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THE FAMILY, LAW & SOCIETY

MARRIAGE AND  
COHABITATION

Alison Diduck

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# Marriage and Cohabitation

*Edited by*

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ASHGATE

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# Marriage and Cohabitation

Regulating Intimacy, Affection and Care



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# Series Preface

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The family is a central, even an iconic, institution of society. It is the quintessentially private space said, by Christopher Lasch, to be a 'haven in a heartless world'. The meanings of 'family' are not constant, but contingent and often ambiguous. The role of the law in relation to the family also shifts; there is increasing emphasis on alternative dispute mechanisms and on finding new ways of regulation. Shifts have been detected (by Simon Roberts among others) from 'command' to 'inducement', but it is not a one-way process and 'command' may once again be in the ascendancy as the state grapples with family recalcitrance on such issues as child support and contact (visitation) arrangements. Family law once meant little more than divorce and its (largely) economic consequences. The scope of the subject has now broadened to embrace a complex of relationships. The 'family of law' now extends to the gay, the transgendered, 'beyond conjugality', perhaps towards friendship. It meets new challenges with domestic violence and child abuse. It has had to respond to new demands – from women for more equal norms, from the gay community for the right to marry, from children (or their advocates) for rights unheard of when children were conveniently parcelled as items of property. The reproduction revolution has forced family law to confront the meaning of parentage; no longer can we cling to seeing 'mother' and 'father' in unproblematic terms. Nor is family law any longer a 'discrete entity'; it now interfaces with medical law, criminal law, housing law and so on.

This series, containing volumes on marriage and other relationships (and not just cohabitation), on the parent–child relationship, on domestic violence, on methods of resolving family conflict and on pluralism within family law, reflects these tensions, conflicts and interfaces.

Each volume in the series contains leading and more out-of-the-way essays culled from a variety of sources. It is my belief, as also of the editors of individual volumes, that an understanding of family law requires us to go beyond conventional, orthodox legal literature – not that it is not relevant – and use is made of it. But to understand the context and the issues, it is necessary to reach beyond to specialist journals and to literature found in sociology, social administration, politics, philosophy, economics, psychology, history and so on. The value of these volumes lies in their coverage as they offer access to materials in a convenient form which will not necessarily be available to students of family law.

They also offer learned and insightful introductions, essays of value in their own right and focused bibliographies to assist the pursuit of further study and research. Together they constitute a library of the best contemporary family law scholarship and an opportunity to explore the highways and byways of the subject. The volumes will be valuable to scholars (and students) of a range of disciplines, not just those who confront family law within a law curriculum, and it is hoped they will stimulate further family law scholarship.

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# Introduction

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Ten, even five years ago, there probably would have been no subtitle to this book. Debate about the legal regulation of adult family affiliation in Britain centred around two options: marriage, which changed the legal status of the partners and with it the nature and extent of their rights and responsibilities to each other (and to other family members, to the state, to the market, and even to strangers or co-citizens), and conjugal cohabitation, which ascribed no legal status and attracted only ad hoc regulation. Same-sex partners and those who cared for another, loved another and/or committed themselves to another without co-residence or sexual intimacy were simply not recognized by law or family policy as ‘partners’ or families at all and so were left out of the debates entirely. But as we have heard repeatedly, relationships, *families*, seem to have changed in recent times, and these changes have demanded social and legal attention. Some say that families have changed to their detriment and to the detriment of society, while others say that the ways in which adults commit to each other and care for each other or ‘practise family’ (Morgan, 1996) have always been variable (see, for example, Stephen Parker, Chapter 10 in this volume) and so the so-called changes are illusory. In any event, they would say, the so-called ‘new family forms’ we are living in now are not evidence so much of a breakdown in family but of an assertion of its centrality and its adaptability.

With the apparent increase in options for family living, or at least in the increased visibility of those options, have come questions about whether some or all of them ought to be subject to legal regulation and thus legitimation and, if so, what form that regulation ought to take. The subtitle to this volume, then, indicates that my intention in choosing the essays I have included is to examine those questions by providing a taste of the ways in which scholars have located marriage and cohabitation within a range of intimate affiliations in order to address them.

## Marriage and Cohabitation?

Our changing family practices may be a result of changing social norms or may precede them. As Jane Lewis reminds us in Chapter 11, normative influences go both ways. Social norms interact with legal ones so that the effects of discourses of individualization, rights, equality or care can be uncovered in both. Those influences may be direct and obvious, as in the Law Commission of England and Wales’s mandate (2006) to find a way to recognize legally demographic changes in cohabitation behaviour, or they may be more subtle such as the way in which the continuing social and ideological primacy of marriage is reflected in that same mandate. Indeed, to recognize, even to celebrate, different ways of organizing our intimate lives does not mean that traditional heterosexual marriage has lost either its appeal or its idealized<sup>1</sup> status in the public imagination or in legal and social policy.

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<sup>1</sup> O’Donovan (1993, p. 44) calls it a ‘sacred, magical status’.

Marriage is still an aspiration for many people, straight, gay or lesbian. Indeed, Patricia Morgan (2000, p. 6) tells us that 90 per cent of young people in Britain want to marry and that having a 'good marriage' as a life goal has increased in importance for young people,<sup>2</sup> and researchers from the (David) Morgan Centre for the Study of Relationships and Personal Life report that a large minority of their same-sex couple respondents had hoped that marriage, rather than civil partnership, would have been made available to them by law (Smart *et al.*, 2006, p. 2). Apparently, the attraction of marriage is obvious: it is associated with love and so is a romantic ideal (Mary Hibbs *et al.*, Chapter 3 in this volume; Diduck, 2003), and as a happy bonus, we are also told that marriage is good for us physically, emotionally and financially (Waite and Gallagher, 2000). Marriage is also associated with embarking upon a joint project with someone, with sharing one's life with someone, with *commitment* to that project or that person. (Mary Hibbs *et al.*, Chapter 3; John Eekelaar and Mavis Maclean, Chapter 6; Mavis Maclean and John Eekelaar, Chapter 7, all in this volume; see also Berger and Kellner, 1964; Diduck, 2003; Diduck and Kaganas, 2006). In 2003 the majority of people in England and Wales over age 16 had achieved this goal; 51.7 per cent of us were married (ONS, 2006b, p. 78) and while in 2006 there was a 4 per cent drop in marriages from the previous year in England and Wales (ONS, 2008a), that drop followed a four-year rise in the marriage rate (ONS, 2008b; ONS, 2006a, p. 71).

Marriage seems to remain popular, yet at