups toward attaining legal status may depend on how well they are able to engage the collaborative mechanisms that smooth the path from contract to status.

[±] The title, draws on (and challenges) Henry Maine's famous statement that "the movement of progressive societies has...been a movement from Status to Contract." HENRY SUMNER MAINE, ANCIENT LAW 174 (J. Murray, 10th Ed) See Brian Bix, *Private Ordering in Family Law*, 23 Hofstra L. Rev. 249, n. 30 (discussing domestic relations context of Maine's statement).

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INTRODUCTION

Many contemporary scholars and policy advocates challenge the privileged status of marriage, arguing that the state should recognize and support other family relationships.¹ Historically, this challenge has been based on a feminist critique of marriage as a patriarchal institution that oppresses women. But the trend toward greater gender equality in the formal status of husbands and wives has led recently to a more generalized claim that the elevated status of marriage demeans and unfairly disadvantages other families.² These arguments have been influential in the successful movement toward recognition of the marriage rights of same-sex couples. They apply as well to the (as yet unsatisfied) demands by scholars and advocates that other family categories based on adult relationships³ – cohabiting couples and their children, voluntary kin groups,⁴ polygamists, and multi-generational family groups raising children—deserve the legal recognition enjoyed by married couples.⁵

The view that heterosexual marriage should be an exclusive legal status was grounded traditionally in conventional moral and religious norms. Cohabiting, polygamous and same-sex

¹ Often critics argue for the abolition of legal marriage. See MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1996) (challenging the privileged status of marriage and arguing that marital privilege should be transferred to families based on caretaker and dependent); NANCY POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008) (arguing that privileging marriage harms other families); JUDITH STACEY, *UNHITCHED: LOVE, MARRIAGE AND FAMILY VALUES FROM WEST HOLLYWOOD TO WESTERN CHINA* (2011) (arguing that marriage should be abolished and a diverse range of families recognized because marriage is declining and family diversity dominates). See also Mark Goldfeder, *It's Time to Reconsider Polygamy*, CNN Opinion, 12/16/2013 at <http://cnn.com/2013/12/16/opinion/goldfeder-polygamy-laws> (advocating legalization). A Canadian commission argued for legal protection of a broad range of families. Law Commission of Canada, *Beyond Conjuality ; Recognizing and Supporting Close Personal Adult Relationships* (2001).

² Suzanne Goldberg, *Why Marriage?*, in *MARRIAGE AT THE CROSSROADS: THE BRAVE NEW WORLD OF TWENTI-FIRST CENTURY FAMILIES* 224 (M. GARRISON & E. SCOTT, EDs. 2012) (arguing that the argument against marriage as a privileged legal status has shifted to one focused on the harm to non-marital families; Judith Stacey, *supra* note 1 at 8-15. (advocating diversity and challenging feminist opposition to polygamy).

³ We assume that a parent raising a child alone constitutes a family that warrants societal support and resources, but our focus is on families based on adult relationships: For our purposes, “families” are relationships that warrant a special legal status based on their perceived social value in satisfying dependency needs. See text accompanying notes _ to _ *infra*. The qualities of family relationships is discussed in Part I *infra* at _

⁴ Voluntary kin groups are often described as families of choice; family relationships developed by parties without blood or legal ties, Dawn Braithwaite, et al., *Constructing Family: A Typology of Voluntary Kin*, 27 (3) *J. Soc. & Pers. Rel.* 388 (2010) (describing types and functions of voluntary kin relationships). See discussion in Part III C2 *infra*.

⁵ See note 1 *supra*.

unions were considered illicit and therefore undeserving of legal protection.⁶ As contemporary moral norms have evolved, however, the historic justification for this exclusive legal status has weakened. Recent surveys by the Pew Foundation and other polling organizations show growing public acceptance of cohabitation relationships as well as same-sex unions.⁷ Some observers suggest that even polygamous relationships are becoming “normalized,” pointing to the popularity of the television series’ *Big Love* and *Sister Wives*.⁸ Although social acceptance of a broader range of intimate relationships need not result in their recognition by the state as legal families, it is clear that religious and moral sanctioning of non-traditional families has diminished, lowering a barrier to societal recognition of novel family groups.

The transformation in social attitudes creates the possibility of a legal regime that fosters pluralism, allowing individuals to pursue their own vision of the good life in forming family relationships. On this view, fundamental notions of autonomy and fairness support the claim that the liberal state should offer individuals the freedom to undertake whatever family relationships maximize their utility and then should support those families equally.⁹ From a social welfare perspective, however, personal satisfaction is not the sole basis for conferring family status.¹⁰ Families serve the critically important functions of raising children, caring for elderly persons and otherwise satisfying society’s dependency needs. Only relationships that fulfill those functions adequately are likely to attain legal status as families. But a puzzle that remains: Why, in an era of social tolerance, have novel family categories,¹¹ with the exception of gays and

⁶ See discussion of this trend in *Marvin v Marvin*, 557 P2d. 106 (Cal. 1976)(holding contracts between cohabitants enforceable). See also *Lawrence v. Texas*, 539 U.S. 558 (2003)(striking down criminal sodomy law). However, moral norms against illicit sexual relationships do not explain why non-conjugal relationships failed to qualify as family relationships. See discussion in Part IIIC2, *infra* at ---.

⁷ Pew Research Center, *The Decline of Marriage and Rise of New Families*, at 1.

<http://www.pewresearch.org/pubs/1802/decline-marriage-rise-new-families> (hereinafter *The Decline of Marriage*).

⁸ Goldfeder, *supra* note 1. Adrienne Davis, *Regulating Polygamy: Intimacy, Default Rules and Bargaining for Equality*, 110 Colum. L. Rev. 1955 (2010) (suggesting how regulation based on a partnership model could normalize polygamous relationships). *Big Love*, which ran for 5 seasons from 2006-2011, was nominated for Emmy and Golden Globe awards. <http://www.hbo.com/big-love#/big-love/about/index.html>. See discussion of polygamy in Part IIIC1, *infra*.

⁹ The autonomy norm suggests, for example, that the state might provide a menu of family forms from which individuals could choose the option best suited to their needs. Shahar Lifschitz, *Married Against their Will? Toward a Pluralist Regulation of Spousal Relationships*, 66 Wash. & Lee L. Rev. 1535 (2010)(arguing for family pluralism as an intrinsic value and challenging the imposition of mandatory obligations on cohabitants)(discussing the intrinsic value of pluralism as allowing individuals to make life choices); William Eskridge Jr., *Family Law Pluralism: The Guided Choice Regime of Menus, Default Rules and Override Rules*, 100 Geo. L.J. 1881 (2012).

¹⁰ See discussion in Part I *infra* at _.

¹¹ Our analysis of the path to legal recognition focuses on novel family *categories* (not individual novel families) primarily because we predict this is the course regulators are likely to take. As with marriage, once a category is

lesbians seeking marriage rights, failed to attain legal recognition? The answer to this question turns on the effects of substantial uncertainties that impede the pathway to legal status for novel family forms.

This Article develops an informal model to illustrate those uncertainties as well as solutions to the possible obstacles they create. The uncertainties begin with questions the parties themselves will have about the viability of their novel relationship, but also including public ambivalence and the skepticism of lawmakers about the quality of the novel group's relationships. The discrete challenges facing an aspiring family are a function of three conditions that we label novelty, social isolation and non-verifiability. We describe a hypothetical group consisting of two adult men and two adult women in a polyamorous relationship who are initially uncertain whether their family form can succeed in maintaining a long-term commitment to mutual care, interdependency and formal equality. In addition, even as a few such successful families evolve, at first they are likely to be socially isolated, lacking the necessary affiliations with each other to form a mutually supportive normative community and to pursue their goals of public acceptance and legal recognition. Finally, our aspiring families face regulatory uncertainty: the state will lack the information needed to verify the acceptable functioning of the novel class as a precondition to licensing individual families.

Uncertainty in each of these dimensions contributes to a lack of confidence in the durability and effectiveness of novel relationships to adequately fulfill family functions on the part of the aspiring family members themselves, the larger social community and, ultimately, the state. Yet, high levels of uncertainty have been resolved successfully in other contexts through a process of collaboration in which trust in the relationship and confidence in a successful outcome develops incrementally. This raises the question whether collaborative processes can also address the conditions that impede the legal recognition of aspiring families. Here we draw on successful collaborations in commercial settings to describe in a stylized manner an evolutionary, multi-stage process through which the novel group can obtain the rights and obligations of legally recognized families.¹² Initially, by forming collaborative agreements, the

recognized, individuals seeking to register their relationships may be subject to administrative requirements, but not to inquiry about whether their *relationship* satisfies the criteria discussed in the text.

¹² The stages are presented as distinct but, as we discuss in Part IIIA, they are likely to overlap substantially.

parties can build trust and confidence in both the quality and durability of their relationships.¹³ Further, by affiliating in networks, isolated novel families can build a normative community that can provide support, facilitate social awareness and acceptance, and overcome political obstacles to attaining their legal objective.¹⁴ Finally, through an iterative process, the state can develop confidence in the capacities of the novel family category to fulfill family functions.¹⁵

The model sheds light on both the success and failure of two contemporary aspiring family groups in securing legal protection for their relationships. First, it illuminates the process through which same-sex couples have attained marriage rights.¹⁶ We show how these couples seeking official recognition of their families faced the uncertainties we describe and argue that the movement toward marriage equality has roughly tracked the evolutionary process we model. In the early period, despite public opprobrium, same-sex couples entered committed relationships, that were often maintained secretly.¹⁷ But the AIDS crisis and the lesbian baby boom clarified the vulnerability of these family relationships,¹⁸ spurring the formation of a powerful normative community and a network of advocacy groups aimed at gaining public acceptance and legal protection.¹⁹ Legal recognition of family status has then proceeded through an iterative process as regulators and the public have gained confidence in the quality of committed same-sex relationships. Second, the model suggests why cohabitation relationships as a class have failed to attain protected family status.²⁰ Here the sorting problem is acute because cohabiting couples are a heterogeneous category with diverse goals and expectations for

¹³ See Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 Colum. L. Rev. 1377, 1405–10 (2010) and discussion in Part IIB(2) *infra*.

¹⁴ See Walter W. Powell, *Neither Market nor Hierarchy: Network Forms of Organization*, 12 Res. Org. Beh. 2905 (1990) and discussion in Part IIB (3) *infra*.

¹⁵ See Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Forms*, 88 N.Y.U. L. Rev. 170 (2013) and discussion in Part IIB (4) *infra*.

¹⁶ See discussion in Part IIIA *infra*.

¹⁷ William N. Eskridge, Jr., *Democracy, Kulturkampf, and the Apartheid of the Closet*, 50 Vand. L. Rev. 419, 441 (1997).

¹⁸ GEORGE CHAUNCEY, WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY 96–111 (2004) (arguing for significance of HIV/AIDS and assisted reproductive technology as key factors in push for same-sex marriage).

¹⁹ This movement included an effective strategy of signaling to the broader society the marriage-like nature of the gay and lesbian affiliations. See discussion in Part IIIA *infra*.

²⁰ See discussion in Part IIIB *infra*. Cohabitants have struggled to establish claims for support and property rights despite law reform efforts. See Marvin, *supra* note 5; ALI, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, Domestic Partners, 907-944 (2000)(creating and enforcing financial obligations between unmarried cohabitants).

their relationships. This heterogeneity, together with the defining decision not to marry, impedes the creation of networks and sends a confusing signal about the nature of cohabiting unions.²¹ Moreover, the state has not found an effective means of distinguishing those cohabiting partners who are committed to assuming long term family obligations from others who are not.

Finally, the model predicts the course (though not the success) of other novel families seeking legal recognition. Individuals in polyamorous, multigenerational, and voluntary kin groups may perform family functions and aspire to the legal status of established families.²² In our society, these groups are truly novel in the sense that they are not dyadic unions modeled on marriage. They face the uncertainties of novelty, isolation and non-verifiability to varying degrees and, in order to succeed, each group must overcome its own set of challenges. For example, like same-sex couples, polyamorous groups are likely to confront public hostility, but they also face the challenge of creating and enforcing understandings among multiple parties sufficient to sustain well-functioning families. Voluntary kin groups are diverse and face the challenges created by heterogeneity. In each case, the model suggests the impediments to legal recognition and how they might overcome through the various collaborative processes we describe.

At the outset, it may be helpful to make a few clarifying points. Our approach to the issues we address in the Article is primarily descriptive and predictive, rather than normative. We recognize that American law places primary responsibility for satisfying dependency needs on private families and assume that this “neo-liberal” approach is likely to continue.²³ On our view, the assumption of greater responsibility for dependency by the state would enhance social welfare, but the Article does not directly address this important policy issue. We also assume that families based on marriage likely will continue to enjoy broad public support and a privileged legal status, and to be viewed as embodying qualities associated with satisfactory

²¹ Some cohabitants are in marriage-like unions while others cohabit specifically to avoid family obligations. See discussion in Part IIIB *infra*.

²² See discussion in Part IIIC *infra*.

²³ Anne Alstott, *Neo-Liberalism in U.S. Family Law: Negative Liberty and Laissez Faire Markets in the Minimal State*, at http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2459972, June 2014 (challenging this approach); See generally MARTHA FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004) (arguing for collective responsibility for dependency); MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT AND AMERICA'S POLITICAL IDEALS* (2010) (arguing that modern liberal theory discounts families and offers too narrow a conception of the government's responsibility for dependency).

family functioning. Our goal is to explore under what conditions and through what mechanisms other family categories that embody those qualities could attain a similar status.

The Article proceeds as follows. Part I describes demographic changes in American families and in public attitudes over the past half century that have created the possibility that other family forms could be accorded the legal status and resources that marriage enjoys. After describing the useful social functions of families, we argue that marriage is likely to continue to qualify for special treatment, but that other groups successfully performing family functions can also aspire to similar recognition.

Part II develops an informal model that describes predictable obstacles to legal recognition and a multi-stage collaborative process by which a hypothetical aspiring family might overcome these obstacles. Successful collaborations mature into contracts for mutual care and support with enforceable obligations that define relationships in terms of the maintenance of family functions. As these commitments become widely observable, a collaborative network forms among aspiring families: A set of emerging social norms reinforces the stability of those relationships and the families and their leaders signal the quality of their relationships to the larger society, increasing awareness and acceptance. Ultimately, the state verifies that family functions are performed adequately and extends formal recognition through a collaborative process that certifies the novel family category.

In Part III, we first show that the still-evolving process that has led a growing number of states to grant marriage rights to gays and lesbians is consistent with the predictions of the collaborative approach. We then turn to cohabitation and explain how the model developed in Part II sheds light on the failure of cohabitants to gain substantial legal protection. Finally, we examine the unique uncertainties facing other novel families including polygamous and voluntary kin relationships, and briefly address the question of legal recognition for groups assuming more limited family obligations. We conclude that collaborative processes designed to build confidence and trust between the family members and with others (including the state) offers these and other aspiring families the means to resolve uncertainty and ultimately attain legal recognition.

I. MARRIAGE AND THE SPECIAL LEGAL STATUS OF FAMILIES

As the public has increasingly come to accept non-marital families, the claim of marriage critics that the law should recognize and support a broader range of families has become more compelling. In this Part, we briefly sketch these social changes, and then explore the key social functions of families and the qualities of relationships that perform these functions well and are likely to qualify for legal recognition. We examine privileges, benefits and obligations that currently are assigned to marriage, and predict that, although many contemporary marriages fall short, marriage as a category is likely to continue to provide the template for well-functioning families for the public and lawmakers alike. Our analysis also leads us to conclude that other relationship categories that function satisfactorily to fulfill family functions qualify to receive the same level of support and societal resources.

A. FAMILY CHANGE AND THE EVOLUTION OF SOCIAL ATTITUDES

The question that our article addresses-- under what conditions and through what means might the law recognize novel families-- is the subject of serious discussion only because of dramatic changes in family demographics and social attitudes over the past half century. Until the 1960s, both the law and entrenched social norms prescribed heterosexual marriage defined by ascribed gender roles as the only acceptable family form.²⁴ Much has changed since that time. To begin, the proportion of families based on marriage has declined. A recent Pew survey found that barely 50% of American adults were married, the lowest rate ever reported.²⁵ Meanwhile, the percentage of couples living together in non-marital unions has increased steadily, as have the number of children born to unmarried mothers, often cohabiting (at birth) with their children's fathers.²⁶ As a result of the increase in non-marital families and their relative instability (and also higher divorce rates among married couples), more children live in families that include their mothers, new partners and step and half siblings. Gay and lesbian couples also

²⁴ See generally Marsha Garrison & Elizabeth Scott, *Legal Regulation of Twenty-First Century Families*, in GARRISON AND SCOTT, MARRIAGE AT THE CROSSROADS, supra note 2 at 303.

²⁵ Pew Research Center, *Barely Half of U.S. Adults are Married-A New Low* (2011), at <http://www.pewsocialtrends.org/2011/12/14/barely-half-of-us-adults-are-married-arecord-low/?src=prc-headline>.

²⁶ The most comprehensive research on children in unmarried families is the ongoing longitudinal Fragile Families Study, conducted by Sara McLanahan and her colleagues. See e.g. Sara McLanahan and Christine Percheski, *Family Structure and the Reproduction of Inequality*, 34 Annual Rev. Sociology 257 (2008) (reporting 50% of non-marital parents living together at child's birth); Sara McLanahan and Irwin Garfinkel, *Fragile Families: Debates, Facts and Solutions*, in GARRISON AND SCOTT, MARRIAGE AT THE CROSSROADS, at 151.

live together and raise children in a way that was uncommon fifty years ago. And as the traditional nuclear family has become less prevalent, multi-generational groups in which grandparents assist with childcare and adult children care for their parents have taken on new importance.²⁷ Less often highlighted but also a part of the picture of family diversity in the early 21st century are other non-conjugal families made up of relatives or groups of unrelated adults, sometimes called voluntary kin.²⁸

The factors contributing to these demographic changes have been much discussed and are not of central importance to our analysis.²⁹ What is important is the generally tolerant public response to these social developments. Recent polls indicate that most adults in this country have positive or at least neutral views about a broad range of families, expressing accepting attitudes toward non-marital couples with (and without) children and same sex couples.³⁰ In many states, a majority of citizens endorse same-sex marriage.³¹ Younger adults are more accepting of non-marital families than their elders,³² suggesting that attitudes may become increasingly tolerant over time. In a 2010 poll, only unmarried women having children without a partner met with respondents' disapproval.³³

This account oversimplifies somewhat how the public views novel intimate relationships. To be sure, tolerance does not extend to all relationships. Polygamy, for example, continues to be subject to public censure; fundamentalist Mormons and other religious-based groups practicing polygamy have generally been viewed as pathological, arousing public alarm about

²⁷ The Supreme Court has acknowledged the importance of grandparents in children's lives. *Troxel v. Granville*, 530 U.S. 57 (2000)(holding that parents' objection to grandparent visitation must be given substantial weight, but declining to hold grandparent visitation statute unconstitutional).

²⁸ For a general discussion of the diversity of modern American families, see Natalie Angier, *The Changing American Family*, N.Y. Times, 11/26/2013 at http://www.nytimes.com/2013/11/26/health/families.html?_r=0 t. See also Braithwaite, et.al., *supra* note 4_(study of voluntary kin).

²⁹ See discussion in Angier, *id.* Contributing factors to family change include the sexual revolution, availability of birth control, the decline in religious observance, the women's equality movement, etc.

³⁰ Pew, *The Decline of Marriage*, *supra* note ---.

³¹ Pew Research Center, *Changing Attitudes on Gay Marriage*, March 12, 2014, at 4. <http://www.pewforum.org/topics/gay-marriage-and-homosexuality>. A large minority of states recognize same sex marriage (hereinafter *Changing Attitudes*). See National Center of State Legislatures, *Defending Marriage: State Defense of Marriage Laws and Same Sex Marriage* at <http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx#>.

³² Pew, *Changing Attitudes*, *id.* at 6.

³³ Pew, *The Decline of Marriage*, *supra* note ---.

the sexual coercion of young girls.³⁴ Certainly less controversial, but also less familiar, are non-conjugal voluntary kin groups, which thus far have attracted little public or political attention.³⁵ Nonetheless, the recent demographic changes, together with more accepting public attitudes toward a range of families, raise the possibility that other groups besides married couples might gain legal recognition as families.

B. THE QUALITIES OF WELL-FUNCTIONING FAMILIES

Given that our project is to explore whether novel family categories might attain legal recognition, we must answer a threshold question: Why are families so special and what are the qualities of adult relationships that are likely to function adequately as families?

We start with the observation that in contemporary society, a broad public consensus supports the proposition that (at least some) family relationships have substantial social value and should enjoy a special legal status. The reasons for this consensus are straightforward. As many scholars have noted, families do the important work of satisfying society's dependency needs.³⁶ Families care for dependent children, prepare them for citizenship and educate them to be productive members of society.³⁷ Families also assume responsibility for responding to members' physical and emotional needs created by illnesses, disabilities, old age and the ordinary stresses of life.³⁸ Not every family provides necessary or adequate care to its dependent members, of course, but collectively families perform an extraordinarily valuable social function. The state assists families in performing these functions by providing key services and financial

³⁴ A recent Gallup poll found that 86% found polygamy to be morally wrong. Frank Newport and Igor Himelfarb, In U.S., *Record High Say Gay, Lesbian Relations Morally Okay*, Gallup Politics at 2. <http://www.gallup.com/poll/162689/record-high-say-gay-lesbian-relations-morally.aspx>. Elizabeth Emens describes the hostility to polygamy generated by opponents to gay marriage, Elizabeth Emens, *Monogamy's Law, Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U Rev. L. & Soc. Change 277, 277-284 (2004-05) (hereinafter *Monogamy's Law*). For discussion of public attitudes toward polygamy, see text accompanying notes – to -- infra.

³⁵ Scholars and law reform groups have shown some interest. See Law Commission of Canada, supra note 1. See also text accompanying notes – to – infra.

³⁶ See FINEMAN, *THE NEUTERED MOTHER*, supra note 1.

³⁷ See Elizabeth Scott, *Parental Autonomy and Children's Welfare*, 11 Wm & Mary Bill of Rts. J. 1071 (2003). In an earlier article, we described the valuable societal service parents provide and argued that autonomy and state support of parenting is a quid pro quo for parents' assuming responsibilities for raising and educating their children—functions that would otherwise be borne collectively. See Elizabeth Scott & Robert Scott, *Parents as Fiduciaries* 81 V. L. Rev. 2401(1995). See also Linda McClain, *Care as a Public Value: Linking Responsibility, Resources and Republicanism*, 76 Chi-Kent L. Rev. 1673, 1677 (2001).

³⁸ FINEMAN, *THE AUTONOMY MYTH*, supra note 24 at 15-19. In some families, of course, adult members may undertake specialized roles in performing these functions, with some performing direct caretaking services and others providing financial resources that indirectly support caretaking.

subsidies,³⁹ by recognizing intimate family bonds, and by defining family rights and obligations.⁴⁰ Family members performing their roles responsibly save societal resources that otherwise would be expended in providing adequate care for children and for elderly and disabled persons.⁴¹ Even if the state were to assume a far greater responsibility for satisfying society's dependency needs as many reformers have advocated, families would continue to play a critical role.⁴²

Many individuals and groups may assume the burden of caring for others, but not all will attain legal recognition as families. Biological relationship is neither a necessary nor a sufficient condition for protected legal status.⁴³ The nephew who resides with his aunt and uncle while attending college and assists with babysitting is not in a “family” relationship that is acknowledged by law—though his co-residents are.⁴⁴ What then are the qualities that identify adult affiliations as family relationships? On our view, a contemporary family that is based on adult relationships embodies several key attributes: a demonstrated commitment to a long-term emotionally intimate affiliation in which the parties usually live together in a relationship of relative equality, the assumption of responsibility for mutual care (and the care of children or other dependent family members), financial interdependence, and the understanding that members' welfare is prioritized above that of others.⁴⁵ Family bonds are built on trust that enables each member to rely on others to fulfill their roles and to “be there” in good times and

³⁹ Government services that assist families in raising children and caring for dependency includes free public schools, subsidized day care, TANF subsidies, nutrition programs, Medicaid and social security spousal and survivor benefits. See CURRIE, *supra* note _ (discussing safety net programs). See also CLARE HUNTINGTON, *FLOURISHING FAMILIES: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* (2014)(critiquing current policy as inadequate and proposing how law could fully support families.)

⁴⁰ The state recognizes family bonds in guardianship law, in the duty to rescue children and spouses and in laws governing intestacy. Divorce regulation of property division and support define financial spousal obligations. See note -- *supra*.

⁴¹ FINEMAN, *THE NEUTERED MOTHER*, *supra* note 1 (arguing that the government should support and compensate families for their critical role in caring for dependency needs) ; FINEMAN, *THE NEUTERED MOTHER as Fiduciaries*, *supra* note – at -; (describing *quid pro quo*); see also, Collins, Leib and Markel, *supra* note - at 1355-56 (describing how special legal protections of families are compensation for the services families provide, thereby relieving the state of their cost).

⁴² Text accompanying note _*supra*.

⁴³ See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989)(upholding statute denying parental rights unmarried biological father of child born to married couple).

⁴⁴ Similarly three young adult cousins likely would not be eligible to rent a house zoned for “single-family” residences.

⁴⁵ Some of these traits might be contested but we think our description is consistent with conventional understandings. Courts evaluating whether *de facto* relationships constitute family relationships point to these qualities. See cases discussed in note 88(?) *infra*.

bad. The nephew in our example is not in a family relationship with his aunt and uncle because the co-residency arrangement is time-limited as are any mutual obligations of the parties. The core qualities we have identified – a demonstrated, long-term commitment and the assumption of mutual care and financial responsibility -- increase the likelihood that family relationships will be stable and sustainable and can be relied on to fulfill the important functions of satisfying dependency needs.

C. MARRIAGE AS AN ENDURING FAMILY FORM

Although it would seem that other groups that embody the qualities of well-functioning families might qualify for legal recognition and protection, marriage continues to be the sole legal family accorded full legal protection. In this section we describe the legal attributes of marriage that aspiring families do not (but might wish to) enjoy. We then briefly review the critiques of contemporary law by scholars and advocates, many of whom challenge the continued utility of marriage. We conclude that despite its deficiencies, marriage seems likely to retain its protected status; this is so because lawmakers and the public continue to view marriage as a relatively well functioning family form, a view with some empirical support.

1. Contemporary Marriage as a Privileged Status

Marriage is a relationship defined by legal rights and obligations that do not apply to other families.⁴⁶ Marriage confers tangible financial benefits and privileges, including social security survivor benefits, estate tax exclusions, health insurance benefits for government employees, as well as special status under residential zoning laws and the opportunity to protect property from creditors.⁴⁷ Married couples are also granted rights and privileges based on the presumed closeness of their relationship, such as surrogate decisionmaking authority and

⁴⁶ The General Accounting Office famously reported more than 1000 references to marital status in the United States Code, many of which conferred benefits on married couples that other families do not enjoy. U.S. Government Accounting Office, Defense of Marriage Act (Publ. No. GAO-OGG-97-16, 1/31/1996 at <http://w/archives/1997og97016.pdf>

⁴⁷ Perhaps the most comprehensive accounts have been offered by advocates seeking marriage rights for gays and lesbians and by courts holding that their exclusion violates the principle of equal protection. See *Goodrich v. Dep't of Public Health*, 798 N.E.2d 941, 355-57 (2003) at _ (cataloguing marital rights and privileges under Massachusetts law); *Varnum v. Brien*, 763 N.W.2d 862 (2009)(same under Iowa law). See also Nicole Berg, *Designated Beneficiary Agreements: A Step in the Right Direction for Unmarried Couples*, 2011 U. Ill. L. Rev. 267 (discussing marital benefits). See discussion in JESSE DUKEMINIER, JAMES KRIER, GREGORY ALEXANDER & MICHAEL SCHILL, *PROPERTY* (8TH ED.) (2014) at 321 (discussing creditor protection dimensions of property acquired by spouses as tenants by the entirety).

inheritance rights.⁴⁸ Further, as LGBT advocates have argued, marriage as a legally privileged family form carries intangible value beyond its tangible benefits.⁴⁹ Married couples also have legal obligations to one another that are not imposed on members of non-marital families. By virtue of marital status, spouses cannot unilaterally disinherit one another,⁵⁰ and under property distribution laws applied at divorce,⁵¹ each spouse has a right to share in earnings and property acquired during the marriage by the other.⁵²

To be sure, non-marital families are not deprived of all legal and constitutional rights.⁵³ But these groups are disadvantaged as compared to families based on marriage in many ways that can undermine their functioning. Adults in self-identified families can contractually assume financial obligations to one another but otherwise no familial rights or duties inhere in their relationships.⁵⁴ Moreover, these relationships receive little support or recognition from the state; they do not receive social security spousal benefits, estate tax advantages, inheritance rights, or (usually) health insurance benefits.⁵⁵ Further, although the parent-child relationship receives

⁴⁸ See Berg, *id. at* --. .

⁴⁹ In states that recognized civil union status for gay couples (replicating most marital rights), the emphasis shifted from tangible rights to the dignitary harm of exclusion. Perry v. Schwarzenegger, 704 F. Supp. 2d. 921 (2010) (finding Proposition 8 prohibiting same sex marriage unconstitutional, despite availability of civil unions)

⁵⁰ See DUKEMINIER ET. AL., *id.* at 384-386.

⁵¹ See generally discussion of marital property rights and division on divorce IN IRA ELLMAN, ET. AL., FAMILY LAW: CASES, TEXTS, PROBLEMS 317- 350 (5TH ED. 2010).

⁵² Wage-earning spouses may also be subject to a duty to pay alimony. *Id.* at __. Spouses have a duty to rescue one another under tort law, whereas a non-marital family member faces no liability for allowing his loved one to starve. Jennifer Collins, Ethan Lieb & Dan Markel, *Punishing Family Status*, 1327 B.U. L. Rev. 1327 at 1335 (2008) (discussing special liability of parents and spouses for failure to rescue).

⁵³ Most importantly, the parent-child relationship receives substantial legal protection, regardless of the marital status of the parents. Meyer v. Nebraska, 262 U.S. 390 (1923)(parents have constitutionally protected liberty interest to guide children's education); Pierce v. Society of Sisters, 268 U.S. 510 (1925)(same); Yoder v. Wisconsin, 406 U.S. 205 (1972)(state cannot apply mandatory attendance law to Amish children). The Court has also struck down laws discriminating against children born to unmarried mothers. See *Levy v. Louisiana*, 391 U.S. 68 (1969)(striking down statute prohibiting children born to unmarried mothers to sue under the state's wrongful death statute); Unmarried parents receive less protection than their married counterparts. See *Michael v. Gerald D.*, 491 U.S. 110 (1989) (upholding California statute creating presumption of legitimacy for child born to married mother against child's biological father seeking access).

Courts, including the Supreme Court, Sometimes have accorded legal protections to other non-marital families. Moore v City of East Cleveland, 431 U.S. 494 (1977)(finding ordinance definition of family that prohibited grandson from living with grandparent unconstitutional under Due Process clause). See also Eisenstadt v. Baird, 405 U.S. 438 (1972)(state law prohibiting unmarried persons from having access to contraceptives violated 14th Amendment).

⁵⁴ *Marvin v. Marvin*, 557 P2d. 106 (Cal. 1976)(holding contracts between cohabitants enforceable).

⁵⁵ It is not surprising that activists for same sex couples' relationship rights in response to the AIDS crisis: the experience of exclusion from family health benefits, medical proxy decision-making authority and guardianship priority underscored that even long-term committed gay and lesbian relationships received no legal protection. See Part IIIA, *infra*. Indeed, until recently, these unions were legally prohibited in many states. See *Lawrence v Texas*,

substantial legal protection,⁵⁶ the relationship *between* unmarried parents does not.⁵⁷ The dependent parent has no claim to alimony or a share of her partner's property if the relationship ends even though these financial awards redound to the benefit of the children. Unmarried parents also have no inheritance rights; children in non-marital families may have to share a parents' estate with a more distant relative not living in the household.

Scholars and law reform advocates have sharply criticized the elevated legal status of traditional marriage and argued for legal protection of other family relationships. The LGBT marriage equality movement has offered the most prominent and successful challenge, of course.⁵⁸ But other reformers have argued that a broad range of non-marital families-- including single parent families, unmarried couples and their children and adults in non-conjugal relationships-- should be accorded legal parity with marriage."⁵⁹ Finally, a few scholars have explored the social and legal response to polyamory and tackled the challenge of designing a regulatory regime for polygamous relationships.⁶⁰

The contemporary critique has shifted somewhat from the well-established feminist argument that marriage is a hierarchical, patriarchal institution that oppresses women to a broader challenge based on principles of liberty, equity and equality.⁶¹ Many critics today focus

539 U.S. 558 (2003) (finding criminal anti-sodomy statute unconstitutional as a violation of same-sex consenting adults' right of privacy).

⁵⁶ See note *_ supra* (discussing protection of parent-child relationship. Further many government programs aim to provide services to children of unmarried parents in poor families. Medicaid, SCHIP and WIN programs are federally funded. Many states also have child care programs. For a comprehensive discussion of safety net programs, see generally JANET CURRIE, *THE INVISIBLE SAFETY NET: PROTECTING THE NATION'S POOR FAMILIES AND CHILDREN* (2006).

⁵⁷ Meryl Weiner, *Caregiver Payments and the Obligation to Give Care or Share*, 59 *Vill. L. Rev.* 135 (2014) (explaining that few financial obligations run between unmarried parents to the detriment of caregivers and arguing for increasing those obligations for both unmarried or married parents).

⁵⁸ See generally Stoddard, *supra* note --. WILLIAM ESKRIDGE, *THE CASE FOR SAME SEX MARRIAGE* (1996). *But see* Franke, *Longing for Loving*, *supra* note -- (arguing that after *Lawrence v Texas*, gays and lesbians should fight to protect the unregulated territory for relationships between marriage and criminality, an area endangered by marriage). For a breakdown of state laws, see National Center, *supra* note _.

⁵⁹ See generally Nancy Polikoff, *Making Marriage Matter Less: The ALI Domestic Partnership Principles are one Step in the Right Direction*, 2004 *U. Chi. L. Forum.* 353 (expressing approval of the ALI Principles on this ground). Martha Fineman and Judith Stacy argue for the abolition of marriage. See note 1 *supra*. See *BEYOND CONJUGALITY*, *id.*

⁶⁰ See gen. Davis, *supra* note 7; Elizabeth Leshner, *Protecting Poly: Applying the Fourteenth Amendment to the Nonmonogamous*, 22 *Law & Sexuality* 127 (2013) (developing substantive due process argument for legal protection of polyamorous relationships); Emens, *Monogamy's Law*, *supra* note --, probes the hostility to polyamorous relationships and describes non-pathological nature of these relationships .

⁶¹ Of course, some feminists continue to reject marriage as harmful to women, emphasizing that married women's caretaker/homemaker role often leaves them financially vulnerable on divorce. See Weiner, *supra* note _ at 135 to

primarily on the deficiencies of marriage⁶² and on the harm to non-marital families of privileging marriage and withholding its benefits from other groups that fulfill family functions.⁶³ Other scholars argue that the liberal state should support a broad range of family options, allowing individuals to pursue their conception of the good life.⁶⁴

A general theme emerges from these critiques: A wide range of diverse families function (at least) as well as (different sex) marriage and the exclusive legal privileging of marriage can no longer be justified. The various critiques accept the social value of *families*, but challenge the notion that traditional marriage warrants the special status that it has long enjoyed.⁶⁵

2. The Durability of Marriage as a Family Form

Even though many contemporary marriages do not embody qualities of stability and mutual care,⁶⁶ substantial evidence supports that marriage continues to be widely regarded as a

137. But see Goldberg, *supra* note 2 at 233-34 (pointing to legal reforms that have created formal gender equality in marriage to challenge argument that marriage by gays would transform the institution).

⁶² Judith Stacey, for example, derides marriage as a flawed and obsolete institution in an era in which almost half of marriages dissolve and many spouses (mostly husbands on her account) fail to live up to their vows. See generally Judith Stacey, *Forsaking No Others: Coming to Terms with Family Diversity*, in GARRISON AND SCOTT, *MARRIAGE AT THE CROSSROADS*, *supra* note 2 at 201

⁶³ See Martha Fineman, *supra* note 1 (marriage is the key mechanism through which dependency is privatized in American law). See also POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE*, *supra* note --. Polikoff's book (and earlier work) comprehensively argues for protection of all families and documents the harms to non-marital families under the current regime. She argues that the legal benefits associated with marriage, such as family health insurance, social security survivor benefits and inheritance rights, are just as important to the welfare unmarried gay and straight couples, siblings, adult children living with elderly parents and other groups living in long term relationships. See also Nancy Polikoff, *Ending Marriage as We Know It*, 32 Hofstra L. Rev. 201 (2003).

⁶⁴ See Eskridge, *Family Law Pluralism*, *supra* note 8 at 1818-1725 (arguing for a utilitarian approach of guided choice to family formation that supports individual flourishing and the value to family members); Shahar Lifschitz, *supra* note --. See also Shahar Lifschitz, *supra* note _ (arguing for family pluralism as an intrinsic value and challenging the imposition of mandatory obligations on cohabitants).

⁶⁵ A few scholars have questioned the law's deferential treatment of families. Mary Anne Case, for example, challenges the assumption that employers, employees and taxpayers should be responsible for substantially subsidizing parents in their role of raising their children. Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions about Where, Why and How the Burden of Care for Children Should be Shifted*, 76 Chi-Kent L. Rev 1753 (2001). Other scholars have challenged of benefits of family status in the criminal justice system, criticizing testimonial privilege, sentence reductions and effective immunity from prosecution for harboring a family member. See Collins, Leib and Markel, *supra* note --.

⁶⁶ The relatively high divorce rate in this country varies substantially on the basis of class; it has declined substantially since the mid-1980s for educated couples, but remained high for working class couples. See JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY*, at 15-16 (2014). Spouses can avoid financial interdependence through separate bank accounts and (in many states) property ownership and premarital agreements. See discussion of marital property ownership in equitable distribution (vs community property jurisdictions, *supra* note --).

well-functioning family form.⁶⁷ Public attitudes toward marriage are positive;⁶⁸ most individuals, even in non-marital families, aspire to marriage.⁶⁹ Moreover, courts and legislatures often have invoked marriage as the template for evaluating the claims of parties in non-marital family relationships that their affiliations should qualify for legal benefits.⁷⁰ It is not surprising perhaps that advocates seeking legal protection for these relationships emphasize their similarity to marriage.⁷¹

The empirical evidence as well indicates that families based on marriage, even today, tend to embody the qualities we have identified as contributing to satisfactory family functioning. In general, spouses are much more likely to share income and property than are cohabiting couples.⁷² Moreover, despite the relatively high divorce rate, marriages tend to be more stable than informal family relationships; that stability translates into advantages for children in educational attainment, social adjustment and other measures of well-being.⁷³

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⁶⁸ See discussion in note _ supra (citing survey that 78% plan to marry).

⁶⁹ According to a 2013 Gallup poll, 78% of respondents who had never been married wanted to get married. When asked why they were not married at the present time, most respondents indicated they hadn't found the right person, they were too young/not ready, or they were waiting because of financial considerations. *Marriage*, GALLUP, <http://www.gallup.com/poll/117328/marriage.aspx#1> (last updated Aug. 1, 2014).

Social scientists find that marriage has become idealized as a marker of financial and personal success and is viewed as out of reach by many poor and working class individuals. Kathryn Edin has found that both women and men hold this view. KATHRYN EDIN, *DOING THE BEST I CAN* (2013); *PROMISES I CAN KEEP* (2005). See also McLanahan and Garfinkel, *supra* note 27 at 151; Andrew Cherlin, *The Growing Diversity of Two-Parent Families*, *id.* at 290

⁷⁰ For a discussion of the use of marriage as a template for family relationships both by lawmakers and advocates in the marriage equality movement, see Part IIIA *infra*. Courts also have compared relationships to marriage in evaluating whether they qualify as "family" relationships. See also *Braschi v. Stahl Associates*, *supra* note _.

⁷¹ See discussion in text accompanying notes _ to _ *infra*. The priority assigned by LGBT advocates to attaining marriage rights for same-sex couples suggests the continued importance of marriage. See Part IIIA *infra*. This priority has been controversial in the gay community. Paula Ettelbrick and Thomas Stoddard famously debated whether marriage should be a key political goal of the gay community. See Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, *Outlook*, Fall 1989, at 9; Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, *Outlook*, Fall 1989, at 14. See also Katherine Franke, *Longing for Loving*, 76 *Fordham L. Rev.* 2685 (2008)(challenging efforts to gain marriage equality by arguing that same sex relationship are marriage-like).

⁷² See Michael Pollard and Kathleen Harris, *Cohabitation and Marriage Intensity: Consolidation, Intimacy and Commitment*, RAND, Natl Instit. Child Health & Hum Devp't. (2013). These researchers compared marriage and cohabitation, using a large data set of young adults . They found that 68% of married couples had joint checking accounts v. 16% of cohabitants. Marital property is shared on divorce unless the spouses affirmatively opt out through premarital agreements, an option chosen by only a small percentage of married couples. Heather Mahar, *Why Are There So Few Prenuptial Agreements?*, Harvard John M. Olin Center for Law, Economics and Business Discussion Paper Series, Discussion paper 436, September, 2003, at http://www.harvard.edu/programs/olin_center/ (describing studies finding 1.5%, 5%, and 5%-10% of marrying couples have prenuptial agreements).

⁷³ The recent National Survey of Family Growth found that almost half of those cohabitation unions that do not transition to marriage dissolved within three years. 40 percent of first cohabitation transitioned to marriage by 3 years, 32% remained intact and 27% dissolved. Casey Copen, Kimberley Daniels, & William Mosher, *First Premarital Cohabitation in the United States: 2006-2010 National Survey of Family Growth*, Nat'l Health Statistics

Although many factors contribute to the differences, including substantial selection effects, some of the benefits accruing to marital families inhere simply in the stability of marriage itself.⁷⁴

Scholars have argued that the relative stability of marital families in part is a function of legal and normative influences on the behavior of spouses that support the bond between them. The formal commitment undertaken by couples entering marriage is not casual; it is typically involves the ceremonious assumption of mutual obligations.⁷⁵ Marriage can be set aside only through the formal legal process of divorce, which even today carries high social and legal costs.⁷⁶ But beyond its formal legal structure, marriage is embedded in informal social norms that prescribe expectations for spousal behavior and underscore its nature as a family relationship defined by long-term commitment. These norms are internalized, reinforcing trust, and are also enforced externally through informal sanctions.⁷⁷ Although the norms regulating marriage

Rep. Center for Disease Control, April 4, 2013 at 5. Get 5 year statistics. Pollard and Harris, *supra* note __, found substantially lower levels of commitment between cohabitants than between spouses. Sara McLanahan and her colleagues in an important longitudinal study, the Fragile Families and Child Well Being Study, have found that children born to unmarried parents are far less likely to be living with both parents at age five than those born to married parents. See discussion of study, *supra* note –

⁷⁴ More educated and wealthier couples marry at far higher rates than poorer, less educated couples and many of the differences in outcomes can be attributed to this selection effect. See CAHN AND CARBONE, *supra* note __ at __. But not all. See Robert Emery, Erin Horn, and Christopher Beam, *Marriage and Improved Well-Being*, in Garrison & Scott, *MARRIAGE AT THE CROSSROADS*, *supra* note 2 at 126 (using twin study to confirm marital benefits). See also Deborah Carr and Kristen Springer, *Advances in Families and Health: Research in the 21st Century*, J. Marriage & Fam. 742 (2010)(review of research showing marital benefits). This does not mean, of course, that coercing unmarried couples to marry would produce stability.

⁷⁵ For a discussion of the role of wedding ceremonies and traditions such as wedding rings in reinforcing marital commitment, see Elizabeth Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901(2000). See also Elizabeth S. Scott, *A World without Marriage*, 41 Fam. L. Q. 531 (Fall 2007).

⁷⁶ Economists Shelly Lundberg and Robert Pollak argue that the high cost of divorce, including the internalized sense of personal failure, defines marriage as a relationship of inter-temporal commitment and is a key distinction between marriage and cohabitation. On their view, this commitment facilitates a long term investment in children, a goal that motivates contemporary marriage. Shelly Lundberg & Robert Pollak, *Cohabitation and the Uneven Retreat from Marriage in the U.S., 1950-2010*, September 2013 at NBER Working paper 19413 at 14 <http://www.nber.org/papers/w19413>.

Upon dissolution, the financial obligations undertaken by the spouses usually are legally enforceable. See Elizabeth Scott & Robert Scott, *Marriage as Relational Contract*, 84 Va. L. Rev. 1225 (1998)(describing through property distribution on divorce). In community property states, property and income acquired during marriage is community property. In other states, marital property is subject to equitable distribution on divorce, unless the couple opts out through a prenuptial agreement. See generally ELLMAN, ET AL., at 317-380 for a discussion of property distribution on divorce). See also text accompanying note __ *infra* (discussing small portion of couples executing prenuptial agreements).

⁷⁷ Scott, *Social Norms*, *supra* note -- (arguing that traditional marriage was regulated by commitment norms and gender norms, which became bundled, contributing to contemporary criticism of marriage). The couple's community sanctions violations through gossip and other expressions of disapproval. *Id.* at 1920-1923.

function imperfectly in contemporary society,⁷⁸ they tend to support marital commitment by guiding spouses' behavior in ways that strengthen relationships and deter behavior that may have a destabilizing effect on the relationship.

In sum, marriage occupies a secure status as a legally recognized family with broad public support. Moreover, although marriage has become both less common and less stable in modern times, the weight of the evidence is that marriage as a category continues to fulfill relatively well the functions that justify its protected legal status.

C. EXTENDING STATE BENEFITS TO OTHER FAMILIES

The fact that the law confers deference and societal resources on marriage does not mean that the privileged status of this traditional family form should be *exclusive*. In a liberal society, fundamental principles of autonomy support a state policy that promotes pluralism and provides opportunities for individuals to form family relationships that bring happiness and satisfy their needs.⁷⁹ Moreover, the current social climate makes such a pluralist approach feasible. But while autonomy values argue for expanding choice beyond traditional legal boundaries, social welfare concerns predictably will be invoked to justify restricting family status to those relationships that predictably will fulfill the legitimate state interest in reliably satisfying dependency needs. Legal privileging of families absorbs resources that are not available for other social purposes: estate taxes not paid by surviving spouses, for example, are lost to the federal treasury. Nonetheless, this allocation of resources is justified when an aspiring family group fulfills the socially valuable functions identified above, thereby relieving the state of part of its collective obligation to care for dependency. In sum, while not all claimants warrant special family status, groups that care adequately for members' dependency needs and have the qualities of commitment, durability and emotional and financial interdependence deserve legal recognition and support.

On occasion, lawmakers have acknowledged this point. As we have discussed, legal benefits are sometimes extended to adult *de facto* relationships on the basis of their similarity to

⁷⁸ Id. at 1940. This is so for two reasons: first, the norms themselves are weaker and, second, the greater anonymity and mobility of urban society dilutes their effectiveness.

⁷⁹ A pluralist approach allows individuals to pursue their own conceptions of the good life, which for many people surely includes living in families that satisfy physical and emotional needs. *Supra* note – (citing articles arguing for pluralist approach).

marriage.⁸⁰ Courts have also recognized *de facto* parent-child relationships in situations in which an adult has functioned in a parental role for an extended period in a family setting.⁸¹ But despite general public tolerance of a diverse range of families, the success of gays and lesbians in gaining access to marriage represents the only discernible trend toward elevating the legal status of a category of non-traditional family.

This presents a puzzle. In a society in which the public accepts family diversity, and acknowledges the importance of families to individual and collective welfare, what explains the legal inertia? Are there particular conditions that impede legal recognition of non-marital families? The answers to these questions can shed light on why some non-marital families have failed to obtain legal protection despite more tolerant social attitudes.

II. A COLLABORATIVE MODEL OF THE EVOLUTION OF NOVEL FAMILY FORMS

In this Part, we seek to explain the legal inertia and to specify a process by which aspiring family groups might attain their goal. We develop an informal model that describes a multi-stage collaborative process by which novel family forms can achieve legal status as families. Our analysis begins with the premise that the state appropriately grants legal privileges and benefits to families because these groups supply important social goods for which the state would otherwise be responsible.⁸² In Part IIA, we show that, owing to the effects of uncertainty about whether novel family groups satisfy this criterion, the parties face challenging conditions that impede their progress

⁸⁰ Courts assessing whether some non-marital couples deserve recognition as “families” have evaluated their relationships against a metric of marital family behavior and attributes—pointing to their durability, history of financial interdependence, care during illness and intimate companionship. See *Braschi v. Stahl Assoc. Co.*, 543 N.E.2d 49 (N.Y. 1989) (couple qualify as “family” under rent control ordinance based on marriage-like relationship). See also *Connell v. Francisco*, 898 P.2d. 831 (Wash. 1995) (upholding equitable distribution of property between cohabitants on basis of marriage-like quality of relationship). See also Douglas NeJaime, *Before Marriage: The Unexplored History of Non-marital Recognition and its Relationship to Marriage*, 102 Cal. L. Rev. 87, 113 (2014) (explaining that California advocates for domestic partnership rights in 1990s argued that gay unions were marriage-like).

⁸¹ Many cases involve lesbian *de facto* parents living with the child and legal (birth) mother. Courts have allowed visitation rights when petitioners can show they functioned as a parent with the agreement of the parent for an extended period of time. See e.g. *V.C v. M.J.B.*, 748 A.2d 549 (N.J. 2000) (*de facto* parent had standing to seek visitation). When the gay couple marries, the spouse becomes the legal parent to children born to the marriage.

⁸² We do not challenge that historically marital privilege may have had other justifications, but assume that in contemporary society, the legitimacy of marital privilege is based on its social utility as a family form.

toward gaining legal recognition as families. In Part IIB, the uncertainty is resolved in the model through three stages of an integrated process, each of which is defined by a form of collaboration. Collaborative engagement in the development of novel commercial relationships provides exemplars of how these impediments have been overcome in other contexts. This analysis illuminates the mechanisms parties use to make credible commitments to each other, signal those commitments to others, and engage with the state in verifying their compliance with established norms.

A. CONDITIONS IMPEDING THE LEGAL RECOGNITION OF NOVEL FAMILY RELATIONSHIPS.

We begin with a thought experiment. Consider a group composed of two men and two women, who have developed close emotional and sexually intimate relationships with one another and wish to live together as a single family bound by a long term commitment to mutual support, interdependency and equality.⁸³ They plan to pool their earnings and property and to have children and care for them collectively. Will this group face conditions that impede their efforts to secure the rights and obligations currently bestowed on marital families? Our thought experiment yields the prediction that an aspiring polygamous family⁸⁴ will confront three significant obstacles on the path to legal recognition.

The first challenge this group faces is relational uncertainty or novelty: family relationships such as these are experimental, and even close emotional bonds are not predictive of whether the group will function well as a family. Lacking models of similar relationships that have succeeded in forming families, the individual members of the polygamous family will be unsure whether their affiliation will be durable and whether the trust and confidence that support long-term commitment will develop. A second difficulty inheres in the fact that novelty also implies idiosyncrasy. In the initial stage, there are few other polygamous families with similar aspirations with whom to share experiences. Thus, even if they can develop the means to create the necessary trust in each other's capabilities, a polygamous family may be socially isolated, lacking a community of similar aspiring families. The nature of their relationship will also be

⁸³ The commitment of our hypothetical polygamous family to formal equality and mutual support and loyalty distinguishes this aspiring family from other polygamous groups, such as fundamentalist Mormons, that are organized hierarchically around a single dominant male figure. See Davis, *supra* note -- at 1.

⁸⁴ Polygamy is defined as plural marriage with multiple spouses regardless of the gender combination. Polygyny is the familiar form of one man and multiple wives. Our group aspires to legal recognition of plural (or polygamous) marriage. See Emens, *Monogamy's Law*, *supra* note 300-303 (clarifying terms). Polyamorous relationships do not imply the commitment of family relationships as we have defined them; thus our family is "polygamous."

unfamiliar to the public, which may view this novel family with suspicion –and perhaps hostility.⁸⁵ This isolation creates a daunting obstacle to recognition at the level of practical politics, of course,⁸⁶ but also means that aspiring polygamous families are not (or are only weakly) integrated into the larger normative community that defines expectations for family behavior.

A final problem stems from the need to persuade the state to extend legal recognition to polygamous families as a recognized family form in exchange for their readiness to assume family responsibilities. The state faces a serious information deficit in evaluating whether this new category of family has the qualities that justify special legal treatment. This is because family functioning is largely private and the durability and adequacy of the novel group may be hard to assess. Thus, state actors face informational barriers in sorting groups deserving of family status from other groups that may seek the privileges and resources allocated to families but fail to create the welfare benefits the state requires.⁸⁷ In the discussion that follows, we argue that in combination these conditions impose significant obstacles to efforts by a hypothetical polygamous family to secure legal family status.

1. The Problem of Relational Novelty

To some extent, the problem of novelty is almost universal when adults form family relationships. Individuals must establish trust in each other’s character and have confidence in their respective abilities before they can make credible commitments to undertake the demanding roles required. Although some people report having a love-at-first-sight experience when they met their future life partners, more typically the process of finding satisfactory and lasting family relationships is one of experimentation and adjustment. Commitment is usually tentative when

⁸⁵ The public reaction to polyamorous groups is very likely to be hostile. See survey of public attitudes, *supra* note __. Other novel families, such as voluntary kin, may meet skepticism but less animus. See discussion in Part IIIC.

⁸⁶ We argue in Part IIB3 that the formation of interest group networks is likely to be an important means of pursuing the goal of legal recognition.

⁸⁷ A legal status (such as marriage) carrying benefits and privileges carries a moral hazard risk. See Kerry Abrams, *Marriage Fraud*, Cal. L. Rev. 1 (2012)(describing government strategies to prevent fraudulent claims to various marriage benefits). The risk will likely be (and has been) a concern when novel families seek recognition. For example, when advocates sought domestic partnership status for gay couples in California in the 1990s, insurance companies’ insisted the status be defined so that only marriage-like couples qualified. The companies feared that individuals with AIDS would register with sympathetic friends, thereby qualifying for health insurance. *See, e.g.,* NeJaime, *supra* note – at 115 (2014) (explaining that insurance carriers “resisted adding domestic partnership coverage without assurances that this new relationship status would be characterized by a marriage-like level of commitment”).

relationships are new and grows over time unless or until one or both of the parties realizes that the relationship is unsuccessful. Moreover, the parties may differ in their intentions and investment in the union. Each hopes that the prospective partner will be a trustworthy and competent caretaker and that emotional attachments will mature and endure. But only through experience can parties evaluate accurately whether their relationships embody the qualities that define successful families.⁸⁸

The level of uncertainty is significantly greater when individuals, such as those forming a polygamous family, experiment with novel family forms. Aspiring families are by nature experimental; the parties lack exemplars to guide them in family behavior and must adapt and adjust their roles and interactions over time as they seek to fulfill family functions in uncharted settings.⁸⁹ Some forms may work better than others to satisfy dependency needs reliably. The individuals forming a polygamous family, for example, will be uncertain whether multiple adults in a conjugal group will function effectively to care for one another and their children in stable committed relationships. Increasing the number of adults beyond a partnership of two individuals adds complexity to the relationship, and with complexity may come a greater potential for exploitation, conflict, or alliances within the group—all of which might contribute to instability.⁹⁰ Even if these risks are never realized, the evidence of whether a novel family form is viable can only be acquired through extended experience. Only when the heightened level of uncertainty is substantially resolved can the parties determine that their polygamous family has the caring qualities and the enduring character that the social welfare criterion requires.

2. Social Isolation: The Absence of Associational Bonds and Public Acceptance

Even if the adult members of a polygamous family gain confidence and trust in one another as a functioning family, other challenges remain. In the early period of its evolution, the isolated novel family typically lacks a community of similar families; this creates two problems. First the polygamous family must rely solely on its own members' commitment and resources

⁸⁸ The evidence that almost half of cohabiting couples marry in 3 years suggests that many relationships go through the kind of experimentation we describe. Copen, et. al, supra note __.

⁸⁹ For example, polygamous families such as ours, cannot model their relationships on marriage. But because they are dedicated to formal equality among all adult members, they would not receive substantial normative support from those polygamist groups, such as fundamentalist Mormons, that function as male dominated hierarchies.

⁹⁰ Fundamentalist Mormon groups may maintain stability through a rigid hierarchical structure, which we reject as unacceptable in a modern family. Adrienne Davis identifies these challenges and argues they can largely be resolved through partnership regulation. See discussion in Davis, supra note __, 2002-2017.

for success. The absence of a broader social group leaves the polygamous family without the benefit of friends and neighbors who offer support and enforce behavioral norms,⁹¹ important sources of stability for marital families. Moreover, even as their numbers increase, success in the political arena is unlikely unless polygamous families affiliate and form an interest group (or groups) dedicated to achieving their shared political goals of attaining legal recognition. Without such coordination, polygamous families may fulfill family functions well but they are still likely to retain their outsider status. In short, the novel family faces the challenge of overcoming isolation and creating a network of families capable of developing group norms and mobilizing political action to gain support for the group's legal recognition.⁹²

Successful mobilization poses daunting challenges for novel families.⁹³ Due to polygamous families' separation from society, the public initially may be unaware of the group's existence and later may find their family relationships to be strange and unfamiliar. Public awareness is a necessary (but not sufficient) condition for legal recognition. But even in an era of more tolerant public attitudes, growing public awareness may engender skepticism or hostility based on assumptions that polygamous families will not function adequately as families, or that they may harm dependent members, or are engaging in immoral behavior.⁹⁴ Thus, the aspiring family category faces the challenge of demonstrating to the larger community that they are faithfully performing family roles, a difficult task given that families function largely in the private sphere. Further, the anticipation of a hostile public response may inhibit the inclination

⁹¹ As we discuss below, the creation of a network of aspiring families, may be a key intermediate step in a norm formation process between a period in which small numbers of families function in isolation and one in which the novel family group attains some level of public acceptance.

⁹² Our description of the process is stylized and real isolation likely exists only in the earliest stage. See VERTA TAYLOR AND NANCY WHITTIER, *COLLECTIVE IDENTITY IN SOCIAL MOVEMENT COMMUNITIES: LESBIAN FEMINIST MOBILIZATION*, *FRONTIERS IN SOCIAL MOVEMENT THEORY* 104-29 (1992) ("...the purposeful and expressive disclosure to others of one's subjective feelings, desires, and experiences – or social identity – for the purpose of gaining recognition and influence is collective action").

⁹³ A substantial literature focuses on the role of social movements in advancing legal and constitutional reforms. Some scholars have analyzed the mobilization and impact of identity-based social movements. See William Eskridge, *Channeling: Identity-based Social Movements and Public Law*, 150 U. Pa. L. Rev. 419 (2001) (describing the mobilization of the gay rights movement). Lani Guinier and Gerald Torres, *CITE*. See text accompanying note infra for a discussion of social mobilization to attain family rights.

⁹⁴ The testimony in the Congressional hearings for the Defense of Marriage Act in 1995 was replete with allegations that gay relationships were immoral, promiscuous, and harmful to children. See e.g. Congressional Rec., Statement by Cong. Sensenbrenner, July 12, 1996. Today polygamous families face a similar response. See text accompanying notes -- to -- infra.

of these families to publicize their family relationships.⁹⁵ But if they are “closeted,” polygamous families will find it more difficult to gain public acceptance as well- functioning families.

Public ignorance or skepticism about the qualities of an aspiring family category undermines the prospect of legal recognition.⁹⁶ Although the relationship between public attitudes and legal reform in the realm of civil rights is complex,⁹⁷ some level of public tolerance and receptiveness is (and has been) a predicate to the willingness of political actors and courts to confer new family rights.⁹⁸ Moreover, a community of polygamous families that is separated from the larger society largely lacks the benefit of the normative framework regulating family behavior that generally stabilizes and supports those families that already enjoy social recognition.⁹⁹

3. The Verifiability Problem

Even after polygamous families develop the trust and confidence to sustain their mutual commitments and affiliate with similar families in pursuit of public acceptance and legal recognition, the state confronts a severe information problem in verifying the petitioning groups’ family functioning. Predictably not all relationships will qualify for the legal subsidy that is conferred on families, and even groups that have attained social acceptance may have a relational

⁹⁵ In Part IIIA, we describe how gay couples living in family relationships faced not only public animus, but criminal sanctions and loss of employment, which not surprisingly led many remain closeted. Most observers agree that the AIDS crisis and the lesbian baby boom were critically important in leading many gay couples to live openly and form networks in pursuit of the goal of legal protection of their family relationships. This in turn led to public familiarity.

⁹⁶ See Part IIIA for discussion of the relationship between public familiarity and acceptance in the marriage equality movement. See also MICHAEL KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH AND THE STRUGGLE FOR SAME-SEX MARRIAGE* 197-203 (2013) (discussing relationship between changing public attitudes and legal reform).

⁹⁷ Michael Klarman has studied the relationship between public opinion and constitutional reform in other contexts. See MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2007)(discussing the public backlash to *Brown v Board of Education*). See generally, JACK CITRON, EGAN AND NATHANIEL PERSILY (EDS.) *PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* (2008).

⁹⁸ This does not mean that general acceptance is required. The early judicial opinions conferring marriage rights on gays and lesbians were criticized and not generally popular. [The Massachusetts legislature moved to amend the state constitution post-Goodridge, but reconsidered a year later.] KLARMAN, *FROM THE CLOSET TO THE ALTAR*, supra note _ at 166-169. However, it seems likely that the public was more receptive to recognizing the rights of gays and lesbians in the early 21st century than it would have been a generation earlier, when the possibility of legal marriage between same sex partners would have seemed fanciful to most people. See discussion in Part IIIA infra.

⁹⁹ See Scott & Scott, *Marriage as Relational Contract*, supra note --at 1288-93 (describing the role of informal social norms in enforcing terms of marriage contract and promoting cooperation and stability in intact marriage). There are clearly exceptions to the statement in the text. The Amish live separately from the larger society in a community regulated by robust social norms. But the basic norms that regulate Amish family behavior are modeled on those that regulate marriage generally.

form that imposes latent risks on vulnerable members. The state has an independent interest in determining whether novel family categories seeking recognition function safely and successfully for all family members, an interest that may require a greater depth of knowledge than is needed to attain public acceptance.¹⁰⁰ Accurate information is particularly important because legal recognition, once conferred, may be difficult to withdraw. But the inherent privacy of family functioning poses a classic information problem: state actors making decisions about conferring family status may have difficulty discerning whether polygamous families as a category fulfill the functions and possess the qualities that make family relationships socially valuable.¹⁰¹ Many of the tangible qualities that characterize successful family groups such as financial interdependence and mutual care involve behaviors that are not readily observable to third parties. Moreover, intangible qualities that define families, such as long-term commitment, loyalty and equality are difficult to evaluate in the absence of express promises or reliable proxies. Thus, distinguishing well-functioning family categories from exploitative or less stable affiliations poses a challenge for state actors, who may have difficulty getting reliable evidence about the nature of claimants' relationships.

B. THE EVOLUTION TOWARD LEGAL RECOGNITION THROUGH COLLABORATION

1. The Elements of Collaborative Behavior.

Our social welfare premise implies that the state will limit legal recognition to those categories of aspiring families that can overcome the impediments caused by relational novelty, social isolation and non-verifiability. While the possible means of coping with these conditions are overlapping and interrelated, for analytical purposes we separate them into three, highly stylized evolutionary stages: 1) individuals (exemplars of the novel family type) form and successfully maintain families; 2) the individual exemplars form associational bonds that foster durable group norms and enable the collective to pursue the acceptance and support of the community at large; and 3) the state acquires the information about the particular context in which a novel family type functions to certify its entitlement to legal family status.

¹⁰⁰ See text accompanying footnotes 170-173 *infra*.

¹⁰¹ The problem of verifiability by third party decision makers has been of great interest to contracts scholars. The problem arises when courts must evaluate contract performance that cannot be specifically described. See Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 Yale L. J. 814, 825 (2006). See also OLIVER HART, *FIRMS, CONTRACTS AND FINANCIAL STRUCTURE* 35-38, n 15 (1995).

Our model uses exemplars from commercial contexts to show how each of the uncertainties that impede the recognition of novel family forms can be resolved by processes that we loosely describe as *collaboration*. By collaboration we mean a set of behaviors designed to pursue a common objective that can only be achieved through the combined efforts of more than one party when the prospect of success cannot be determined until after each party makes investments in the relationship. Parties who collaborate commit to sharing private information, adjusting iteratively to the new information acquired from others, and relying on informal norms as the means of motivating each party to invest in the relationship.¹⁰² This technique builds trust in each party's commitment to cooperate in pursuing substantive goals as well as confidence in the ability of the other(s) to perform their undertakings competently.¹⁰³

Aspiring families, such as our polygamous family, can use collaborative techniques to respond to each of the three challenging conditions that we have identified. At the first stage, joint collaborations between (or among) individuals aspiring to form polygamous families builds the trust and confidence needed to overcome the unique uncertainty caused by relational novelty. Collaborative agreements interweave formal commitments with informal norms in ways that respond to the uncertainty inherent in the process of experimentation. At the second stage, collaboration enables isolated polygamous families to overcome collective action problems and associate with other similar families in developing group norms and forming networks in pursuit of their goals of public acceptance. Finally, at the third stage, collaboration between an aspiring category and the state facilitates joint action to mitigate the risk of harms that otherwise may impede certification of the family class. At each of these evolutionary stages, the key collaborative behaviors of information sharing, iterative adjustment and informal enforcement are common elements.

In the discussion that follows, we show how collaboration in the world of commercial contracting has facilitated effective responses to the conditions of relational novelty, social isolation, and non-verifiability. We use these analogies to develop an extended example of how a novel family form can evolve from individual aspiring families that successfully develop

¹⁰² Charles F. Sabel, A Real-Time Revolution in Routines *in* The Firm as a Collaborative Community 106 (Charles Heckscher & Paul S. Adler eds., 2006); Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 Colum. L. Rev. 431, 446-448 (2009).

¹⁰³ Gilson, Sabel & Scott, *Braiding*, *supra* note --- at 1402-04.

mechanisms to ensure mutual care and support for their members, to an associational network that signals its identity with the larger normative community, and finally to the verification and certification by the state that members of the successful group are able reliably to fulfill family functions.

2. Collaborative Contracting as a Means of Coping with Uncertainty.

We begin with this question: How can a polygamous family (of two men and two women) form a durable family without prior experience with one another or with the family form, and without normative guidance tailored to the form?¹⁰⁴ The parties understand the functions of families and have general goals for their affiliation. But because of the novelty of their relationship and the dearth of similar family exemplars, the prospect of a durable commitment for on-going support, care and nurture is highly uncertain. At the outset none of the aspiring family members knows whether making an enduring commitment is the best means of pursuing his or her best interests. For this reason, the parties cannot specify with any confidence defined obligations that will achieve their goals for the relationship. In short, at the outset there is not only uncertainty about whether particular individuals can form these durable commitments but also uncertainty over whether the form itself is one in which the functions of families are fulfilled satisfactorily.

a. A Commercial Analogue: Collaborative Contracting in an Uncertain World. An analogue exists in the commercial realm to this vexing problem of relational uncertainty. Because of the increasing pace of technological development in the contemporary global environment, commercial actors sometimes need to find partners to share capabilities in pursuing a project that can only be defined and ultimately developed through their joint efforts.¹⁰⁵ Traditional modes of contracting often offer no solution to the contracting problems these parties confront. Facing these conditions of relational uncertainty, commercial actors innovate,

¹⁰⁴ Recall that our hypothetical polygamous family is committed to loyalty and equality among all adult members. Thus, this aspiring family cannot use hierarchical, male-dominated polygamous groups as a template for their relationship. See note ---supra.

¹⁰⁵ Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. Econ. Lit. 629, 649 (2008) (hold-up problem “clearly pose[s] problems for long-term contracting, and those problems are exacerbated in volatile environments”).

searching for partners capable and willing to engage in on-going collaborations.¹⁰⁶ These innovative “collaborative agreements” have become an essential part of doing business in the contemporary commercial environment.¹⁰⁷

In a number of industries characterized by rapid technological development, conditions of high uncertainty have led to collaborations where both parties’ skills and commitment to cooperate are necessary to achieve success.¹⁰⁸ In settings as diverse as the pharmaceutical industry and manufacturing supply chains, parties have come to realize that the feasibility of many projects can only be determined by joint investment in the production of information to evaluate whether a project is profitable to pursue.¹⁰⁹ An example is the research collaboration between a large pharmaceutical company with expertise in bringing new drugs to market and a smaller biotech firm with innovative technology. The collaborative agreement aims to explore the feasibility of jointly discovering and developing a novel pharmaceutical product.¹¹⁰ The common feature of these regimes is a commitment to joint exploration without imposing legal consequences on the outcome of the parties’ collaborative activity other than in conditions of “bare-faced cheating.”¹¹¹ Thus, neither party has a right to demand the performance that the parties imagine may result from a successful collaboration. If the parties cannot ultimately agree on a final objective, they may abandon the collaboration.¹¹²

¹⁰⁶ For discussion of the legal mechanisms that support the search for partners capable and willing to engage in a collaboration, see Alan Schwartz & Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 Harv. L. Rev. 661 (2007).

¹⁰⁷ The development of and increase in the use of this new form of commercial contracting is documented in Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 COLUM. L. REV. 431, 472-89 (2009). See text accompanying notes – to – infra.

¹⁰⁸ In previous work, one of us has identified what is loosely called “the information revolution” as the exogenous shock that marked the emergence of collaborative contracting. Id. at 441-42.

¹⁰⁹ These types of collaborative arrangements sometime times take the form of preliminary agreements or “letters of intent.” For discussion of the range of preliminary agreements, see RALPH B. LAKE & UGO DRAETTA, LETTERS OF INTENT AND OTHER PRECONTRACTUAL DOCUMENTS (2006). For a discussion of preliminary agreements as a form of collaborative contracting, see Gilson, Sabel & Scott, *Braiding*, supra note -- at 1439-44.

¹¹⁰ See, e.g., Research, Development, and License Agreement by and between Warner-Lambert Co. and Ligand Pharmaceuticals Inc. (Sept. 1, 1999) [hereinafter Warner-Lambert/Ligand Agreement], available at <http://contracts.onecle.com/ligand/warner.rd.1999.09.01.shtml> (pharmaceutical research and development collaboration between “big pharma” and “little pharma”).

¹¹¹ See, e.g., *Eli Lilly & Co. v. Emisphere Technologies Inc.*, 408 F. Supp. 2d 668, 696–97 (S.D. Ind. 2006) (holding that the contractual remedy for breach of a collaborative agreement is limited to the right to terminate and retain accrued scientific information).

¹¹² Gilson, Sabel & Scott, *Contracting for Innovation*, supra note --.at 455-56; see also Gilson, Sabel & Scott, *Braiding*, at 1422.

b. Key Elements of Collaborative Agreements. The ability of any party to exit the collaboration raises a central question: What knits the collaborators efforts together? After all, unless the parties can make credible commitments to invest in the relationship, the project will never get off the ground. Studies of these commercial collaborations provide answers to this key question.¹¹³ In brief, the collaboration rests on a governance structure that, over time, creates confidence in the capabilities and trust in the character of the counterparty. Trust and confidence are extremely valuable commodities: not only do they motivate each party to invest in the relationship but they also make the prospect of abandoning the relationship in order to collaborate with others much less attractive.¹¹⁴

The governance of these commercial collaborations shares several common elements. The first element is a commitment to an ongoing mutual exchange of private information designed to determine if a project is feasible, and if so, how best to implement the parties' joint objectives. The second component is a procedure for resolving disputes. Its key feature is a requirement that the collaborators reach unanimous agreement on crucial decisions, with persistent disagreement resolved by unanimous agreement at higher levels of management from each firm.¹¹⁵ Together these two mechanisms make each party's character traits and substantive capabilities observable and forestall misunderstandings. Working under conditions of uncertainty, the parties can expect to encounter unanticipated problems that can only be solved jointly and that may generate occasions of disagreement. Their increasing knowledge of each other's capacities and willingness to share private information in service of their collective goals facilitates the resolution of problems and constrains opportunistic behavior.¹¹⁶

¹¹³ Gilson, Sabel & Scott, *Braiding*, supra note – at 1405-15; See also, Iva Bozovic & Gillian K. Hadfield, *Scaffolding: Using Formal Contracts to Build Informal Relations in Support of Innovation* 7–10 (Univ. of S. Cal. Law & Econ. Research Paper, No. C12-3, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1984915 (finding empirical support for the institutional structure of collaborative contracting in a study conducted through interviews with a group of innovative firms.).

¹¹⁴ Gilson, Sabel & Scott, *Braiding*, supra note – at 1405–10 (2010). See discussion infra at --.

¹¹⁵ See, e.g., the Warner-Lambert/Ligand contract, supra note ---, which provides that all decisions are by unanimous vote (Art. 3.1.4) and disagreements are resolved by the CEO of Ligand and the President of Warner-Lambert's Pharmaceutical division (or their designees). Requiring unanimity for project decisions makes it easy for reasonable skeptics to require more information from enthusiasts; bumping disagreements up to impatient superiors discourages obstinacy. Gilson, Sabel & Scott, *Contracting for Innovation*, supra note -- at 479-81.

¹¹⁶ The information regime characteristic of these collaborative agreements is designed to make it easy for each party to request clarification from the other. Thus, the regime allows for the joint interpretation of ambiguity, and makes observable to the parties actions that would be opaque in an unstructured, informal exchange. This heightened, mutual observability allows the parties to learn about their respective capabilities as well as their disposition to cooperate. Under these conditions, continuing cooperation builds trust and protects each party's reliance on that trust in its substantive performance by increasing the costs of finding an alternative partner capable of reliably doing, and learning, as much as the current one. Id at 1476-88.

This arrangement is distinctively limited in its goals, functioning only to allow the parties to learn about each other's skills and capabilities for collaborative innovation and to develop jointly the routines necessary to pursue a desired objective. But, importantly, the collaborative agreement does not commit either party to develop, supply or purchase any product or service. Rather, the object is to discover two things about the counterparty: How well does the counterparty cooperate and how capable are they at working jointly toward the ultimate goal? In this way, the governance structure provides the environment in which trust and confidence can grow: in effect, collaborative contracting endogenizes trust by formalizing a process that builds parties' confidence in one another and thereafter supports investments in their joint objectives based on the trust created. The evidence indicates that if the collaborative process is successful, the uncertainties that existed at the outset of their dealings are resolved through accrued experience, giving rise to traditional contractual statements of obligation and remedy.¹¹⁷

c. Collaborative Contracting in the Family Context. The collaborative contracting mechanism is ideal for experimentation in an effort to achieve a goal 1) that none of the parties can accomplish on his or her own; and 2) where the parties are unwilling, owing to uncertainty about the viability of the collaboration, to commit in advance to a sustained investment in the relationship. These two conditions characterize the challenge facing parties desiring to establish novel family relationships. Consider again a hypothetical polygamous family. As in the commercial context, these parties face uncertainty about the viability of the venture they aim to undertake: it is unclear whether this (or any other) polygamous family represents a stable and enduring model for fulfilling family functions satisfactorily. Moreover, novel relationships such as this are not supported by strong social norms defining behavioral expectations and encouraging long-term commitment.

Under those conditions, the goals of this aspiring family can be furthered through processes that are analogous to the kind of collaborative agreements that have proved useful in commercial contexts. To be sure, the sources of relational uncertainty are somewhat different and the form of the agreement among individuals in a novel family group is likely to differ from

¹¹⁷ Gilson, Sabel & Scott, *Braiding*, supra note -- at 1382-84. Repetition results in a learning process that reduces uncertainty, permitting a shift from a collaborative regime to a fully specified contract. Michael D. Ryall & Rachelle C. Sampson, *Do Prior Alliances Influence Alliance Contract Structure?*, in STRATEGIC ALLIANCES: GOVERNANCE AND CONTRACTS 206, 206-07 (Africa Ariño & Jeffrey J. Reuer eds., 2006) (finding that contracts are more complete or detailed when firms have prior alliances, whether with the same firm or other firms).

the commercial counterparts. A major difference between commercial collaborative contracts and their nascent familial counterparts, for example, is the form of the governance arrangement that creates the environment within which trust and confidence can grow.¹¹⁸ In commercial settings, these structures are specified in formal written documents, while in the familial context the governance commitments typically arise out of mutual understandings often based on the parties' conduct over time. But this distinction does not diminish the significance or utility of the commitment to collaborate by an aspiring family unit.¹¹⁹

In both the commercial and familial cases, however, the enforceable commitment is limited at the outset to the obligation to collaborate on efforts to pursue the parties' mutual goals.¹²⁰ A polygamous family commits to pursue an objective—long term mutual care and support of each other and other dependents in their household -- under circumstances where they are uncertain about the ultimate success of the relationship (or even the specific form that it may take). As noted above, the resulting agreement forms the basis for building trust as the foundation of a committed family. These collaborative agreements do not impose obligations to share property upon the dissolution of the relationship; the parties' uncertainty about the success of the collaboration makes such precise commitments infeasible. What then are the enforceable obligations of the family aspirants who do commit to collaborate? By analogy to the commercial context, each party is free to abandon the relationship at any time without facing any legal consequences. However, the initial commitment implies an enforceable obligation of family fidelity and loyalty during the period of ongoing collaboration.¹²¹ On this basis, evidence that

¹¹⁸ See note ---infra.

¹¹⁹ Restatement of Contracts (Second) § 4 provides “A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct.” A majority of states recognize the validity of claims based on contracts implied in fact between unmarried cohabitants. See e.g., *Marvin v. Marvin*, 557 P. 2d 106 (Ca. 1976); *Doe v. Burkland*, 808 A. 2d 1090 (R.I. 2002); *Goode v. Goode*, 396 S.E. 2d 430 (W.Va. 1990); *Marsha Garrison, Non-Marital Cohabitation: Social Revolution and Legal Regulation*, 42 Fam. L. Q. 309, 315-6 (2008) (noting that at least twenty six states have approved some form of contract implied in fact claims between cohabitants). Conduct-based agreements sometimes raise difficult problems of proof, but if the conduct among members of a novel relational group is clear, this form of contracting carries the same degree of legal significance. *Bailey v. West*, 249 A. 2d 414 (1969); *Continental Forest Prods., Inc. v. Chandler Supply Co.*, 518 P. 2d 1201 (Id. 1974). For discussion see ROBERT E. SCOTT & JODY S. KRAUS, *CONTRACT LAW AND THEORY* 9 (5TH ED. 2013). Some courts and legislatures have required that contracts between cohabitants be written. IRA MARK ELLMAN ET AL, *FAMILY LAW: CASES, TEXT, PROBLEMS* 943 (5TH ED. 2010) (describing the writing requirement in some states).

¹²⁰ The unique feature of collaborative contracts is that they combine both legal and normative elements. The formal contract is limited to enforcement of the reliance investments that parties have made in the commitment to collaborate. See Gilson, Sabel & Scott, *Braiding*, supra note – at 379-82, and text accompanying notes – to -- infra.

¹²¹ These contracts rely on low-powered enforcement techniques that cover only the commitment to collaborate, without controlling the course or the outcome of collaboration. This means that defection from the commitment—

one of the parties was pursuing another familial relationship during the collaboration or selfishly appropriating shared resources gives rise to an enforceable claim for the value of any investments that injured parties have made in reliance on the commitment.¹²²

Family collaborations have both disadvantages and advantages relative to their commercial counterparts. Family relationships do not lend themselves to the kind of hierarchical structure that motivates consensus in the business setting, where higher levels of management review disputes. On the other hand, the co-residency of aspiring-family members and their ability to monitor one another closely push the parties toward consensus and reinforce the collaboration in ways that establish trust. Moreover, the personal nature of the information shared by each party creates the potential for reputational harm if that information is later disclosed, making abandonment costly.¹²³

Not all collaborative contracts creating familial obligations will be successful; some parties' relationships, and perhaps some relationship forms, may simply not develop into stable interdependent family groups. But in those relationships that do mature, understandings among the members of the polygamous family will become more complete through accrued experience as time goes on.¹²⁴ In this way, the polygamous family will move beyond collaborative agreements to enforceable understandings about their performance obligations.¹²⁵ Thus, just as parties in the pharmaceutical industry undertake formal agreements for drug development on the basis of information attained during the collaborative contract phase, so a polygamous family in a collaborative family relationship may reach formal understandings about property sharing, financial support and obligations for child care. Again, as in the collaborative contract phase,

say, by cheating on the exclusive commitment to care for each other—would only entitle the injured party to recover her reliance costs as measured by investments to date in the collaboration and any opportunities foregone. For a commercial example of the kind of cheating on the commitment that creates liability and a discussion of the limited remedies available, see *Medinol Ltd. v. Boston Scientific Corp.*, 346 F. Supp. 2d 575 (S.D.N.Y. 2004).

¹²² This limited enforcement may be more available to some novel families than others. Courts have ordered equitable remedies such as restitution and constructive trust in cases involving financial claims by cohabitants. See *Harmon v. Rogers*, 510 A2d 161 (Vt. 1986); *Salzman v. Bachrach*, 996 P2d 1263 (Colo. 2000). See discussion in ELLMAN, ET. AL., supra note _ at 943-44. But if aspiring families are deemed immoral (as may be the case with polygamous families), courts may decline to enforce collaborative agreements.

¹²³ Personal information shared in the family setting may be embarrassing if later disclosed, creating a situation analogous to hostage exchange. Scott & Scott, *Marriage as Relational Contract*, supra note – at 1290-91.

¹²⁴ See Kyle J. Mayer & Nicholas S. Argyres, *Learning to Contract: Evidence from the Personal Computer Industry*, 15 *Org. Sci.* 394, 396 (2004) (finding that successive contracts between the same two contracting partners become more complex over time as the partners learn how to address contracting hazards).

¹²⁵ See Part IIIB2 infra and discussion of commitment ceremonies among polygamous groups that aspire to legal family status.

these agreements may be understandings implied from conduct based on duration, shared duties and other objective proxies that arise over time in cohabitation relationships.¹²⁶

In this first stage of collaboration, the evolutionary process we describe can result in an aspiring polygamous family bound by (usually implied) contract to provide each member mutual support and care with provisions for the assignment of responsibilities and for the distribution of property rights upon termination. Predictably, we would, over time, expect to find a number of aspiring polygamous families living in committed, contractually based relationships.

3. Moving from Isolated Collaborations to a Socially Integrated Collaborative Network.

Even as a number of polygamous families establish stable family relationships based on contract, other challenges remain. How do isolated polygamous families coordinate to overcome collective action impediments and ultimately become integrated into the larger social community? The process that leads first to association among polygamous families and then to integration serves two functions. At a pragmatic level, coordination is necessary for the novel family to begin the process of pursuing its political goals. Isolated polygamous families are unlikely to attract public attention, gain acceptance, or effectively communicate their identity as successful families. The formation of associations among aspiring novel families also facilitates the development of shared social norms and enables these polygamous families and their agents to signal collectively their identity with the larger social community.¹²⁷ Integration into the

¹²⁶ As we explain in Part IIIB, this evolution to enforceable contracts together with default rules based on relationship duration can resolve the difficult problem of sorting non-marital cohabitation relationships. One response is for the state to freely enforce contracts implied in fact that provide for mutual support and shared property rights in long term unions unless parties opt out. Elizabeth S. Scott, *Domestic Partnerships, Implied Contracts and Law Reform*, in RECONCEIVING THE FAMILY (R. WILSON, ED.) (2006) (hereinafter *Implied Contracts*).

¹²⁷ See text accompanying notes – to – infra. To some extent, of course, even isolated polygamous families may internalize norms of established families. For a general discussion of the role of informal norms in regulating behavior through anticipation of external sanctions such as shaming or shunning, see JON ELSTER, *THE CEMENT OF SOCIETY* 101-02 (1989); Richard H. McAdams, *The Origin, Development and Regulation of Norms*, 96 Mich. L. Rev. 338, 350-51 (1997); Robert Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. Pa. L. Rev. 1643, 1656 (1996). See also Scott and Scott, *Marriage as Relational Contract*, supra note _ at 1288-93 (discussing the role of norms in reinforcing marital commitment).

broader normative community further reinforces socially approved behavior and the stability of evolving relationships.¹²⁸

a. Normative Integration in Common Purpose Communities: The Case of Collaborative Networks. Again we turn to the commercial context to provide an analogue for how family aspirants can resolve the problem of social isolation and form a coherent community with collective goals and shared norms. Commercial parties in particular industries form networks (or informal alliances) in order to enhance mutual collaboration in an environment where multi-lateral cooperation produces gains for all members in pursuit of their *individual* business ventures.¹²⁹ These networks are not aided by formal association (although individual members may execute bi-lateral contracts), but are linked informally by cooperative norms. Research by organizational sociologists shows how shared norms evolve and successfully control opportunism and other non-cooperative behaviors in these networks even as new members join the network and others drop away.¹³⁰

A business network consists of a number of independent firms that enter a pattern of collaboration designed to achieve the benefits of cooperation without formal integration.¹³¹ Of particular interest for our example are networks consisting of a cluster of firms whose membership shifts over time. A useful exemplar is the tech transfer network consisting of a university/research entity (inventor), a number of biotech companies, large pharmaceutical firms

¹²⁸ See Karen S. Cook & Russell Hardin, *Norms of Cooperativeness and Networks of Trust* in SOCIAL NORMS 327, 328-330 (MICHAEL HECHTER & KARL-DIETER OPP EDS 2001) (parties have a strong interest in abiding by their community's norms so as to avoid exclusion).

¹²⁹ For discussion, see Walter W. Powell, *Neither Market nor Hierarchy: Network Forms of Organization*, 12 Res. Org. Beh. 2905 (1990); Walter W. Powell, Kenneth Koput & Laurel Smith-Doerr, *Inter-organizational Collaboration and the Locus of Innovation: Networks of Learning in Biotechnology*, 41 Admin. Sci. Q. – (1996), and text accompanying notes – to -- infra. Networks stimulate the development of norms creating behavioral expectations that are internalized by network members and enforced informally by others. Walter W. Powell, *Inter-Organizational Collaboration in the Biotechnology Industry*, 152 J. Inst. & Theoretical. Econ. 197, --- (1996), and text accompanying notes – to -- infra.

¹³⁰ Cook & Hardin, *supra* note—at 330-35; See also Michael Hechter & Karl-Dieter Opp, *What Have We Learned About the Emergence of Social Norms* in SOCIAL NORMS 394, 399-400 (MICHAEL HECHTER & KARL-DIETER OPP EDS 2001) (reviewing the literature).

¹³¹ GUNTHER TEUBNER & HUGH COLLINS, NETWORKS AS CONNECTED CONTRACTS 1 (HART PUB. 2011). Network forms of organization share some common elements. Parties engage in reciprocal, preferential, mutually supportive actions. The basic assumption of network relationships is that one party is dependent on actions or behaviors of the other and that there are gains to be had from pooling resources to achieve common purposes. As networks evolve, it becomes more efficient for parties to exercise voice rather than exit. For discussion, see Walter W. Powell, *Neither Markets Nor Hierarchy: Network Forms of Organization*, 12 Res. in Org. Beh. 295, 303-4 (1990).

and venture capital firms joined by their common interest in the development of therapeutic compounds to cure disease.¹³² These diverse entities share a desire to resolve uncertainty over the challenges they face collectively. To a large extent, network enforcement of these inter-party understandings is purely relational, relying on a combination of reputation, repeated dealings and tit for tat reciprocity.¹³³

What are the factors that cause these bio-tech networks to form and then sustain themselves? In the context of rapid technological development, research breakthroughs are so broadly distributed that no single firm has all the capabilities necessary for success. Research to produce further technological advances requires *collective collaboration* designed to pool the broadly dispersed information of a large number of firms.¹³⁴ Thus, periods of rapid change stimulate a variety of collaborative behaviors aimed at reducing the inherent uncertainties associated with novel products or markets through the sharing of private information that benefits each firm in its own pursuits.¹³⁵ Despite the absence of formal rights and obligations internal to members of the network, the evidence suggests that the forces that govern cooperation are durable, with trust and cooperation increasing with participation in the network. When there is a recognition of common interests and a high probability of future association, parties are more likely to cooperate and also willing to punish defectors.¹³⁶ Cooperation is a continuing strategy rather than a one-shot calculation; networks use a reputation for cooperation and trustworthiness as a guide to future interaction.¹³⁷ At the level of the network community, there is a kind of

¹³² These high tech networks have been studied extensively by organizational sociologists, see e.g., Walter W. Powell, Kenneth Koput & Laurel Smith-Doerr, *Inter-organizational Collaboration and the Locus of Innovation: Networks of Learning in Biotechnology*, 41 Admin. Sci. Q. 116 (1996); Walter W. Powell, *Inter-Organizational Collaboration in the Biotechnology Industry*, 152 J. Inst. & Theoretical. Econ. 197 (1996) and text accompanying notes – to -- infra.

¹³³ See TEUBNER & COLLINS, *supra* note--- at 21-25 (discussing the evolution of norms of trust and cooperation that are enforced informally).

¹³⁴ Walter W. Powell, *Networks of Learning in Biotechnology: Opportunities and Constraints Associated with Relational Contracting in a Knowledge-Intensive Field* in EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 251, 252-53 (2001).

¹³⁵ *Id.* At 265-66

¹³⁶ For discussion of ways in which routines of cooperation develop, see ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

¹³⁷ Powell, *Inter-Organizational Collaboration*, *supra* note – at 207-208.

mutualism or normative integration. This community level mutualism is both self-maintaining and self-enforcing.¹³⁸

b. Network Collaboration and Normative Integration of Novel Families. The research on collaborative business networks offers lessons about how novel polygamous families can overcome their initial isolation, affiliate with similar groups with compatible norms and, over time, develop and signal their identity with the larger community. The key elements in successful network collaborations are 1) the pursuit of a shared purpose through exchange of private information; 2) collective recognition of the value of individual collaborators' performance; 3) the adherence to norms of cooperation that advance the collective purpose; and 4) the capacity of outsiders to gain membership in the network by developing a pro-social reputation.¹³⁹ These elements support the prediction that as polygamous families evolve, they will form social networks around their common interests to advance their purpose of attaining social and legal recognition.

In the case of novel families, these network communities predictably emerge in response to the uncertainties associated with their shared vulnerability as social and legal “outsiders.”¹⁴⁰ Consider how a community of polygamous families might evolve from the collaborative contracting stage discussed above. As the number of families' increases, they become aware of similar aspiring families with common interests and relational patterns as well as a common purpose of obtaining social acceptance and legal recognition. They also understand that informal affiliation (and ultimately formal organizations) can provide social support and reinforcement of their own relationship goals and assist them in attaining their social and political goals.¹⁴¹ Today, this process likely can be facilitated by the internet, which provides a low-cost means to connect and interact with other polygamous families.¹⁴² The emerging community is reinforced

¹³⁸ Ranjay Gulati, *Does Familiarity Breed Trust? The Implications of Repeated Ties for Contractual Choice in Alliances*, 38 Acad. Mgmt J. 85 (1995).

¹³⁹ Walter W. Powell, *Interorganizational Collaboration and the Locus of Innovation: Networks of Learning in Biotechnology*, 41 Admin. Sci. Q. 116, 119-124 (1996); Walter W. Powell, *Neither Market nor Hierarchy: Network Forms of Organization*, 12 Res. in Org. Beh. 295, 303-306 (1990).

¹⁴⁰ See discussion in Part IIIA describing how gay and lesbian support groups developed in the struggle for legal protection of family relationships.

¹⁴¹ The literature on social movements is also informative here. See text accompanying notes _ to _ infra.

¹⁴² See e.g. www.polygamylifestyle.com, which invites polygamist groups to find others in their locality. Websites such as this avoid the risk of public exposure in the search for similar groups.

by interactions and information sharing that is more extensive and frequent than interactions with others outside the community, to whom polygamous families remain outsiders.¹⁴³

Theory and evidence from other settings predict that as a network of polygamous families forms and mobilizes in pursuit of their common interests and goals, collective family commitment norms emerge, together with norms of cooperation, reciprocity and trustworthiness.¹⁴⁴ The emergence of shared norms, enforced by the network community, strengthens each polygamous family's commitment to fulfill family functions, creating a feedback effect that reinforces the norms that isolated polygamous families sought to establish through collaborative contracting.¹⁴⁵ The normative structure of the network thus serves the dual functions of stimulating the emergence of norms of cooperation in relation to one another as well as reinforcing commitment norms in individual families. These norms of family fidelity are powerful behavioral regulators, reinforced through expressions of approval and informal sanctions such as gossip, shaming and exclusion.¹⁴⁶ They are also durable because they enhance the willingness of members of the community to collaborate to achieve their common purpose.¹⁴⁷

The final step—the normative integration of novel polygamous families into the larger social community and their acceptance as fully functioning families—is one that is less well understood. Among the theories that have been offered, the literature on social movements offers insights about this process, at least as applied to some aspiring family categories.¹⁴⁸ Prominent

¹⁴³ Members of polygamous groups may interact with others but are less likely to share information about their family relationships, for fear of social and legal sanctions. See discussion, Part IIIA *infra*. See discussion at text accompanying notes -- to -- *infra*. Samuel Bowles & Herbert Gintis, *The Moral Economy of Communities: Structured Populations and the Evolution of Pro-Social Norms*, 19 *Evolution and Human Behavior* 3,4 (1998).

¹⁴⁴ Scott, *Social Norms*, *supra* note -- at 1908-1912 (describing norms of reciprocity, loyalty and fidelity in marriage as commitment norms).

¹⁴⁵ Richard McAdams has developed the most comprehensive theory to explain the origin and regulation of norms. He explains the conditions for norm creation as arising from a consensus within a community of the esteem-worthiness of a target behavior. If there is also a risk of detection for deviation from the consensus and a capacity to publicize the deviation--through gossip or other informal or formal means-- a norm can arise. McAdams, *The Origin of Norms*, *supra* note -- at 350-351 and *passim*. Considerable empirical evidence supports the notion that peer disapproval is an effective sanction against disfavored behavior. See, e.g., HERBERT JACOB, DETERRENT EFFECTS OF FORMAL AND INFORMAL SANCTIONS IN POLICY IMPLEMENTATION 69 (1980); Donna Bishop, *Legal and Extra-legal Barriers to Delinquency: A Panel Analysis*, *Criminology* (1984).

¹⁴⁶ Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 *Va. L. Rev.* 1225, 1288-1292 (1998).

¹⁴⁷ See Gulati, *supra* note --.

¹⁴⁸ Sociologists have long studied how citizens organize themselves to pursue often transformative social and legal goals through social movements in contexts as varied as environmental justice, access to knowledge, civil rights and animal rights. In recent years, many scholars have focused on the relationship between law and social movements.

legal scholars have analyzed identity-based social movements, in which individuals in legally disadvantaged groups have organized in pursuit of public acceptance, political recognition, and civil rights.¹⁴⁹ The marriage equality movement, for example, is part of a larger social movement by gays and lesbians to attain equal citizenship. As William Eskridge explains, collective action was stimulated by the designation of sexual orientation as a legally salient trait and source of discrimination.¹⁵⁰

Although collective action by aspiring families is the foundation of their normative integration into the larger society, theory suggests that committed leaders, or norm entrepreneurs, will play a key role in mobilization to attain public acceptance.¹⁵¹ These network leaders facilitate normative integration by creating organizational contexts for coordinating people and resources, and by developing strategies to utilize the media and other outlets to spread information about the successful functioning of polygamous families.¹⁵² Given that the ultimate

See note 151 infra. See also Michael McCann, Law and Social Movements: Contemporary Perspectives, 2 Ann. Rev. L. & Soc. Sci. 17 (2006)(reviewing social movement theories and arguing for a legal mobilization approach). For an early article in the legal literature, see Edward Rubin, Passing through the Door: Social Movement Literature and Legal Scholarship, 150 U. Pa. L. Rev. 1 (2001).

¹⁴⁹ Scholars have analyzed the impact of social movements on constitutional and public law reform. *See* William Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. Pa. L. Rev. 419 (2006)(analyzing the dynamic interaction between identity-based movements and law). Reva Siegel has probed the impact of social movements on constitutional culture. *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 Cal. L. Rev. 1323 (2006. *See also* Jack Balkin & Reva Siegel, *Principles, Practices and Social Movements*, 154 U. Pa. L. Rev. 927 (2006)(explaining how social movements can result in challenges to the legitimacy of customary practices as inconsistent with long-standing principles); Lani Guinier & Gerald Torres, *Changing the World: Notes Toward a Demosprudence of Law and Social Movements*, 123 Yale L.J. 2340 (2014)(describing impact of social movement on statutory and constitutional civil rights reform).

¹⁵⁰ Eskridge, *id.* at 433-434. Eskridge explains how urbanization promoted consciousness raising among gays, reducing the costs of collective action.

¹⁵¹ Both the social movement and other sociological literatures make this point. *See* Rubin, *supra* note _ (describing the key role of movement leaders in mobilization and information dissemination. *See also* Robert C. Ellickson, *A Market Theory of Social Norms*, 3 Am. L. & Econ. Rev. 1, 10 ((2001)(describing influential opinion leaders as “moral entrepreneurs”); MALCOLM GLADWELL, *THE TIPPING POINT* (2000) (describing “mavens,” norm entrepreneurs who learn a great deal about emerging norms and then sharing that knowledge with others, thus serving to spread the information widely at low cost). Gladwell argues that mavens play a key role in spreading fads, fashions and (by implication) norms. *Id.* at ---. These leaders can organize mobilization, *see note 154 infra.* They also can generate norm cascades, a process of rapid norm change. *See also* Cass R. Sunstein, *The Expressive Function of Law*, 144 U. Pa. L. Rev. 2021, 2035-36 (1996); Randall C. Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U. Chi. L. Rev. 1225 (1997). *See also* Cass R. Sunstein, *Social Norms and Social Roles*, 96 Colum. L. Rev. 903, 909 (1996); Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. Pa. L. Rev. 2181 (1996).

¹⁵² *See* Rubin, *supra* note _ at 28-34; and note 61. Rubin describes the role of committed leaders in mobilizing resources and people to create a social movement. Rubin describes resources useful in mobilization expansively to include salient events (the Stonewall riots), court cases and media coverage, as well as money and funds. The use of media to dispense information is a key strategy of social movements. *See* McCann, *supra* note _ at 24. Today the

goal of the polygamous family group is legal recognition, and that some level of public acceptance is a predicate to attaining that goal,¹⁵³ it seems likely that norm entrepreneurs in this context will organize formal interest groups and use legal tools in pursuit of the community's goals; predictably lawyers often will perform the function of norm entrepreneurs.¹⁵⁴

Scholars studying cultural change shed further light on the social integration process, documenting how outsider groups, once affiliated, can signal their identity with and become assimilated into the larger cultural community.¹⁵⁵ The theory of identity signaling developed by economists studying changing social behaviors seems to fit the evolutionary process by which novel families become integrated into the larger society.¹⁵⁶ Researchers have studied how cultural conventions and behaviors function as symbols of identity, communicating aspects of individuals or groups to others in the social world.¹⁵⁷ Normative behaviors gain meaning, or signal value, through their association with groups or similar types of individuals. The normative identity that polygamous families or other novel families signal is based on their family relationships of long-term commitment to mutual care and support; thus the essential elements of this identity are similar to those of established families.¹⁵⁸ The society at large associates successful commitment norms with established families, and comes to recognize that polygamous families successfully perform familial functions, although their behaviors and

internet is an important source of information dissemination. See note _ infra (describing informational web sites promoting polygamy and dispelling myths. See also Ellickson, *The Market for Social Norms*, supra note – at 18-22.

¹⁵³ See discussion in KLARMAN, note _ supra.

¹⁵⁴ Cause- lawyers have played a key role in pursuing and implementing legal change generated by social movements aimed at advancing racial and gender equality and gay and lesbian rights. See generally Austin Sarat & Stuart Scheingold, *What Cause Lawyers do for and To Social Movements*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, Austin Sarat & Stuart Scheingold, eds. (2006). See McCann, supra note _ at 25-26 (generally discussing role of law and legal activism in advancing social movements).

¹⁵⁵ See Berger, *Identity Signaling*, supra note – at 183 (“cultural tastes gain meaning or signal value, through their association with groups, or similar types of individuals”). The recent history of changing public attitudes toward gay and lesbian relationships provides an example of this process of norm evolution and corresponding social change. See discussion in Part IIIA, infra.

¹⁵⁶ Berger, *Identity Signaling*, supra note ---; ERIC A. POSNER, A THEORY OF SOCIAL NORMS (2000); Eric A. Posner, *Symbols, Signals and Social Norms in Politics and Law*, 27 J. Legal Stud. 765 (1998). These versions of signaling theory all draw on the work of MICHAEL A. SPENCE, MARKET SIGNALING (1974).

¹⁵⁷ M. DOUGLAS & B. ISHERWOOD, THE WORLD OF GOODS: TOWARD AN ANTHROPOLOGY OF CONSUMPTION (1978); M.R. Solomon, *The Role of Products as Social Stimuli: A Symbolic Interactionism Perspective*, 10 J. Cons. Res. 319 (1983).

¹⁵⁸ William Eskridge describes a politics of recognition through which an identity group signals to the majority that the legally stigmatized trait is simply a benign variation and should not be the basis of legal discrimination. Eskridge, supra note _ at 467-77. This equality- based claim (that novel families are similar to established families) is inherently integrative. Id at 487.

identity may not mirror precisely those of marital families.¹⁵⁹ This process of identity signaling is advanced in part by advocates (and perhaps litigation strategists) who, by serving as norm entrepreneurs, accelerate the process of social change. As the cohort of novel families grows, public awareness of their identity increases as well, and if the identity signaling is successful,¹⁶⁰ a cascading process of changing social attitudes follows, culminating in public tolerance or acceptance.¹⁶¹

Research on the mechanisms that produce social change also aid us in formulating predictions about this last phase of norm integration. Jonah Berger documents a process of change occurring when an idea, cultural view or attitude spreads contagiously through continuous observation and word of mouth.¹⁶² This happens typically when the idea is associated with images or narratives linked to “arousal emotions” such as anger or love¹⁶³ and when the behavior is observable and public.¹⁶⁴ In our context, identity signaling by novel families can have this effect. For example, consider the narratives of committed gay and lesbian couples, often with their children, that became familiar during the campaign to extend marriage rights to these couples.¹⁶⁵ Berger’s research suggests that these positive images may have played a key role in generating relatively rapid changes in public attitudes.

The process of identity signaling does not proceed seamlessly: it imposes costs on polygamous families, especially in the early period. Successful signaling and normative integration depends on families’ willingness to sacrifice some privacy, as public familiarity and

¹⁵⁹ Once these outsiders adopt the family-behavior signal, the normative meaning of a family itself may evolve. In other words, as the social change occurs, the set of socially accepted family behavior expands to include the unique means of cementing commitment that the novel group has developed. Berger, *Identity Signaling*, supra note – at 183-4. Thomas Stoddard argued that extending marriage rights to gays and lesbians would positively influence the meaning of marriage. Stoddard, supra note _ at 14.

¹⁶⁰ Of course, it is possible that the signaling will not be effective and public awareness of polygamous families will be lead to alarm accompanied by public hostility.

¹⁶¹ See Ellickson, supra note – at 26-27, for a review of the literature on norm cascades and tipping points. See also, Sunstein, *Social Norms and Social Roles*, supra note – at 909, and McAdams, supra note – at 365-72. Economists have studied similar phenomena as well, focusing on bandwagon effects, herd behavior and information cascades. See e.g., A.V. Banerjee, *A Simple Model of Herd Behavior*, 107 Q. J. Econ. 797 (1992); W. Bikchandani, D. Hirshleifer, I. Welch, *A Theory of Fads, Fashion, Custom and Cultural Change as Information Cascades*, 100 J. Pol. Econ. 992 (1992).

¹⁶² See generally, JONAH BERGER, *CONTAGIOUS* (2013).

¹⁶³ Jonah Berger & Katherine Milkman, *What Makes Online Content Viral*, 49 J. Marketing Res. 192 (2012).

¹⁶⁴ For a discussion of the role of social influence, see NICHOLAS A CHRISTAKIS & JAMES FOWLER, *CONNECTED: THE SURPRISING POWER OF OUR SOCIAL NETWORKS AND HOW THEY SHAPE OUR LIVES* (2009).

¹⁶⁵ See discussion in Part IIIA infra.

acceptance can only happen if polygamous families are open about their relationships. To varying degrees, identity signaling exposes the family to the risk of negative public reactions, ranging from curiosity and skepticism to hostility and outrage. For some novel families (including polygamous families), the costs are likely to be high, including the risk of criminal sanctions for living together as families.¹⁶⁶ Predictably, aspiring families will be reluctant to incur onerous costs. In this situation, some exogenous shock that increase costs on continuing their closeted lives may serve as a catalyst, motivating novel families to bear the initial costs of living openly.¹⁶⁷ Over time, as the public becomes familiar with the nature of novel family relationships, the hope is that acceptance grows and hostility dissipates.

* * *

Although our model proceeds in three discrete stages for analytical purposes, the collaborative process through which polygamous families seek to gain public acceptance overlaps substantially with the group's effort to attain legal recognition. First as we have discussed, novel families and their advocates pursue their legal goals in part by signaling their identity with established families, assuring the public about the quality of their relationships. Second, as we discuss below, regulators are likely to extend legal protections through an incremental process that allows state actors to gain information about the aspiring family category. The incremental extension of legal rights has feedback effects that also contribute to public familiarity and acceptance, while at the same time minimizing backlash that might follow from full recognition of unfamiliar groups.¹⁶⁸ Moreover, legal recognition in itself powerfully signals legitimacy that, in turn, contributes to growing public acceptance of novel families.¹⁶⁹

¹⁶⁶ See discussion in Part IIIA of how anti-sodomy laws inhibited gay couples from living together pre Lawrence.

¹⁶⁷ See discussion in Part IIIA of how the exogenous shock of the AIDS crisis functioned as a catalyst for gays' coming out and advocating for legal protection of their family relationships.

¹⁶⁸ See discussion of incremental approach infra text accompanying notes _ to _. See also KLARMAN, FROM THE CLOSET TO THE ALTAR, supra note _ (describing backlash to early cases extending marriage rights to gay couples)

¹⁶⁹ This interaction has been widely studied by scholars examining the expressive function of the law. Larry Lessig has shown that the state, if sensitive to social meaning of particular behaviors, can stimulate desired changes through legal expression. See e.g., Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. Chi. L. Rev. 943, 964-73 (1996). Cass Sunstein extended Lessig's analysis by analyzing how legal regulation can affect normative structures as well. Sunstein suggested that antilittering statutes have such an expressive effect. Sunstein, *The Expressive Function of Law*, supra note – at 2026-35. These changes in preferences and values occur because the social meaning of these behaviors has been changed. Thereafter a norm cascade can result through the stimulation of individual preferences being changed by the legal regulation. *Id.* See also McAdams, supra note – at 355-66 (arguing that law can change behavior by signaling a consensus that is only dimly perceived by the larger

4. Resolving the Verifiability Problem through Collaborative Regulation

a. Legal Certification to Guard against Uncertain Risks. Even if the novel family category gains social tolerance or acceptance (and success is certainly not guaranteed), the state independently has an interest in verifying that these groups will function effectively for all of members before it certifies the category as a legal family. But here the state faces a significant information problem: family behavior is private and thus resists efforts to verify the quality of family functioning, especially when (as with polygamous families) there is little by way of historic experience. Some types may appear to perform family functions satisfactorily but create latent risks affecting some members that are not immediately apparent. For example, polygamous family groups may appear to provide care and support to members harmoniously, but experience over time might reveal difficulties maintaining equality norms and avoiding exploitation.¹⁷⁰ (Indeed, it is plausible that groups lacking the qualities of well-functioning families might organize to pursue social acceptance and legal recognition through fraudulent means, a stratagem that time likely would reveal.¹⁷¹) Time might also reveal that conjugality serves a key bonding function for unrelated adults and, as a consequence, intergenerational and voluntary kin groups may turn out to be fragile, thereby jeopardizing dependent members.¹⁷² To be sure, these particular risks may not materialize, but the general point is that the state will demand sufficient information to mitigate latent risks as part of the process of determining whether a novel family category should receive family status and the societal benefits and resources that follow.¹⁷³ The network of polygamous families, in turn, has an interest in providing information that assures the state that this category meets the state's expectations for family functioning.

Several challenges may arise. Some aspiring groups may deserve legal recognition as fulfilling family functions but be difficult to evaluate because they are based on unconventional commitments or appear to be continuing the process of evolution. Other groups may face

community) and discussion in note _ infra. For a review and critique of this literature, see Scott, *The Limits of Behavioral Theories of Law and Social Norms*, supra note – at 1623-30.

¹⁷⁰ The risk of coercion and exploitation may be as great in dyadic relationships

¹⁷¹ Several readers suggested this possibility, as a component of the political economy story. For example, fundamentalist polygamists could influence public opinion by masking their undesirable qualities and falsely signaling that their relationships were reformed.

¹⁷² Of course, non-conjugal unions avoid the destabilizing threat of infidelity.

¹⁷³ See discussion Part IIIC infra.

unusual political obstacles, despite their apparently effective functioning, that impede full recognition as families. Thus, the state must seek to understand the context in which the aspiring family group functions; in doing so, lawmakers are likely to proceed with caution, perceiving that once rights are extended, they will be difficult to withdraw. For some groups, an iterative process may be appropriate, one in which the legal rights and responsibilities are assigned incrementally, allowing the state to monitor family functioning over time in the process of certifying family status.¹⁷⁴ For other aspiring family categories, particularly those that are truly novel, a collaborative approach may also require joint efforts by the state and the group to establish a standard of best practices that are policed informally by the network itself.

b. An Iterative Approach. The state can verify and certify the family status of an aspiring family type in several ways, including judicial recognition on constitutional grounds, state legislative enactments, and administrative regulation. For some family groups, such as cohabiting couples or (perhaps) multigenerational groups, the risk of exploitation and instability may be relatively modest because the aspiring family is modeled on a familiar form. For these groups, full family status can be attained through a straightforward iterative process, with rights and obligations extended to the group incrementally.¹⁷⁵ Through this collaborative process, state actors acquire information informally about the quality of the family commitments over time, allowing the state to verify that family functions are being performed satisfactorily.¹⁷⁶ For example, if the state creates a family status with some relationship rights and privileges, it can acquire information comparing dissolution rates to divorce rates.¹⁷⁷ Moreover, the iterative process may have a feedback effect, with the limited family status expediting public acceptance of the novel group as “real” families. Eventually, the state’s monitoring function recedes as the

¹⁷⁴ Several scholars, often drawing on the experience in some European countries, have argued that the path to marriage equality for gay couples is a step by step process. William Eskridge has argued that a “step-by-step approach to the extension of marriage rights for gay couples was important to increase public acceptance. WILLIAM ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 115-118 (2002) (arguing that a step-by-step legal process is a means to changing public attitudes). For a contrary view, see Erez Aloni, *Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage*, 18 *Duke J. of Gender L. and Policy* 105 (2010).

¹⁷⁵ For a discussion of the key features of public-private collaborations, see Charles F. Sabel & William F. Simon, *Contextualizing Regimes: Institutionalization as a Response to the Limits of Interpretation and Policy Engineering*, 110 *Mich. L. Rev.* 1265, --- (2012).

¹⁷⁶ See Part IIIA for a discussion of how relationship rights have been extended incrementally to gay and lesbian couples, culminating in the right to marry.

¹⁷⁷ See discussion in Part IIIA of the iterative process through which gay couples obtained marriage equality rights, first through limited domestic partnership laws and then civil union statutes..

new family category stabilizes and ultimately attains full legal recognition. This iterative process provides greater certainty for the parties and for third parties dealing with the new families and enhances the privacy and freedom of individual members of the recognized category to pursue their relationship goals without external monitoring.¹⁷⁸

c. Joint Mitigation of Risks through “Best Practices” Collaboration. For novel groups that pose substantial informational and/or political challenges, the state may require a more formal collaborative process in conjunction with an iterative approach. For polygamous family groups, for example, uncertainty is high because there are no models for family behavior or tested responses to the possible risks that may arise from certification of the group. In this case, the state may turn to a more interactive collaboration to enunciate and enforce “best practices” that mitigate those risks. Here the goal is to encourage common efforts by the polygamous families themselves to create binding commitments that minimize the risk of perceived harm.

Once again we invoke a commercial analogue—one that at first blush may seem quite remote from the realm of novel families. Leafy green vegetables pose particular risks because they are often eaten raw and, today, often sold in “salad mixes” that mingle greens picked in different locations, thus expanding the possibilities for cross contamination.¹⁷⁹ Following an outbreak of illness, California designated an authority to establish safety standards or “best practices” for the farms from which member handlers buy.¹⁸⁰ These standards require growers and processors to identify hazardous control points and report the measures undertaken to

¹⁷⁸ Mary Anne Case argues that the licensing of marriage protects couples’ privacy from government intrusion in ways not available couples in domestic partnerships. Once a couple marries, they can have separate bank accounts, live apart etc., whereas domestic partners must provide evidence of marriage-like behavior to establish their status. Mary Anne Case, *Marriage Licenses*, 89 Minn. L. Rev. 1758, 1772-76 (2004-2005). The same freedom would be enjoyed by novel families once the new category is recognized.

¹⁷⁹ Gilson, Sabel & Scott, *Contract and Innovation*, supra note – at 211-212. All actors in the food supply chain have an interest in protecting their market by developing a regime of practices that reduce the chances for contamination and limit its effect. The state, as the protector of public health, has complementary interests. *Id.* at 212-213.

¹⁸⁰ The authority was delegated to a Board established by the Leafy Green Product Handlers Agreement (LGMA). State of Cal. Dep’t of Food & Agric., California Leafy Green Products Handler Marketing Agreement (effective as amended from Mar. 5, 2008) [hereinafter California Marketing Agreement], available at <http://www.cdffa.ca.gov/mkt/mkt/pdf/CA%20Leafy%20Green%20Products%20Handler%20Agreement.pdf>. LGMA is governed by a thirteen-member board, chosen by the state Secretary of Agriculture from nominations by the membership. Twelve must be representatives of the handler-members of the organization; the thirteenth is supposed to represent “the public.” California Marketing Agreement, *id.* at art. III.

mitigate the hazard.¹⁸¹ Inspectors from the California Department of Food and Agriculture monitor compliance,¹⁸² but the ultimate sanction for noncompliance is suspension or withdrawal of a recalcitrant member's right to use a service mark, and thus temporary or permanent exclusion from the industry is enforced informally.¹⁸³

The success of this “best practices” approach offers a regulatory prototype for the mitigation of harms from legal recognition of some categories of novel families where a more formal process of information-sharing and monitoring is warranted. Such a collaboration has four key elements: 1) creation of a formal association of aspiring families in the high-risk group; 2) information exchange between the group (or its representatives) and the state to establish best practices; 3) monitoring by the state to ensure that the group complies with those practices; and 4) informal enforcement by the association through shaming or exclusion.¹⁸⁴ In the case of polygamous families, risks that might attend the recognition of multiple-party family types include the exploitation of minors and other “minority” interests or harms caused by instability of the family relationships. Problems such as these can be addressed through a collaborative process in which the aspiring families provide information to the state about the context in which they fulfill their family functions, the parties collectively establish benchmarks that embody their expectations for the support and care of all family members, and the families collectively seek to promote compliance with the benchmarks.¹⁸⁵ Through mechanisms such as this, the state, as it incrementally extends rights, can certify well-functioning family categories subject to a regulatory scheme tailored to their needs but serving the general goals of facilitating well-functioning family relationships. Thereafter, as with marriage, deference to family privacy will

¹⁸¹ The LGMA additionally requires each handler to maintain records that permit identification of the farm and field from which all components of its products originate in case contamination is later discovered. California Marketing Agreement, *supra* note --, art. V. See generally, Cal. Leafy Green Prods. Handler Mktg. Bd., Commodity Specific Food Safety Guidelines for the Production and Harvest of Lettuce and Leafy Greens (Jul. 22, 2011, available at <http://www.caleafygreens.ca.gov/sites/default/files/LGMA%20Accepted%20Food%20Safety%20Practices%207.22.11.pdf>). (provisions that impose record-keeping requirements on signatory handlers).

¹⁸² *Id.*

¹⁸³ The handler members, in turn, commit to deal only with farms that comply with the standards. California Leafy Greens Handler Marketing Agreement, (Jan. 27, 2007) available at www.caff.org/policy/documents/lgph_agreement.pdf. There are other private standard setting and certification regimes, such as GlobalGAP (for “good agricultural practices”), an organization formed by major European retailers; and a private international organization, the Global Food Safety Initiative assesses certification regimes in accordance with a set of meta-standards.

¹⁸⁴ Gilson, Sabel & Scott, *Contract and Innovation*, *supra* note – at 210-213.

¹⁸⁵ In Part IIIC, we discuss how polygamous groups can adopt a best practices regulatory framework.

translate into minimal state involvement for any individual family that is licensed so long as the family is intact.

d. The licensing of individual families. Once a novel family type is certified, a registration or licensing system, analogous to marriage licensing, provides a means by which individual families in the novel type can obtain the formal status. This mechanism sets out simple, clear rules that authorize licensing of all families that qualify under the certified category. The registration process has a number of benefits: It provides public acknowledgment of qualifying family categories, signaling that recognized relationships fulfill important social functions. Further, registration embodies commitment in a concrete form, reinforcing family commitment norms.¹⁸⁶ Licensing is also a means by which the legal obligations and rights that attend the status are clearly defined and assigned, providing security and certainty to family members through post-dissolution enforcement with modest administrative and judicial costs.¹⁸⁷ For example, if formal family status confers on polygamous families a right to share property with other family members as it does for married couples, individual families by registering can avoid difficult proof problems that are likely to accompany contractual enforcement.¹⁸⁸ Registration reduces the risk that exploitative individuals will succeed in enjoying the benefits of family relationships while avoiding reciprocal obligations (as sometimes happens in informal unions).¹⁸⁹ Finally, and importantly, a formal licensing process protects family privacy by avoiding intrusive inquiries to determine whether an individual family embodies the qualities that justify family status, another cost that informal families must bear.¹⁹⁰

¹⁸⁶ The public signal of family status reinforces social norms by resolving any uncertainty the community may have had about the nature of the relationship.

¹⁸⁷ Licensing avoids error and administrative costs that regulators face when they seek to evaluate individually the claims of informal aspiring families. It also protects family privacy. See note 188 *infra*.

¹⁸⁸ See Elizabeth Scott, *Implied Contracts*, *supra* note _ at_ (describing the difficult proof problems faced by partners in informal unions seeking to enforce contractual understandings). See also Ira Ellman, *Contract Thinking was Marvin's Fatal Flaw*, 76 *Notre Dame L. Rev.* 1365 (2001) (describing poor enforcement).

¹⁸⁹ *Id.* The ALI Domestic Partnership status creates marriage-like obligations between long time cohabitants, but has not been adopted by American states. ALI, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* SECT. 6:06-6.06 (2000). See also Robin Fretwell Wilson and Michael Clisham, *American Law Institute's Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principle or Obligatory Footnote?*, 42 *Fam. L.Q.* 573, 590 (2008) (describing failure of states to adopt ALI Domestic Partnership Principles). Some European countries, as well as Canada and Australia, have sought to mitigate these problems by expanding legal protection to cohabitants and their children. SEE POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE*, at 111-120, *supra* note --.

¹⁹⁰ When parties in non-marital families seek legal recognition of their family status, an individualized inquiry often requires parties to provide decision-makers with intimate information about their relationship, living arrangements and intentions. See, e.g., *Braschi v. Stahl Associates Co.*, 74 N.Y.2d at 213 (1989) (supporting the judgment with

* * *

One challenge to the iterative approach we propose is that the evolutionary process toward full legal protection could have the effect of limiting the options for family formation if fully licensed families supplant other less comprehensive forms. In this vein, marriage critics have expressed concern that same-sex couples will be channeled into marriage as an exclusive status that crowds out other forms of legal protection.¹⁹¹ We acknowledge this risk but, as suggested below, we do not think that the iterative approach necessarily is incompatible with policies of recognizing more limited family relationships.¹⁹²

III. FROM THEORY TO PRACTICE: THE WAY FORWARD FOR NEW FAMILIES

The model developed in Part II describes in stylized terms the discrete stages of an evolutionary process by which novel family groups can use collaborative techniques to overcome the uncertainty that otherwise impedes legal recognition. In this Part, we turn our attention to real world contexts in which the stages of relational novelty, isolation and non-verifiability are largely overlapping and thus less sharply delineated. In Part IIIA, we show how the movement toward recognition of marriage rights for gay and lesbian couples has successfully deployed collaborative strategies in an evolutionary process that is broadly consistent with the model we describe in Part II.¹⁹³ Part IIIB examines, in contrast, the somewhat puzzling failure of families

evidence of the parties' living arrangements over time, daily schedules, joint bank accounts, life insurance policy beneficiaries, in addition to other typically private information). In contrast, the acquisition of a marriage license automatically confers the rights and obligations of family status and allows the defines the group freedom to arrange their lives as they wish without oversight and monitoring by the state. See Case, *Marriage Licenses*, supra note _ (pointing out the freedom that married couples enjoy). Marital obligations are not formally enforced in intact relationships, but provide the basis for property division and support after divorce. Presumably the same approach would be applied to other registered families.

¹⁹¹ See e.g. Katherine Franke, *Marriage is a Mixed Blessing*, NY Times, June 23, 2011 (op ed arguing that New York's recognition of same-sex marriage may lead to abolition of domestic partnership status and rights of de facto family members).

¹⁹² See discussion of options for limited family status, such as Colorado Designated Beneficiaries statute, in Part IIIC2b infra.

¹⁹³ Of course, ours is one of many possible accounts of the marriage equality movement. Constitutional law scholars have focused on the impact of the LGBT social movement on constitutional culture. See Jack Balkin and Reva Siegel, *Principles, Practices and Social Movements*, 154 U. Pa. L. Rev. 927, 948 (explaining how the LGBT social movement challenged settled constitutional practices as violating anti-discrimination principle); William Eskridge, *Channeling: Identity-based Social Movements and Public Law*, 150 U. Pa. L. Rev. 419 (2001) (describing politics of recognition through which gays and lesbians (and other identity groups) employ equal protection principle to gain majority rights).

based on informal cohabitation to attain legal recognition. We suggest that the complexity and variety of these relationships pose daunting information problems that have inhibited collaborative affiliation, normative integration and legal recognition. In Part IIIC, we focus on relationships not involving dyadic intimate pairs, including polyamorous, multi-generational and voluntary kin groups. These aspiring family groups cannot be measured as readily against the template provided by marriage. Thus, they pose more complex governance issues than does the standard two-party union, and that may create challenges for the state in evaluating family functioning. The collaborative framework we developed in Part II highlights both the challenges and the opportunities for achieving a legal status facing these truly novel family forms.

A. SAME-SEX FAMILY RELATIONSHIPS: FROM OUTLAW TO MAINSTREAM

The modern history of gay and lesbian family relationships conforms roughly to our account of how a novel family category evolves from outsider status to full integration and legal recognition.¹⁹⁴ Through the 1980s and well beyond, many (perhaps most) gays were closeted, hiding their sexual orientation and intimate relationships from family, friends and colleagues to avoid harsh social and legal sanctions. But even in this hostile environment, couples cohabited in long-term unions¹⁹⁵ and developed clear understandings of their mutual obligations.¹⁹⁶ Same-sex couples in committed relationships began to execute contracts to formalize their understandings regarding property sharing, support, inheritance and related issues.¹⁹⁷ Over time

¹⁹⁴ To be sure, the path to recognition of marriage rights for LGBT couples does not precisely follow the stylized three-stage process we describe. But the overall pattern largely tracks the course we describe. Two landmark Supreme Court decisions dramatically mark the change in status we describe. In 1986, the Supreme Court in *Bowers v. Hardwick* upheld the constitutionality of a state statute criminalizing the sexual intimacy between gay men. 478 U.S. 186 (1986). Twenty seven years later, in *United States v. Windsor*, the Court struck down Section 3 of the Defense of Marriage Act on the ground that excluding same-sex couples married under state law from the federal definition of marriage offended the dignity of their relationships. 133 S. Ct. 2675 (2013).

¹⁹⁵ MARY MENDOLA, *THE MENDOLA REPORT: A NEW LOOK AT GAY COUPLES* (1980) (recounting survey of hundreds of same-sex couples in the 70s and 80s). See also e.g., Anne Hull "*Just Married, After 51 Years Together; Activist Gay Couple Accepts Leading Role.*" WASH. POST., Feb 29, 2004. p. A.01 (describing life of gay couple together for over 50 years); Glenn Chapman, *Being Gay in America: a 50-year Love Story* AFP, available at http://www.google.com/hostednews/afp/article/ALeqM5iBphZRCRncTYPkQT_xk9K-seengng?docId=CNG.feaf99808e07209bf669127e7046e006.bd1 (May 8, 2014)(same).

¹⁹⁶ George Chauncey's history of the movement describes gay partners exchanging vows in marriage ceremonies performed in the Metropolitan Community Church in the 1970s and 1980s. GEORGE CHAUNCEY, *WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY* 91-92 (2004).

¹⁹⁷ See, e.g., *Whorton v. Dillingham*, 202 Cal.App.3d 447 (App. Dist. 1988) (upholding oral contract between same-sex partners in which one promised to provide financial support in exchange for emotional support and household services); *Posik v. Layton*, 695 So. 2d 759, 760 (Fla. Dist. Ct. App. 1997) (upholding written agreement between same-sex partners); *Anonymous v. Anonymous*, 784 N.Y.S.2d 918 (Sup. Ct. 2004) (upholding agreement between same-sex partners that decided division of property upon termination of relationship).

these couples and their advocates, motivated by a common goal of attaining respect and legal protection for their relationships, increasingly formed networks through their social, political and religious affiliations.¹⁹⁸ This movement contributed to greater openness about sexual orientation, stimulated media interest and increased public familiarity with, and acceptance of, same-sex family relationships. In recent years, advocates have sought and won legal recognition of these unions through an incremental process, culminating in the largely successful (and ongoing) effort to obtain marriage rights.

1. Contract and Commitment.

Throughout the 20th century, gays and lesbians faced intense public animus. Until quite recently, polls showed that most Americans thought same-sex intimacy was immoral;¹⁹⁹ social and religious conservatives in the 1980s even suggested that AIDS was God's punishment for sinful behavior.²⁰⁰ Some states had criminal anti-sodomy statutes aimed at gays, until these laws were ruled unconstitutional in 2003.²⁰¹ Discrimination in employment, housing and education was rampant and gays and lesbians received little protection under anti-discrimination laws.²⁰² Not surprisingly, in this environment many LGBT individuals chose not to publicize their sexual orientation or their intimate relationships, a stance that in many settings prevailed into the 21st century.

¹⁹⁸ The movement from isolation to broad societal acceptance is generally seen as starting in the 1950s with the Mattachine Society, a group of gay men in Los Angeles who wanted to create social acceptance for LGB people. JAMES T. STEARS, *BEHIND THE MASK OF THE MATTACHINE* 147 (2006). Disagreements within the group about what methods should be used eventually led the group to disband. C. TODD WHITE, *PRE-GAY L.A.* 18–19 (2009) (discussing initial disagreement about purpose and mission of Mattachine). The modern LGBT rights movement is then seen as having started with the Stonewall riots in 1969. SAM DEADERICK & TAMARA TURNER, *GAY RESISTANCE: THE HIDDEN HISTORY* 39–40 (1997).

¹⁹⁹ From the 1970s to the early 1990s, polls showed that between two thirds and three quarters of Americans thought gay sexual relations were “always wrong.” That percentage dropped to 44% by 2010. Tom Smith, *Public Attitudes toward Homosexuality*, Nat'l Opinion Research Center (2011) at www.norc.org M. Jones, *Americans' Opposition to Gay Marriage Eases Slightly*, Gallup Politics (May 24, 2010), <http://www.gallup.com/poll/128291/americans-opposition-gay-marriage-eases-slightly.aspx>.

²⁰⁰ Hans Johnson & William Eskridge, *The Legacy of Falwell's Bully Pulpit—A Commentary by William Eskridge* 78 (last visited 4/19/2014, 11:05 AM), <http://www.law.yale.edu/news/5131.htm>.

²⁰¹ *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down Texas sodomy ban as unconstitutional). Some states still have these laws in their criminal codes, but do not enforce them against consenting adults. See, e.g., Va. Code Ann. § 18.2-361 (2005).

²⁰² The first nondiscrimination law for LGBT people was passed in Massachusetts in 1981; the next was passed 8 years later. David E. Newton, *Same-Sex Marriage : A Reference Handbook* 21 (2010), available at <http://site.ebrary.com/lib/columbia/docDetail.action?docID=10437171>. These laws generated strong opposition and efforts to repeal. Ultimately the Supreme Court intervenes in *Romer v. Evans* to prevent repeal of these laws. 517 U.S. 620 (1996).

Despite this hostile climate, many gays and lesbians found partners and cohabited in stable unions in the last decades of the 20th century.²⁰³ Functioning in isolation from the larger society, and often from family, friends and colleagues, same-sex couples constructed their relationships in a highly uncertain environment in which they lacked legal protection and often social support. The evidence suggests that many same-sex couples had clear understandings of their mutual obligations to care for and support one another, and to share income and property. Despite stresses unfamiliar to straight couples, these couples were able to sustain stable relationships on the basis of these understandings,²⁰⁴ Some couples in supportive communities signaled their marriage-like commitment to one another through wedding ceremonies²⁰⁵ even though neither regulators nor (often) family recognized their commitments.²⁰⁶

The understandings of same-sex gay couples in committed relationships during this period can be seen as analogous to collaborative agreements in the business setting. These early cohabitation agreements were experimental endeavors worked out under conditions of high uncertainty. In this environment, collaborative commitments served to guide normative behavior and to build the trust and confidence that reinforces committed relationships. But even couples who exchanged marriage vows well understood that their commitments were not legally enforceable. By the 1990s, however, courts began to apply equitable remedies in cases where one partner had exploited the other in a grossly unfair manner. Thus, for example, some courts imposed constructive trusts on property held in legal title by one cohabitant where the other had invested large amounts on improvements in reliance on the relational understanding.²⁰⁷ These judicial responses resemble the limited enforcement of collaborative contracts by courts seeking to deter blatant cheating on the commitment to collaborate.

²⁰³ Many relationships have become familiar through litigation, the media and historical accounts and cases. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675 (2013) (holding multi-decade lesbian relationship must be recognized under federal law); Glenn Chapman, *supra* note -- (describing fifty year relationship); WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE?* 251 (2006) (describing 40 year relationship of Jack Baker and Mike McConnell); *Braschi v Stahl Assoc.*, *supra* note -- (11 years).

²⁰⁴ *Id.* See also generally MENDOLA, *supra* note -- (providing in-depth qualitative interviews with same-sex couples).

²⁰⁵ See note _ *infra*.

²⁰⁶ See CHAUNCEY, *supra* note -- at 99 (discussing pattern during AIDS crisis of hospitals and regulators favoring biological family of LGBT patient over partners without legal relationship). See also, e.g., *In re Guardianship of Kowalski*, 478 N.W.2d 790 (Minn. Ct. App. 1991) Kowalski was prevented from seeing her partner injured in a severe car accident by her partner's family for several years, until a Minnesota appeals court found her to be the lawful guardian of her partner.

²⁰⁷ See, e.g., *Cannisi v. Walsh*, 831 N.Y.S.2d 352 (N.Y. Sup. Ct. 2006) (holding lesbian partner "articulated a colorable claim for a constructive trust on the proceeds of the sale of the subject property").

Over time, as our collaborative model predicts, some cohabiting couples began to execute formal agreements creating mutually enforceable property rights. Although courts first enforced agreements between cohabitants in the 1970s, few early cases involved same-sex couples. But by the 1990s, courts began to enforce contracts between gay and lesbian partners that specified mutual financial obligations and understandings.²⁰⁸ Indeed, cohabiting same-sex couples probably were (and are) more likely to execute formal contracts than their straight counterparts because contract provided the only means by which same-sex couples could secure some of the rights and obligations that automatically follow from marital status.²⁰⁹

2. Political Action, Public Acceptance and Normative Integration.

By the 1980s and 1990s, the number of lesbian and gay families increased and the need for legal protection and political advocacy became more pressing. Scholars agree that two developments during this period -- the AIDS epidemic and the lesbian baby boom -- motivated social and political actions that had far-reaching consequences.²¹⁰ A critically important element of this process was the formation of networks by couples and advocates aiming to promote the rights of couples in same-sex relationships, in part through strategies that increased acceptance of gay and lesbian family life in the larger society.²¹¹

²⁰⁸ See e.g., *Doe v. Burkland*, 808 A.2d 1090, 1094 (R.I. 2002) (“[I]t is not illegal for two men to live together, much less to contract and to enter into partnerships with each other while doing so.”) See also cases cited in note ---, supra.

²⁰⁹ Couples who are not able to marry or enter civil unions frequently execute contracts regarding support, property sharing, inheritance, custody rights, guardianship and other matters. Although estimating the number of such agreements is speculative, in 1995, it was estimated that 10% of same-sex couples had written relationships agreements. Margaret F. Brinig, *Domestic Partnership and Default Rules* at 278, in *RECONCEIVING THE FAMILY*, supra note _ (reporting study). Some websites and legal documents encourage same-sex couples to execute written agreements, especially in states where they lack other means of legal formalization. See, e.g., Model Cohabitation Agreement for Domestic Partners, <http://www.lexisnexis.com/legalnewsroom/estate-elder/b/estate-elder-blog/archive/2010/10/05/model-cohabitation-agreement-for-domestic-partners.aspx> (Oct. 5, 2010 10:31 AM); See HRC Sample Domestic Partnership Agreement, available at http://www.hrc.org/files/assets/resources/Domestic_Partner_Agreement.pdf [on file with the authors]. Even where gay couples marry or enter civil unions, they may execute contracts out of concern that other states will not recognize their status. See generally Karel Raba, *Recognition and Enforcement of Out-of-State Adoption Decrees Under the Full Faith and Credit Clause: The Case of Supplemental Birth Certificates*, 15 *Scholar: St. Mary's L. Rev. & Soc. Just.* 293 (2013).

²¹⁰ George Chauncey identifies the AIDS epidemic and the lesbian baby boom as the key catalysts stimulating the marriage movement, CHAUNCEY, supra note -- at 95-111. See also NeJaime, supra note -- at 102 (“The HIV/AIDS epidemic brought countless gay men out of the closet, united lesbians and gay men behind a common cause, and profoundly shaped the organization of the LGBT movement.”).

²¹¹ See CHAUNCEY, supra note -- at 41- 42 and 47 (describing mobilization of gays, with large numbers coming out to friends, workmates and families in the late 1980s and 1990s). David E. Newton, *Same-Sex Marriage : A Reference*

The AIDS epidemic was a traumatic, exogenous shock that played a powerful role in triggering the process of social and legal reform because it provided stark evidence of the vulnerability of committed same-sex relationships when partners were required to engage with society's institutions. First, AIDS patients who lost their health insurance because they were too ill to work were not eligible for family coverage on their partners' plans.²¹² Moreover, when gay and lesbian individuals contracted AIDS (or, indeed any serious illness or disability²¹³), their partners often were prevented from participating in treatment decisions, acting as proxy medical decision-makers, or even from planning funerals and memorial services, often despite decedents' express wishes.²¹⁴ Surviving gay partners had no inheritance rights; in the absence of a will (and sometimes even with one), parents, siblings and even more remote relatives acquired the deceased partner's property.²¹⁵ In response to the plight of patients and their partners, the gay and lesbian community rallied, uniting in ways that reinforced its cohesiveness, and an energized corps of legal advocates mobilized to assert their rights.²¹⁶ The AIDS crisis effectively motivated collective action and provided a foundation for a powerful interest group aimed at gaining protection of same-sex couples' family rights. Despite the onerous cost of living openly, the stakes had become sufficiently high that more couples were willing to take the risk.

In the last decades of the 20th century, this drive for legal protection gained momentum from another source as well. Lesbian (and some gay) couples began to form families and to have and raise children, usually biologically related to one partner and often produced through sperm

Handbook 23 (2010), available at <http://site.ebrary.com/lib/columbia//docDetail.action?docID=10437171> (noting the growth of LGBT organizations in the 1980s, leading to the emergence of the marriage movement).

²¹² See Chauncey, *supra* note 234 at _.

²¹³ The case of Sharon Kowalski, *supra* note -- also had a galvanizing impact, as it made clear how little protection gay partnerships had. See CHAUNCEY, *supra* note -- at 111-116.

²¹⁴ William B. Rubenstein, *We Are Family: A Reflection on the Search for Legal Recognition of Lesbian and Gay Relationships*, 8 J.L. & Pol. 91 (1991-1992) (“AIDS has made the lack of a legal relationship crushingly apparent to lesbian and gay couples: a gay man whose partner is dying of AIDS may have difficulty inquiring about his condition or visiting him in the hospital because the couple has no legal relationship to one another.”).

²¹⁵ See, e.g., *Matter of Cooper*, 592 N.Y.S.2d 797, 800 (1993) (rejecting same-sex partner's claim to be “surviving spouse” for the purpose of inheritance).

²¹⁶ See CHAUNCEY, *supra* note -- at 41-42. See also Tina Fetner, *How the Religious Right Shaped Lesbian and Gay Activism* 55–56 (2008), available at <http://site.ebrary.com/lib/columbia//docDetail.action?docID=10274273>. (“Lesbians, though not afflicted by AIDS in large numbers, were on the front lines of [AIDS response]. . . . In dealing with this tragedy, the gay and lesbian community . . . established close networks of organizations working toward common causes.”).

donation (or surrogacy arrangements).²¹⁷ This trend in itself indicated the growing desire of same-sex couples to live together in committed family relationships, that of necessity could not function in complete privacy. But these families faced daunting legal challenges unknown to different-sex couples. The partner who lacked a biological connection with the child enjoyed no parental rights.²¹⁸ If the legal parent died or became incapacitated, her parents or other relatives were likely to gain custody; despite having lived for years in a parent-child relationship, the partner became a legal stranger to the child.²¹⁹ Further, if the parents separated, the non-biological parent's relationship with her children continued only with the consent of her former partner.²²⁰ Even biological parents lacked secure parental rights as courts in some states were prepared to find lesbians to be unfit parents on the basis of their sexual orientation.²²¹

The growing interest among gays and lesbians in forming family relationships, together with increased awareness of how vulnerable these relationships were, became a catalyst for collective action, conforming roughly to the collaborative processes we describe in Part II. During the last decades of the 20th century, same-sex couples increasingly affiliated through social, political and religious networks, strengthening bonds within the gay community.²²² Commitment ceremonies grew in popularity and religious couples underwent non-legal marriage ceremonies before friends and family in supportive churches.²²³ Committed same-sex couples, together with their children, formed the basis of a normative community of families that provided social support to one another.²²⁴ Particularly with the abolition of anti-sodomy laws criminalizing same-sex

²¹⁷ Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 Buff. L. Rev. 341, 391 n.2 (2002) (citing report that as many as ten million children in the U.S. live in families with same-sex parents).

²¹⁸ Id. at _.

²¹⁹ *Adoption of Tammy*, 619 N.E.2d 315, 321 (1993) (observing that mother's partner's custodial claim was vulnerable, should mother die, even though mother designated her as child's guardian in her will); *T.F. v. B.L.*, 813 N.E.2d 1244, 1254 (2004) (rejecting custodial claim of former female partner of biological mother with no biological relationship to the child).

²²⁰ Jacobs, *supra* note _ at _.

²²¹ Divorced or unmarried custodial mothers were vulnerable to challenges by fathers or other relatives claiming that lesbian mothers were unfit. In a much publicized Virginia case, *Sharon Bottoms*, a lesbian mother, lost custody to her mother. *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (1995) (awarding custody to grandmother on ground that "conduct inherent in [mother's] lesbianism is punishable as a Class 6 felony in the Commonwealth.")

²²² See discussion of role of AIDS crisis in promoting network formation among gays, *supra* notes -- to --.

²²³ See *Chauncey*, *supra* note _ at 91-92; James N. Birkitt, MCC & Marriage Equality, Metropolitan Community Churches (last visited May 8, 2014), <http://mccchurch.org/overview/history-of-mcc/mcc-and-marriage-equality/> (describing early Metropolitan Community Church marriage ceremonies).

²²⁴ See AMANDA K. BAUMLE ET AL., *SAME-SEX PARTNERS* 84-91 (2009) (discussing reasons that LGBT people interact and may choose to live in predominantly LGBT neighborhoods). The formation of social community began even before the catalyst of the AIDS crisis triggered a more activist approach. See e.g. Katherine Turk, "Our

intimacy,²²⁵ these families also began to live more openly in their communities and had more interaction with straight neighbors, teachers, and others, who thus could observe their conventional character.²²⁶

The common goal of securing legal protection for gay and lesbian family relationships was critically important at several levels. First, it served to reinforce cohesiveness within the gay community, with a growing network of same-sex couples and their legal and political advocates collaborating on a common set of political and social objectives.²²⁷ As with the formation of collaborative business networks, this network was supported by the shared goals and common purposes of its members. A norm of cooperation and open exchange of information among network members was essential to the effective pursuit of legal reform. But the evidence suggests that the reform movement served as well to solidify family commitment norms. Beginning in the 1980s with the effort to persuade localities to pass domestic partnership ordinances offering limited protection to gay couples, the clear strategy of the advocates who emerged to lead the political and legal movement (the norm entrepreneurs) was to define the relationships of same-sex couples as being like marriage and *not* like those of different-sex couples who chose not to marry:²²⁸ Advocates described same-sex couples seeking relationship recognition as being in committed, financially dependent unions like their married counterparts. Thus, the state's decision to exclude these couples from benefits that married couples enjoyed

Militancy Is in Our Openness": Gay Employment Rights Activism in California and the Question of Sexual Orientation in Sex Equality Law, 31 Law & Hist. Rev. 423, 432–33 (2013) (describing the early formation of social networks among gays and lesbians, together with organizations such as the Mattachine Society and the Daughters of Bilitis in the 1950s). See discussion in note _ *supra*.

²²⁵ *Lawrence v. Texas*, 539 U.S. 558 (2003) (finding criminal statute prohibiting sodomy unconstitutional).

²²⁶ Much evidence supports that positive attitudes follow when straights have personal association with gays. See discussion in note 233 *infra*. Surveys show that after 2000, the percentage of the population that had personal relationships with gays increased dramatically.

²²⁷ See Fetner, *supra* note -- at 46.

²²⁸ Douglas NeJaime, *supra* note _ makes this point in describing the strategy of advocates seeking to acquire domestic partnership status for same-sex couples in Los Angeles and San Francisco in the 1990s:

“[T]o achieve nonmarital recognition, advocates appealed to marriage's conventions, pointed to the unique exclusion of same-sex couples from marriage, and stressed same-sex couples' commonality with married couples. In building domestic partnership, they emphasized marital norms—such as adult romantic affiliation, mutual emotional commitment, and economic interdependence—capable of including same-sex couples. By challenging marriage's primacy while arguing for recognition in terms defined by marital norms, advocates contested, accepted, and ultimately shaped the institution of marriage while simultaneously portraying same-sex relationships as marriage-like.” *Id.* at 113.

was unfair discrimination.²²⁹ This strategy, in effect, both defined the norms for same sex family relationships and encouraged conformity to those norms as the means to attain the community's legal goals.²³⁰

The movement to gain legal protection of same-sex family relationships also contributed importantly to the transformation of public attitudes about these relationships and ultimately about same-sex marriage. To be sure, changes were not immediate. Although the AIDS epidemic awakened in the gay community a realization of the importance of legal reform, public anxiety about AIDS in the 1980s seemed to intensify hostility toward gay and lesbian relationships.²³¹ But, on our view, collaboration within the community on political and legal goals and consensus about the means to achieve them contributed both indirectly and directly to public acceptance of same-sex relationships.²³² The success of the marriage equality movement required effective engagement with mainstream society. In part, this happened informally as more lesbian and gay couples came out, signaling the quality of their relationships to the straight community; in turn, that community became familiar with same-sex couples living together (often with their children) in conventional family relationships. Research studies clearly indicate that personal association with gay and lesbian individuals as friends, family members, colleagues, and neighbors is strongly correlated with positive attitudes and support for marriage equality.²³³ Coming out by gays and lesbians dispelled the fears held by many straights: two

²²⁹ Id.

²³⁰ As William Eskridge explains, the constitutional equal protection framework deployed by legal advocates intrinsically has propelled gay activists toward an integrative approach, since it is based on a claim that same-sex couples were similarly situated to opposite sex couples, but denied equal treatment. Eskridge, *Channelling* supra note _ at 480.

²³¹ A Gallop poll in 1988 found that 57% of respondents thought that sex between same-sex partners should be illegal. See *Gay and Lesbian Rights*, Gallup, <http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx> (last visited May 7th, 2014).

²³² To be sure, many advocates in the gay community regret the priority given to attaining marriage rights as well as the assimilative strategy adopted to shift public opinion. See Franke, *The Politics of Same-Sex Marriage Politics*, 15 Colum. J. Gender & L. 236, 237-42 (2006) (challenging movement's focus on marriage)(hereinafter *Politics*); Nancy 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"*, 79 Va. L. Rev. 1535, 1549 (1993) opposing strategy emphasizing similarities between "our relationships and heterosexual marriages."); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 Yale L.J. 1623, 1635 (1997) (arguing that advocating marriage contrary to the affirmation of gay identity and culture) . See also Ettelbrick, supra note ---.

²³³ Pew Research Center, *In Gay Marriage Debate, Both Supporters and Opponents See Legal Recognition as Inevitable*, 16 (2013), available at <http://www.people-press.org/files/legacy-pdf/06-06-13%20LGBT%20General%20Public%20Release.pdf> ("68% of those who know a lot of gays and lesbians . . . say

adults raising their children in a loving and supportive family was hardly a threatening image. The softening of public attitudes, in turn, made it easier for lesbian and gay families to live more openly, further reinforcing the trend toward public acceptance.²³⁴

The strategies of legal and political advocates and the behavior of gay and lesbian couples who became the public face of the marriage equality movement also were critical to the process of changing public attitudes. Advocates understood their role as norm entrepreneurs and chose their clients carefully;²³⁵ most petitioners had compelling histories of long-term committed relationships.²³⁶ In various ways, advocates, petitioners and other couples highlighted by the media signaled to the larger community the marriage-like quality of same-sex relationships.²³⁷ The clear message was that if gays and lesbians were actually allowed to marry, couples that chose this option could be expected to conform to stabilizing family norms embraced by the larger community. Media reports confirmed that the desire of gay and lesbian partners to undertake formal commitment through marriage was motivated by the same sentiments and goals as those of straight couples. As Edie Windsor, who successfully challenged the constitutionality of DOMA's exclusion of same-sex spouses from federal benefits,²³⁸ famously remarked, "Marriage is this magic thing. It symbolizes commitment and love like nothing else in the world."²³⁹ Eighty-four year old Windsor and the story of her decades-long relationship with Thea Spyer became world famous; *Time* magazine named her a runner-up as the 2013 Person of

they support same sex marriage." See also PERSILY, CITRON AND EGAN, *supra* note 102 at 201. Thus it appears that coming out by gays dispelled fears held by many straights and reduced animus.

²³⁴ Pew Research Ctr. *A Survey of LGBT Americans*, 44 (2013), available at http://www.pewsocialtrends.org/files/2013/06/SDT_LGBT-Americans_06-2013.pdf. (92% of LGBTs say society is more accepting of them than a decade ago, attributing change to individuals knowing and interacting with LGBT persons, the efforts of advocates and to LGBT couples raising families).

²³⁵ See NeJaime, *supra* note -- at 88 (describing strategy of emphasizing marriage-like quality of gay relationships as contrasted with unmarried straight couples).

²³⁶ See, e.g., Robert Barnes, *Gay Marriage at the Supreme Court: A 'Real Couple' Behind Prop 8 Challenge*, Washington Post (March 9, 2013), http://www.washingtonpost.com/politics/gay-marriage-at-the-supreme-court-a-real-couple-behind-prop-8-challenge/2013/03/09/39dd12f0-869e-11e2-98a3-b3db6b9ac586_story.html (discussing relationship of couple in California Proposition 8).

²³⁷ *Id.* Attractive and non-threatening couples petitioning for legal equality, registering for civil unions and applying for marriage licenses came to represent all lesbian and gay families subject to legal discrimination. Katherine M. Franke, *Politics*, *supra* note --.

²³⁸ *United States v. Windsor*, 133 S. Ct. 2675 (2013). The Court struck down DOMA's § 3, which limited the applications of provisions under federal law relating to marriage to marriages of different-sex couples. *Windsor*, 133 S. Ct. at 2695–96.

²³⁹ Nina Totenberg, *Meet The 83-Year-Old Taking On The U.S. Over Same-Sex Marriage*, NPR, (March 21, 2013) <http://www.npr.org/2013/03/21/174944430/meet-the-83-year-old-taking-on-the-u-s-over-same-sex-marriage>.

the Year.²⁴⁰ On our view, the success of the marriage equality movement owes a great deal to the impact on public and lawmakers' opinion of the stories of petitioners such as Windsor, without which it is unclear whether the powerful legal arguments made on their behalf would have succeeded.²⁴¹

This account of the gay and lesbian movement to attain marriage rights tracks the evolutionary process from isolation to integration described in Part II. Couples and their advocates collaborated in forming normative communities with the common aim of gaining social recognition and legal protection of gay and lesbian families, and these networks reinforced and supported their family relationships. Partly through the strategies of advocates, same-sex couples signaled effectively to the larger community that they lived in conventional, marriage-like relationships, caring for each other and for their children. This process has led to a dramatic shift in public attitudes; by 2013, a majority of Americans approved of marriage rights for same-sex couples.²⁴² In many parts of the country, the social status of committed same-sex couples has evolved in a generation from that of isolated outsiders or even outlaws to families who are integrated into the broader normative community.

3. Incremental Progress toward Legal Recognition

Although the stages of the collaborative process we describe in Part II are usefully separated for analytic purposes, we would expect the networking-social-acceptance stage and the legal-recognition stage to overlap substantially; this overlap has certainly characterized the marriage equality movement. As we have explained, the realization that same-sex unions were legally vulnerable directly led to the creation and strengthening of LGBT networks. Moreover, signaling the marriage-like qualities of same-sex family relationships which contributed to social acceptance was partly a legal strategy; the evidence suggests that this signaling furthered legal

²⁴⁰ Eliza Gray, *Edith Windsor, the Unlikely Activist*, Time (Dec. 11, 2013) <http://poy.time.com/2013/12/11/runner-up-edith-windsor-the-unlikely-activist>, supra note 1; see also Adam Gabbatt, *Edith Windsor and Thea Spyer: 'A Love Affair That Just Kept On And On And On'*, (June 26, 2013), available at <http://www.theguardian.com/world/2013/jun/26/edith-windsor-thea-spyer-doma> (describing relationship).

²⁴¹ Roberta Kaplan, attorney for Edie Windsor, described the importance of Windsor's personal story to the success of the constitutional litigation. Columbia Law School Commencement address, May 22, 2014 (on file with the authors).

²⁴² See Lydia Saad, *In U.S., 52% Back Law to Legalize Gay Marriage in 50 States*, at <http://www.gallop.com/poll/163730/back-law-legalize-marriage-states.aspx> (Gallop poll showing majority support for marriage rights).

claims and reassured lawmakers as well as influencing public opinion.²⁴³ Finally, the extension of legal protections has had a powerful expressive effect, legitimating gay relationships and reinforcing positive public attitudes.²⁴⁴ In the past decade, of course, the dynamic synergy between evolving public attitudes and legal reform has been extraordinary.²⁴⁵

Incremental progress toward full legal recognition of same-sex couples' family relationships began in the late 1980s and continues today. In the early period, LGBT legal advocates enjoyed limited successes; a few courts recognized gay or lesbian couples as *de facto* families for particular purposes,²⁴⁶ and cities such as New York and San Francisco allowed gay and lesbian couples (and sometimes others) to register as domestic partners, a status that carried symbolic meaning but few benefits.²⁴⁷ In the mid and late 1990s, a handful of state legislatures enacted laws creating registration systems that conferred a somewhat broader array of rights and benefits.²⁴⁸ Following the Vermont Supreme Court opinion in *Baker v State* in 1999, several states enacted civil union statutes allowing same-sex couples to register for a status that closely mirrored marriage in its tangible benefits and obligations, but lacked its respected status.²⁴⁹ In 2003, the Supreme Court held anti-sodomy laws unconstitutional in *Lawrence v. Texas*,

²⁴³ See *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (discussing the "aspects of married and family life" embodied in many same-sex relationships). See discussion *supra* Part IIA2.

²⁴⁴ Text accompanying note __.

²⁴⁵ The views of lawmakers changed in response to public opinion, of course, but also sometimes as a result of personal experience. See Richard Socarides, *Rob Portman and His Brave, Gay Son*, *The New Yorker* (March 15, 2013), <http://www.newyorker.com/online/blogs/newsdesk/2013/03/rob-portman-and-his-brave-gay-son.html#ixzz2Nhz4rUQK> (noting Senator Rob Portman changed his mind in favor of same-sex marriage after his son came out); Robin Toner, *Cheney Stakes Out His Own Position on Gay Marriage*, *N.Y. TIMES*, Aug. 25, 2004, at A1 (describing Dick Cheney's shift in opinion on marriage equality after acknowledging sexuality of his lesbian daughter).

²⁴⁶ See *Braschi*, 543 N.E.2d at 55 (holding gay couple to be *de facto* family); *E.N.O. v. L.M.M.* 711 N.E.2d 886, 893–94 (1999) (holding lesbian partner to be *de facto* parent).

²⁴⁷ See NeJaime, *supra* note -- (describing efforts to enact domestic partnership ordinances in Los Angeles and San Francisco). See also Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 *San Diego L. Rev.* 163, 184 (1995) (describing New York City ordinance extending "health benefits to both homosexual and heterosexual domestic partners."). Different-sex couples were allowed to register under some domestic partnership ordinances, but the purpose was to extend some recognition to gay and lesbian couples.

²⁴⁸ Hawaii created a limited "reciprocal beneficiary" status in 1997. See note __ *infra*. See also *In re Marriage Cases*, 183 P.3d 384, 413 (Ca. 2008) (describing 1999 California legislation a statewide domestic partnership registry.)

²⁴⁹ 744 A.2d 864 (Vt. 1999) (ban on same sex marriage violated Common Benefits clause of state constitution). In 1993, the Hawaii Supreme Court held that state's prohibition of same-sex marriage to be sex discrimination under state constitution. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). In response, the state constitution was amended. Vermont responded to *Baker* by enacting a comprehensive civil union statute, as did several other states over the next decade. Misha Isaak, "*What's in A Name?: Civil Unions and the Constitutional Significance of 'Marriage'*", 10 *U. Pa. J. Const. L.* 607, 642 (2008) (describing states enactment of civil unions and domestic partnerships, with many, but not all, of the rights of marriage).

removing a major obstacle to safe family formation for same-sex couples.²⁵⁰ Thereafter, beginning in 2003 with the Massachusetts case of *Goodrich v. Department of Public Health*, courts and then legislatures have extended the right to marry to same sex couples.²⁵¹ Today nineteen states recognize this right.²⁵²

This account is familiar and need not be repeated in detail. For our purposes, three aspects of the regulatory history are important. First, as predicted in the model set out in Part II, the process was iterative, allowing lawmakers to gain information incrementally about the functioning of same-sex unions to determine whether these groups provided the stability and capacity to fulfill family functions. In this way, lawmakers were able to meet the challenge of verifying that an aspiring family group that had been the target of hostility and disparagement deserved legal protection. Courts and legislatures evaluated the claim by marriage opponents that children raised by gay and lesbian parents faced harms not experienced by children raised by married parents—and therefore, these couples lacked the qualities to function adequately as families.²⁵³ Evidence of same sex couples raising their children satisfactorily accumulated over time, along with scientific studies indicating that the opponents' claim was groundless.²⁵⁴ This information greatly weakened the argument against extending the right to marry to gay and lesbian couples since few disputed that, in the absence of particular harm, children benefited if their parents were able to enjoy the benefits of marriage.²⁵⁵

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²⁵¹ *Goodridge v. Dep't of Pub. Health*, N.E.2d 941, 957 (Mass. 2003) (finding a right to marriage by same sex couples in state). In 2014, 19 states recognize full marriage equality for gay couples. Marriage Equality U.S.A., National Map, at www.marriageequality.org/current-status, visited June 13, 2014.

²⁵² This number is updated as of August 1, 2014. Gay Marriage : Pro and Con, at <http://gaymarriage.procon.org/view.resource.php?resourceID=004857>

²⁵³ This ubiquitous claim was made recently in the briefs of the state of Utah appealing a District Court's holding that its statute restricting marriage to different sex couples is unconstitutional. See Brief for Appellants, *Kitchen v. Herbert*, 2013 WL 7175328 (D.Utah) (“[M]an-woman marriage promotes the State's compelling interest in the care and well-being of children (and society) by facilitating responsible procreation and the ideal mode of child-rearing”).

²⁵⁴ See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 948 (N.D. Cal. 2010) (evaluating and rejecting claims by plaintiffs that “children raised by their married, biological parents do better on average than children raised in other environments.”). See also *Goodridge v. Dep't of Pub. Health*, N.E.2d 941, 957 (Mass. 2003) (rejecting state's claim that children raised by gay parents suffered harm).

²⁵⁵ For example, David Blankenhorn, the advocate who argued in *Perry, id.*, that children were harmed by same-sex parents, abandoned his position in 2012 (on the ground that children benefited from the stability of marriage). Ethan Bronner, *Gay Marriage Gains Backer as Major Foe Revises Views*, N.Y. Times (June 22, 2012) <http://www.nytimes.com/2012/06/23/us/david-blankenhorn-drops-opposition-to-gay-marriage.html>.

The second key feature of the process by which legal rights were extended to gay couples suggests another way in which regulators and advocates collaborated to produce the information necessary to evaluate this group of aspiring families. From the beginning, even when the rights sought and conferred were meager, marriage has provided the template of best practices against which both advocates and regulators have measured same-sex relationships. As Douglas NeJaime demonstrates in his interesting study of LGBT advocacy in California in the 1980s and 1990s, advocates and couples argued consistently in different legal settings that same-sex unions were marriage-equivalent and different from the casual affiliations of heterosexual couples who chose not to marry.²⁵⁶ Moreover, lawmakers required, as a condition of even limited legal recognition, that qualifying relationships be marriage-like. Under California domestic partnership ordinances and statutes, for example, domestic partners were defined as two individuals, not related by blood or marriage that “share the common necessities of life,”²⁵⁷ and “declare that they are each other’s principal domestic partner.”²⁵⁸ As NeJaime points out, the language reflected an effort to define the responsibilities and commitment of domestic partners as equivalent to those of marriage.²⁵⁹

Two important purposes were served by defining domestic partnerships as marriage-equivalent. First, domestic partnership status provided same-sex couples with another and clearer means of signaling the quality of their relationships, expediting the process of public acceptance. Registration as domestic partners may have carried few tangible benefits, but the act announced to the world that couples were in a committed interdependent relationship. Second, domestic partnership and civil union registration have some similarity to the collaborative “best practices” process described in Part II: The aspiring couples provided information to the state about how they planned to fulfill their family functions, the parties collectively established benchmarks that embodied their expectations for the support and care of family members, and lawmakers could use domestic partnership registration by same-sex couples to monitor compliance with advocates’ claims that many gay couples lived in marriage-like unions.²⁶⁰

²⁵⁶ See NeJaime, *supra* note_ at 114-116.

²⁵⁷ This language was based on California case law defining marital obligations. *Id.* at 119.

²⁵⁸ San Francisco Dom Ord., *id.* at 130.

²⁵⁹ *Id.* at 131.

²⁶⁰ Thus, for example, if most domestic partnerships failed, advocates claims about the nature of these unions would have been weakened.

The third aspect of the process of legal reform that merits attention is the extent to which lawmakers have conferred legal protection of same-sex relationships through registration and licensing, rather than through judicial recognition of informal unions. Although de facto parents have had some success in obtaining visitation rights in custody disputes, only rarely in the past decade have courts and legislatures conferred rights and obligations on same-sex couples living in informal unions. The ALI Domestic Partnership Principles, under which couples living in informal unions are subject to the *inter se* rights and duties of marriage, has gained little traction.²⁶¹ Given the momentum toward greater legal protection of same-sex relationships, this may seem surprising. But as we suggested in Part II, a licensing approach has many advantages. Registration is an efficient and privacy-protective mechanism for resolving the daunting verifiability problems faced by lawmakers aiming to offer family benefits only to those groups that fulfill family functions. By allowing couples to signal that their relationship is based on mutual commitment and responsibility, registration assists regulators in distinguishing unions that warrant legal protection from more casual affiliations without costly probing inquiries.

B. THE INCOMPLETE RECOGNITION OF COHABITATION RELATIONSHIPS

Although LGBT advocates have enjoyed considerable success in attaining legal recognition of same-sex family relationships, informally cohabiting couples in this country have received few legal protections.²⁶² Public hostility or ignorance about cohabitation cannot explain the failure of lawmakers to confer legal protection on cohabitants; surveys indicate substantial tolerance of informal unions.²⁶³ Yet many couples live together in marriage-like relationships with few of the state benefits associated with marriage and without the obligations to one another

Of course not all aspiring families are modeled on marriage. This suggests that some novel family groups may face different challenges as they seek legal recognition and that regulators' may also need to adopt different verification strategies to evaluate these groups. We address this issue below in Part IIIC.

²⁶¹ See Wilson & Chilham, *supra* note 183 (reporting that no state has adopted ALI domestic partnership status). See note _ *supra* (discussing ALI Domestic Partners' rights and obligations).

²⁶² For a discussion of the very limited legal protections enjoyed by unmarried couples, see ELLMAN, ET. AL, *supra* note _ at 967-73. For critiques and proposals for reform, see NANCY POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE*, *supra* note 1 at 3-4 (describing and critiquing lack of legal protection of unmarried couples); Ann Laquer Estin, *Ordinary Cohabitation*, 76 *Notre Dame L. Rev.* 1381, 1382-85 (2001) (describing the absence of rights and obligations between cohabitants); Cherlin, *supra* note -- at 292-94 (proposing greater legal protection for cohabiting parents); Weiner, *supra* note – at 160 (arguing for increased rights and obligations between unmarried parents).

As Polikoff has noted, unmarried couples in Canada, and other countries have been more successful in attaining legal protections. CITE

²⁶³ See Pew Research Center, *The Decline of Marriage*, *supra* note_ (finding a majority of public either neutral or positive about cohabitation (including unmarried couples raising children)).

that protect spouses on divorce. Our analysis in Part I suggests that a liberal society should confer legal protection on all groups that fulfill family functions satisfactorily. Why then have same sex couples been so successful in attaining the legal benefits awarded to families while cohabitants have largely been left unprotected?

Our analysis of the impediments facing aspiring families and the means of overcoming these obstacles through collaboration sheds light on this puzzle. Two interrelated features of cohabitation have impeded progress toward legal recognition and left cohabitants with few of the legal rights and duties conferred on protected families. First, the category of cohabitants includes a broad range of couples with varying intentions for their relationships. Some cohabiting relationships are based on enduring commitment and interdependence; for psychological or ideological reasons, these couples have chosen not to enter legal marriage.²⁶⁴ Other couples are experimental and tentative in their commitment; they may or may not develop into long-term family relationships. Still other cohabitants affirmatively reject commitment and financial interdependence: Indeed, this is a significant reason not to marry.²⁶⁵ Of course, this variability might describe gay and lesbian unions as well. But the difference, emphasized by LGBT advocates, is the second feature of cohabitation that has complicated the path to family recognition. The decision *not* to marry when marriage is an option sends a confusing signal about the nature of cohabitants' relationships, and the extent to which they are defined by family commitment norms. This uncertainty impedes the sorting of those informal unions that serve family functions adequately from more casual relationships that do not. The uncertain signal created by the choice not to marry, together with the variability among cohabiting couples, has hindered network formation and normative integration; it also poses challenging verifiability problems for regulators. In short, the defining features of cohabitation as a category create the uncertainty that has inhibited progress toward legal recognition.

1. Cohabitation and Norm Creation: Networking and Integration

²⁶⁴ Contractual claims for property and support are often brought by parties whose informal union was marriage-like. See *Friedman v. Friedman*, 24 Cal. Rptr. 2d 892 (1993) (support claim by partner at dissolution of 25 year relationship with 2 children rejected).

²⁶⁵ *Id.* See Judith Seltzer, *Families Formed Outside of Marriage*, 62 J. Marriage & Fam. 1247 (2000) (finding differences between cohabitants and spouses).

Researchers have found that cohabitants have lower levels of commitment to their relationships than do married couples,²⁶⁶ perhaps for this reason, informal unions typically are far less stable than marriages. This is partly due, of course, to the diversity among cohabiting couples described above. For many couples, cohabitation is experimental, a way for each cohabitant to evaluate whether the relationship is viable and the other party a trustworthy and compatible life partner. Thus, within three years, most informal unions either end or transition to marriage.²⁶⁷ Like same-sex couples, some different-sex couples may deal with the uncertainty of their relationships by entering into collaborative contracts in the early experimental phase. But as other scholars have noted, cohabiting couples infrequently execute formal contracts regarding property sharing and future support: plausibly this is because many couples who collaborate successfully see marriage as a superior option to formal contracting.²⁶⁸

Unlike the pattern observed among same-sex couples, there is little evidence that cohabiting couples generally affiliate in normative communities that support and reinforce their family relationships. This also is likely due to the variations among cohabitant relationships. Couples who eschew commitment likely have little in common with those in long term marriage-like unions (who indeed may present to the community as married couples).²⁶⁹ Moreover, social class plays a role in cohabitation patterns, with poor and less educated couples being more likely to dissolve their relationships and less likely to marry before having children than those who are more educated.²⁷⁰ This diversity likely deters the development of collaborative networks that reinforce behavioral expectations promoting care and interdependence. Stephen Nock has argued that, in contrast to marriage, cohabitation is “under-institutionalized,” lacking a strong set of

²⁶⁶ See discussion, *supra* note --- *supra*. Stephen Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. Fam. Issues 53 (1995).

²⁶⁷ The National Survey of Family Growth found that 40 percent of first cohabitation transitioned to marriage by 3 years, Copen et. a., *supra* note -- at 5. Many of these cohabiting couples likely are determining whether they *want* to undertake a more serious commitment to one another. Almost half of the relationships that did not transition to marriage (27% of total group) dissolved in 3 years. 33% were intact at three years. *Id.*

²⁶⁸ Ellman, *Contract Thinking*, *supra* note _. Same-sex couples who cannot marry are often advised to execute contracts to afford legal protection to their relationships., *supra* note ---. Different sex couples have the option of formalizing their commitment through marriage, which many do. *Id.*

²⁶⁹ See *Friedman v. Friedman*, *supra* note --- (associates thought couple in 25 year relationship were married).

²⁷⁰ See general discussion in CAHN AND CARBONE, *supra* note _. See also EDIN, *PROMISES I CAN KEEP*, *supra* note _ (discussing attitudes toward marriage among poor women). Cf. Vivian E. Hamilton, *Family Structure, Children, and Law*, 24 Wash. U. J.L. & Pol'y 9, 29 (2007) (“[C]hildren in . . . cohabiting families are almost three times as likely to be poor as children in married-parent families.”).

stabilizing social norms.²⁷¹ Consistent expectations for cohabitants' behavior or goals would fit poorly with the broad range of relationships in the category.

Nor do we find evidence that groups of cohabitants or their advocates collaborate to further their common interest in attaining legal protection. Cohabitants experience most of the legal disadvantages that same-sex couples have suffered: they are excluded from government benefits conferred on married couples and other legal protections; moreover, absent contract, the parties have few obligations to one another.²⁷² Yet the response to these exclusions has been relatively passive. To be sure, advocates for poor families, that include many cohabitants and their children, seek generally to better lives strained by poverty. But these efforts focus largely on improving child welfare and not directly on extending legal recognition to cohabitants.²⁷³ We find no evidence of network formation aimed at extending legal protection to cohabitation as a family category. Perhaps this is because the vulnerability of non-marital unions can easily be remedied by marriage. Straight couples likely sometimes marry to avoid the frustration and harms of non-marital status, even if their preference might be to continue to cohabit. Those cohabitants who do not marry must solve a difficult collective action problem if they are to pursue legal recognition and protection of their non-marital families.

The process of normative integration into the larger community also has not proceeded in a way that would position cohabitants to attain legal protection. The LGBT drive to attain family rights was instrumental in fostering normative integration of same sex couples into the broader community and in shaping public attitudes about the character of their family relationships. Cohabitants are not subject to the hostility that same-sex couples endured; thus in some sense informal families already enjoy public acceptance. But this does not translate into public support for elevating cohabitants to the status of fully protected legal families. This is not surprising since cohabitants have not signaled their commitment to family functioning norms. Instead, the wide range of cohabiting relationships means that the signals are noisy: couples in casual or

²⁷¹ Steven Nock, *supra* note --- at 55.

²⁷² See text accompanying notes—to – *supra* for discussion of legal rights, obligations and benefits of marriage not conferred on cohabitants. See discussion in ELLMAN, ET. AL. *supra* note _ at 967-72 (describing cohabitants' lack of legal protections enjoyed by spouses).

²⁷³ See McLanahan and Garfinkel, *supra* note 27 (presenting evidence of poorer outcomes in children born to unmarried parents and arguing for various reforms).

tentative relationships do not signal long term commitment while many couples in durable and committed unions often do not announce their unmarried status at all.²⁷⁴

2. Cohabitation and the Verifiability Problem

Even if cohabitants formed networks to advocate for legal recognition of their families, regulators would face difficulty in verifying cohabitation as a family category. The broad range of cohabitants includes many couples that lack the qualities of well-functioning families but who may seek family status with its benefits and privileges. Co-residency in an intimate union is unlikely by itself to serve as an adequate basis for designating informal dyads as families, and sorting couples in committed relationships from less deserving types poses a challenge for regulators. Because informal unions lack the clear commitment signal provided by registration,²⁷⁵ accurate determination of family status requires a costly factual inquiry that threatens privacy²⁷⁶ and is prone to error. Courts have occasionally been willing to make these determinations but typically it has been in situations where simpler mechanisms for signaling family status are unavailable.²⁷⁷ As the lukewarm response to the ALI Domestic Partnership Principles demonstrates, state actors resort only reluctantly to this *ex post* approach to determining family status.²⁷⁸

Some cohabiting couples are clearly in family relationships, and regulators may be able to employ a few straightforward proxies to minimize verifiability problems. For example, biological parenthood could serve as a basis for creating family bonds between cohabiting parents. Currently, unmarried parents living together have no financial or other duties to one another, although both parents have substantial obligations to their children. The combination of shared parenthood and cohabitation could function as a verifiable proxy subjecting the couple to family obligations and entitling them to the benefits that legal families enjoy.²⁷⁹ Cohabitants can

²⁷⁴ See *Friedman v Friedman*, 24 Cal. Rptr. 2d 892, 894 (1993)(associates assumed long-term cohabitants were married).

²⁷⁵ Licensing is the mechanism for imposing binding obligations of mutual care and interdependence, which cohabitants only undertake through contract.

²⁷⁶ See *Mary Anne Case, Marriage Licenses*, supra note _ (showing how licensing of marriage protects against intrusive government inquiry).

²⁷⁷ See discussion of judicial recognition of functional family relationships, supra note --.

²⁷⁸ See *Wilson and Clisham*, supra note _ (finding little impact of ALI Domestic Partnership Principles).

²⁷⁹ See *Meryl Weiner*, supra note --- at 135-138 (arguing that family rights and obligations toward one another should be assigned to cohabitants who have a common child). See also *Cynthia Grant Bowman, Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J. L. & Fam. Stud. 1, 45 (2007) (similar argument).

also be classified on the basis of the duration of their unions. Most cohabiting couples separate or marry in a few years: a couple who live together for five years or more can be assumed to be in a marriage-like relationship, with the attendant rights and duties, unless they opt out contractually from family obligations.²⁸⁰ Well-designed proxies such as these would allow regulators to sort cohabitants in family relationships from those whose commitment (and social value) is less compelling.

C. NON-DYADIC NOVEL FAMILIES: NAVIGATING NEW TERRITORY

Both same- and different-sex cohabiting couples are in intimate dyadic relationships, and have been measured against a template based on marriage. For same-sex relationships, this familiar model has simplified and facilitated normative integration and, ultimately, verification by regulators of the qualities of couples aspiring to gain legal protection. Other aspiring families, however, may lack ready models of family behavior to provide them with normative guidelines or to assist others in evaluating their functioning. Polygamous, multi-generational, and voluntary kin groups may all function as viable families, but to some extent they are pioneers adapting behavior and structuring family obligations to suit their unique forms. To be sure, some such families --such as multi-generational relationships—are familiar, but they have thus far functioned informally without the goal of full legal protection.²⁸¹ In general, these novel families face the initial task of structuring their family relationships through experimentation and adaptation without the template that marriage provides.

These groups are characterized by one of two features—some by both—that distinguish them from families modeled on marriage. The first is that they often include more than two adult parties.²⁸² A group that includes multiple adults is more complex than a dyad in ways that generate uncertainty about its functioning. Avoiding exploitation, imposing obligations fairly and efficiently and protecting the interests of those adults who dissent from decisions by the

²⁸⁰ See Scott, *Marriage, Cohabitation, and Collective Responsibility for Dependency*, 2004 U. Chi. L. Forum 225 (arguing that couples who have cohabited for five years typically are in marriage-like relationships and should be subject to default rules regulating property sharing and support on divorce.)

²⁸¹ Grandparents in the 1980s and 90s did lobby successfully for the enactment of grandparent visitation statutes. See discussion in ELLMAN ET. AL., *supra* note _ at 732-33. *But see* Troxel v. Granville, 530 U.S. 57 (2000) (application of Wash. grandparent visitation statute violate parents' constitutional rights). See also Moore v City of East Cleveland, 431 U.S. 494 (rejecting zoning ordinance that had the effect of excluding grandparent raising her grandchild from definition of "family").

²⁸² A multigenerational or voluntary kin family could include just two adults but many will include more. For simplicity, we do not deal specifically with dyads.

adult majority require more complex mechanisms than is required to regulate an equalitarian dyad.²⁸³ Second, while polygamous relationships involve sexual intimacy, other aspiring unions are not based on conjugal bonds among the adults. The combination of multiple parties and asexual relationships creates uncertainties about the stability and functioning of these novel families that are different from, and possibly greater than, those families based on the model of marriage. For multi-generational groups, of course, this uncertainty may be offset by genetic ties and by historic tradition. But other non-dyadic groups may greater challenges in demonstrating their viability as stable families.

1. Polygamous Groups

In the current climate, it may seem fanciful to discuss the path to legal recognition for polygamous family aspirants. In contemporary American society, polygamy is largely associated with fundamentalist Mormon communities and other notorious cultlike groups that are generally viewed with hostility for posing a severe risk to teenage girls who reportedly are coerced into sexual relationships with older men.²⁸⁴ On this ground, fundamentalist Mormons have been subject to child protection interventions and their leaders have faced criminal prosecution.²⁸⁵ These groups are deeply hierarchical, with women occupying subservient positions in a male-dominated oligarchy-- a family structure that is discordant with contemporary norms of gender equality.²⁸⁶ Finally, because outlaw polygamous groups include a small number of (usually older) men with many wives, young men are often expelled from their communities.²⁸⁷ It is fair

²⁸³ See Davis, *supra* note_ at 1957 - 1961(explaining the governance challenges facing polygamous groups and offering a partnership model in response).

²⁸⁴ The Fundamentalist Church of the Latter Day Saints (FLDS) is led by Warren Jeffs, who has been convicted in several states of criminal offenses related to the coercion of minor girls to “marry” adult men. See generally Mark Shurtleff, *Religion and Non-State Governance: Warren Jeffs and the FLDS*, 2010 Utah L. Rev. 115 (2010) (discussing Warren Jeffs and his criminal history with minors). A polygamous cult, the Branch Davidians, attracted world-wide notoriety when it engaged in a shootout with Federal agents resulting in dozens of deaths at its compound near Waco, Texas in 1993. Branch leader, David Koresh, had multiple “spiritual” wives, including reportedly underage minors. John Burnett, *Two Decades Later, Some Branch Davidians Still Believe*, NPR (Apr. 20, 2013). See, <http://www.npr.org/2013/04/20/178063471/two-decades-later-some-branch-davidians-still-believe>.

²⁸⁵ *Id.* In a notorious Texas case, allegations of sexual abuse of underage girls led to the removal of 126 children by the Texas Department of Family and Protective Services from the Yearning for Zion ranch, a FLDS community. The Texas Supreme Court upheld an appellate court’s order vacating state custody, finding that, despite evidence of a pattern of sexual abuse of pubescent girls on the ranch, children not at risk were removed and those at risk could have been protected without removing them from their parents’ custody. *In re Texas Department of Family and Protective Services*, 255 S.W.3d 613 (Tex. 2008).

²⁸⁶ CITE

²⁸⁷ Julian Borger, *The Lost Boys, Thrown Out Of US Sect So That Older Men Can Marry More Wives*, The Guardian (June 13, 2005), available at <http://www.theguardian.com/world/2005/jun/14/usa.julianborger> .

to say that polygamous families are unlikely to attain public acceptance or legal recognition so long as fundamentalist religious polygamists represent the archetypical model.

But attitudes toward polygamy appear to be softening somewhat, as evidenced by the popularity of the television series, *Big Love*, and the reality show, *Sister Wives*, both depicting rather conventional polygamous families.²⁸⁸ Further, the legal basis for prohibiting polygamous families may be eroding. In 2013, in a case involving the family depicted in *Sister Wives*, a Utah federal district court held unconstitutional a state criminal ban on polygamy.²⁸⁹ As the court in *Brown v. Buhman* pointed out, fundamentalist Mormon men practicing polygamy typically enter multiple *religious* marriages but have only one legal wife. On this basis, the court applied *Lawrence v. Texas* to hold that the prong of the Utah bigamy statute prohibiting cohabitation by a legally married person violated the individuals' right of privacy protected under the 14th Amendment.²⁹⁰ Further, the court found that the Utah law interfered with the free exercise of religion in targeting a particular group. None of this indicates that polygamy has gained public acceptance but it does suggest some change in public attitudes and a movement toward decriminalization, an essential step in the process leading to legal recognition.²⁹¹

Although some polyamorous groups may value the fluidity and liberty that parties in unregulated relationships enjoy,²⁹² others (such as the hypothetical polygamous family we describe) might aspire to relationships based on commitment and interdependence.²⁹³ For those in the latter category, family status may be a desirable goal, made more plausible by the success

²⁸⁸ The web site of *Sister Wives* described the purpose of the show as showing viewers how the Browns, a polygamous family “navigates life as a ‘normal’ family in a society that shuns their lifestyle,” at *Who are the Browns?*, TLC at <http://tlc.discovery.com/tv/sister-wives/about-the-show.html> last visited June 2, 2014. See generally Kaitlin R. McGinnis, *Sister Wives: A New Beginning for United States Polygamist Families on the Eve of Polygamy Prosecution?*, 19 VILL. SPORTS & ENT. L.J. 249 (2012) (discussing impact of *Sister Wives* and *Big Love* on public perception of polygamous relationships).

²⁸⁹ *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013). *Brown* struck down *United States v. Reynolds*, 98 U.S. 145 (1878), a 19th century Supreme Court opinion upholding the constitutionality of such a ban.

²⁹⁰ In his dissenting opinion in *Lawrence v. Texas*, Justice Scalia argued that the decision would weaken the ban on polygamy. 539 U.S. 558, _ (2003). *But see* *Utah v. Holm*, 137 P3d 726 (Utah 2006)(holding that polygamy implicates marriage and thus is outside privacy protection of *Lawrence*).

²⁹¹ Of course, *Lawrence v. Texas* provided this step in the marriage-equality movement.

²⁹² See Emens, *Monogamy's Law*, supra note -- at 309-330 (discussing commitment to free sexual expression among many polyamorists). Some advocates for polyamory may respond similarly to critics arguing that the marriage equality movement has limited the freedom of gays to live their intimate lives free of the constraint of marriage. Franke, *Longing for Loving*, supra note _; cf. Melissa Murray, *Marriage as Punishment*, 112 Colum. L. Rev. 1 (2012)(more general but similar argument).

²⁹³ One polyamory website reports polyamorous groups in committed partnerships and undergoing commitment ceremonies. www.lovemore.com/faq.

of the LGBT marriage equality movement.²⁹⁴ Aspiring polygamous families confront two challenges, one common to multi-party adult relationships generally and the other familiar from the LGBT experience. Like other families with multiple adults, polygamous groups aiming for recognition must create governance structures that promote stability, while ensuring a fair distribution of rights and obligations, without the guidance provided by the dyadic model of marriage. In addition, like same-sex couples, polygamous groups face the formidable challenge of moving from outlaw status to integration into the broader normative community. Moreover, aspiring polygamous families must overcome a challenge not confronted by gays and lesbians—the reputational harm created by the actual practices of fundamentalist polygamists.²⁹⁵

The first challenge for aspiring polygamous families is to create a collaborative agreement sufficient to overcome high levels of uncertainty about the viability of this relationship form. Multi-party contracting requires more complex governance structures than does bilateral agreement.²⁹⁶ In addition to the challenge of specifying mutual obligations and responsibilities, parties must structure their relationships and performance to avoid exploitation of all members and also address the key question of how to resolve disagreements.²⁹⁷ Adrienne Davis has suggested that this challenge can be met by adapting the default rules governing partnership relationships.²⁹⁸ These rules protect dissenting members from exploitation by the majority and permit exit from the partnership by dissenting minorities under specified conditions.²⁹⁹ In addition, the parties can contract for a unanimity rule governing all family decision-making. Here the threat of dissolution of the relationship should the parties fail to agree on a course of action deters frivolous disagreements and encourages compromise. Under this regime, parties are able to learn rather quickly whether their partners are capable of adequate family functioning and whether they have the capacity for collaborative decision-making. Such

²⁹⁴ See Davis, *supra* note -- at 1957 (describing how both supporters and detractors of polygamous marriage rights view the goal as more plausible in the wake of marriage equality for gays.)

²⁹⁵ See notes 277 to 279 and accompanying text (describing association of FLDS with sexual abuse and other harms to children). In contrast, no evidence supports allegations that children of gay parents suffer harm by virtue of their parents' sexual orientation.

²⁹⁶ Fabrizio Cafaggi, *Introduction*, in *CONTRACTUAL NETWORKS, INTER-FIRM COOPERATION AND ECONOMIC GROWTH* 9 (F. Cafaggi ed. 2011).

²⁹⁷ As my colleague Liz Emens points out, the risk of coercion may be as great in dyadic relationships.

²⁹⁸ Davis, *supra* note -- at 2004.

²⁹⁹ Some polygamists favor a structure in which the entity endures, but individual members are free to withdraw. See Davis, *supra* note _ at 2007]. A partnership model of governance would incorporate the fiduciary duties of care and loyalty.

an environment has been shown to create bonds of trust in commercial relationships based on similar collaborative structures. The success of multi-party professional partnerships and other commercial collaborations suggests that there are available models to solve the contracting problems facing polygamous groups who wish to test the durability of their relationship through contract.

But even if individual polygamous relationships can be sustained through collaborative and formal contracting, these groups face a daunting task seeking to move from outlaw status to integration with the larger normative community. Just as same sex intimacy was criminalized in the pre-*Lawrence* era, (at least some) polygamous unions are often prohibited under criminal law.³⁰⁰ For this reason, polygamous groups are likely to be secretive; as with same-sex couples, this inhibits the formation of normative networks and, ultimately, acceptance by the broader social community. Moreover, a powerful strategy deployed by LGBT advocates for gaining public acceptance and legal reform, the identification of same sex unions with marriage, is likely not available to polygamous groups. Further, stable commitment may seem to be incompatible with the simultaneous maintenance of multiple intimate relationships; if so, polygamous relationships may be perceived as offending the strong social norm against adultery.

But polygamists have been heartened by the LGBT movement, the success of which may function as a catalyst that emboldens polygamist groups to live more openly and to pursue legal recognition of their family relationships.³⁰¹ If these groups function as stable, caring units in which adult members relate to one another on the basis of equality and minors are not exploited, polygamous families plausibly can signal to the larger community that they are committed to family functioning norms. As with the LGBT marriage equality movement, a key element of this process is the formation of networks of aspiring families and their advocates. Effective legal and social advocacy by norm entrepreneurs on behalf of contemporary polygamous groups might gradually supplant religious polygamists in the public imagination. Indeed, the process of network formation has begun, facilitated by the internet, with the emergence of interest groups

³⁰⁰ See text accompanying notes _ to _ supra (discussing judicial responses to criminal statutes). Utah Att’y Gen. Off., *The Primer: A Guidebook for Law Enforcement and Human Services Agencies Who Offer Assistance to Fundamentalist Mormon Families* 53–59 (Jan. 2011), available at http://attorneygeneral.utah.gov/wp-content/uploads/sites/6/2013/08/The_Primer.pdf (cataloging and discussing laws that can be used against polygamists in various states).

³⁰¹ See text accompanying note note 326 infra.

whose goal is promote interaction among polygamists, disseminate information to correct negative impressions and ultimately acquire plural marriage rights. The web site of one such group announces that “[f]reely-consenting, adult, non-abusive, marriage-committed polygamy is the next civil rights battle.”³⁰²

Polygamists face particularly daunting challenges in attaining state certification. Because the form is not modeled on the familiar marital dyad and because of the sordid and familiar recent history of polygamy, the state will require extraordinary assurances that these new families are different from fundamentalist cults. Because of these unique obstacles, transparency and cooperation with regulators will likely be essential. The model developed in Part II predicts that an iterative process of collaboration to develop and enforce best practices offers the most plausible path for polygamists to attain family status. To be sure, the goal of attaining marriage rights for polygamists may currently seem unlikely, but *Buhman* and other recent developments hint that the legal prohibition of and moral distaste for multi-party intimate unions is beginning to erode. If so, polygamous groups may well be in the early stages of the evolutionary process that leads to legal recognition.³⁰³

2. Non-Conjugal Aspiring Families

Aspiring non-conjugal families includes groups that are truly contemporary and those that are quite familiar; both confront unique challenges in attaining legal recognition. Some aspiring families, such as voluntary kin groups, have only recently attracted public interest and attention.³⁰⁴ Others, such as multi-generational families, have deep roots in American society and have been recognized by the Supreme Court as having constitutionally protected family status for some purposes.³⁰⁵ Non-conjugal groups have some advantages as aspiring families. They avoid the destabilizing risk of infidelity and, because their non-sexual bonds do not incite moral disapproval, they are unlikely to stir public opprobrium. In this regard, the process toward legal recognition may be smoother than that of same-sex couples or polygamous groups. But

³⁰² Polygamy= Marriage at www.Pro-Polygamy.com. Websites have been critical in the movement to create networks and gain public acceptance of polygamy. Pro-Polygamy.com aims to provide information to media outlets on contemporary polyamory and to dispel myths about polygamous relationships as abusive. See www.lovemore.com/faq. Network formation is also promoted by www.polygamylifestyle.com, which allows polygamist groups to find others in their locality.

³⁰³ Goldfeder, *supra* note 1 (discussing changes in public attitudes toward polygamous relationships).

³⁰⁴ Angier, *supra* note 1.

³⁰⁵ *Moore v City of East Cleveland*, 431 U.S. 494 (1977) (recognizing right of grandparent to live with grandchild).

paradoxically, the absence of conjugal ties may generate skepticism about the durability and stability of some non-conjugal affiliations. Because the legal family has long been modeled on marriage, non-conjugal groups may need to overcome an implicit assumption that a sexual bond reinforces family commitment between unrelated adults. Moreover, like polygamous groups, multi-member non-conjugal family aspirants need to create governance structures that promote commitment and avoid exploitation. Finally, some non-conjugal relationships (particularly voluntary kin) fill important family functions, but the parties themselves do not expect the group to satisfy the full range of dependency needs.³⁰⁶ In short, the evolutionary process whereby these groups might acquire legal protection remains unclear.

a. Multigenerational groups. These obstacles may be least likely to impede legal recognition of multi-generational families. Extended families have the benefit of both deep historic roots and genetic bonds, ties that are assumed to form a solid basis of family commitment. Indeed, until the 20th century, when the two-parent nuclear family became the norm, multi-generational families predominated.³⁰⁷ The Supreme Court, in an opinion rejecting the constitutionality of a zoning ordinance that prohibited a grandson from living in his grandmother's home, famously noted that extended families have played an important role in American society for centuries.³⁰⁸ But despite the fact that multi-generational families are recognized for some limited legal purposes,³⁰⁹ and generally are regarded favorably in the public imagination, for the most part these families function informally and do not receive the legal protection of marital families.

In part, this may be due to the complexity of extended families and uncertainty about which genetic family members are, or should be, recognized as a legal family. A family with multiple adults of different generations may include some who are eager to assume durable family obligations in an extended family unit and others whose affiliations are more attenuated, and who may prefer to form smaller units with non-family partners. Some members may reside

³⁰⁶ See text accompanying note _ infra (discussing limited functions of some voluntary kin groups). discussion

³⁰⁷ CITE

³⁰⁸ *Id* at 504.

³⁰⁹ Examples include intestate succession statutes, statutes imposing obligations on adult children to care for parents and grandparent visitation statutes. Kristine S. Knaplund, *Grandparents Raising Grandchildren and the Implications for Inheritance*, 48 Ariz. L. Rev. 1, 22 (2006) (discussing intestate succession statutes), 23 Pa. Cons. Stat. § 4603 (2006)(statutes imposing care obligations on adult children); *Troxel v. Granville* 530 U.S. 57 (2000) (declining to strike down grandparent visitation statute but finding it to violate parental rights as applied).

with the group for a period and then depart. If legal recognition is justified for multi-generational groups with stable long-term commitments to provide mutual care, the state will require a sorting mechanism –beyond genetic ties – to separate those members that fulfill family functioning needs from those that lack either the willingness or the capability (or both) to fulfill the familial role.

Probably the strongest candidate for full family status is the linear family group composed of grandparent(s), parent(s) and child(ren). It is clear that this familiar type of extended family can function satisfactorily to fulfill family functions. Further, the genetic bond among the members, together with well-defined family roles, reinforces already existing norms of commitment and caring. The primary challenge for these extended families may be the creation of networks with other similar families to pursue their goals of increasing public support and attaining official family status.³¹⁰ More complex multigenerational groups pose a greater challenge because they are less familiar to the public and less likely to be bound by family commitment norms than are linear family groups. Partly for this reason, regulators may find it more difficult to verify the family functioning of these non-conventional multi-generational groups.

b. Voluntary kin groups. Voluntary kin groups have recently received media attention, but generally they are relatively unfamiliar to the public and to regulators.³¹¹ In part, their emergence can be explained as a product of deficits in the functioning of more traditional family forms with the increase in divorce and decline of extended families in recent decades. Thus, some groups of voluntary kin function as substitutes for marriage or other family relationships. Lacking genetic or legal ties, members assume certain family roles and insist that their relationships are not simply friendships.³¹² These groups can take many forms: variations include two or more divorced or widowed adults, sometimes with their minor children; a parent

³¹⁰ An established group such as AARP might be enlisted to assist in this project. AARP effectively advocated for laws allowing grandparent visitation in the 1980s, mobilizing grandparents across the country. Natalie Reed, *Third-Party Visitation Statutes: Why Are Some Families More Equal Than Others?*, 78 S. Cal. L. Rev. 1529, 1536 (2005)(describing the role of AARP in lobbying successfully in 50 states for statutes).

³¹¹ Angier, *supra* note --- at ---.

³¹² Braithewaite, et. al., *supra* note --- (describing types of voluntary kin relationships); Marieke Voorpostel, *Just like Family: Fictive Kin Relationships in the Netherlands*, 68 (5) J. Gerontology: Series B: Psychological Sciences and Social Sciences 816 (2013).

who has lost an adult child and a younger adult who has assumed that role;³¹³ and adult friends who decide to live together, share resources and care for one another in a non-conjugal group.³¹⁴ The latter affiliation may include retired seniors who decide to live together for mutual companionship and support.³¹⁵

In one sense, the path to legal recognition might be less difficult for these aspiring families than for gay couples or polygamous groups because voluntary kin are less likely to face public enmity. Moreover, in contrast to some relationships based on sexual intimacy, these non-conjugal groups are formed specifically (and solely) for the purpose of fulfilling family functions.³¹⁶ But voluntary kin groups have many varying goals and expectations about their family roles. While some live as committed interdependent families, researchers report that in many relationships the voluntary kin do not purport (or aspire) to satisfy the full range of family functions.³¹⁷ Sometimes the relationship is viewed as a supplement to other primary family relationships. For example, lesbian parents may have a relationship with their child's biological father who plays an important role in the child's life but does not assume other family obligations.³¹⁸ As with cohabiting couples, this variety predictably can impede the formation of networks based on common interests and complicate the ability to signal the family-like nature of the category. Of course, unlike cohabitants, committed voluntary kin cannot marry and thus groups that do function fully as families predictably can signal their nature more effectively than can cohabitants.

One issue raised by the possibility of assigning family status to voluntary kin and other multi-adult family groups is whether the size of these groups is self-limiting. As we have suggested, increasing the number of adults adds complexity and costs to family relationships,

³¹³ Angier, *supra* note ---.

³¹⁴ Asexual individuals who seek to form families would be voluntary kin groups. Asexual couples could “pass” as a married couple but this would deny their identity. For a discussion of asexual identity, see Elizabeth Emens, *Compulsory Sexuality*, 66 *Stan. L. Rev.* 303 (2014).

³¹⁵ A Canadian study found that 8 percent of widowed individuals include a friend in descriptions of family. *Beyond Conjuality*, *supra* note 1 at 5. A variation is the naturally occurring retirement community or NORC. See discussion at www.norcs.org.

³¹⁶ Our colleague Bert Huang made this point.

³¹⁷ Braithewaite, et. al., *supra* note ---; Angier, *supra* note ---.

³¹⁸ More broadly, de facto parents represent a category of voluntary kin who may sometimes be in limited family roles. Older adults may assist one another in realizing their healthcare and other caregiving needs but not be financially interdependent and members may have allegiance to their primary biological families. See Braithewaite, et al, *supra* note _ (describing various types of voluntary kin family relationships).

along with the risk of exploitation, shirking, and other potential harms.³¹⁹ These risks may tend to increase as members are added, with the result that only multi-party groups with relatively few members are likely to function effectively in fulfilling family functions. Limitations on the size of aspiring families that are able to qualify for legal recognition forestall the possibility that communes or cult groups might register as a voluntary kinship family.

A final important question that we note but do not fully address is raised by the heterogeneity of voluntary kin groups (and some multi-generational families), with many fulfilling a limited range of family functions. Here the question is whether these limited purpose relationships are likely to acquire legal recognition through the evolutionary process we describe. To be sure, many individuals in voluntary kin relationships, like some cohabitants, prefer to maintain informal ties. But others may desire legal enforcement of the particular rights and obligations that they have assumed and seek protection of those family bonds.³²⁰ Suggestive evidence of groups attaining limited family rights supports the plausibility of this outcome through some variation of the process we describe. For example, grandparents have lobbied successfully (with the assistance of AARP, a powerful interest group) to enact statutes that give them standing to seek visitation with their grandchildren.³²¹ Moreover, at least one state has enacted a statute that allows couples to customize their family relationships by executing “designated beneficiary” agreements in which each party chooses to extend particular rights and protections to the other from a menu of options.³²² It may be that the path to legal protection of more limited family relationships raises fewer or different challenges than those faced by groups

³¹⁹ See text accompanying notes_ to_ supra (discussing these problems in polygamous groups). See Robert ELLICKSON, *THE HOUSEHOLD: INFORMAL ORDER AROUND THE HEARTH* (2008).

³²⁰ The involved biological father of a child raised by lesbian parents is one example.

³²¹ See note _ supra. Grandparent web sites provide information about grandparent rights. www.grandparents.com. Moreover, some states authorize visitation by de facto parents based on the fulfillment of parental obligations for an extended period of time with the consent of the legal parent. *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000)(authorizing custody or visitation by de facto parent and describing factors) . These factors effectively require substantial evidence of commitment to the parental role and a contractual understanding between the de facto and legal parent. But we have not found evidence of networking or advocacy to foster public acceptance. See text accompanying notes—to --- supra..

³²² Colo. Rev. Stat. Sect. 15-22-101 to 112 (2009). The parties to the designated beneficiary agreement (DBA) may select any of the 16 rights/protections on the state-provided form. Colo. Rev. Stat. §15-22-106 (2009). These rights include joint ownership of property, hospital visitation rights, medical decision-making rights, and the ability to sue for wrongful death and to benefit from workers’ compensation. Colo. Rev. Stat. § 15-22-105 (2009). DBA parties cannot be married nor in a civil union with another person. Colo. Rev. Stat. §15-22-104 (2009). See discussion of DBAs in Erez Aloni, *Registering Relationships*, 87 *Tulane L. R.* 573, at 593 and 609 (2013).

who aim to gain social and legal recognition as fully functioning families. But, in any event, that analysis is beyond the scope of our project.

CONCLUSION

The past decade has witnessed a dramatic change in public attitudes and legal status for same-sex couples who wish to marry. These events demonstrate that the legal conception of the family is no longer limited to traditional marriage. At the same time, the lack of substantial movement toward granting legal benefits to unmarried cohabitants is evidence that the state remains committed to a welfarist criterion for granting legal status, one that embodies a commitment to family functioning norms; as a category, cohabitants are too diverse to satisfy this criterion. Viewed together, both of these developments suggest that other groups aspiring to legal recognition as families must overcome substantial uncertainties if they are to achieve their ultimate objectives. At the core, overcoming these uncertainties requires establishing trust at every level — among the individual members of the aspiring family group, among the individual group and other similar aspirants, and among the network of aspiring families, the larger social community and the state. Collaborative processes have been shown in other settings to offer a means for creating trust endogenously and thus appear to offer a way forward in the evolution of other novel families. Moreover, collaboration was a crucial element in the successful movement to achieve marriage rights for LBGT couples, and the absence of meaningful collaboration is one factor in explaining the stasis that characterizes the status of unmarried cohabitants. This, then, is the evidence supporting the prediction that the future progress of other aspiring family groups toward legal status will depend in large part on how well they are able to engage the collaborative mechanisms that smooth the path from contract to status.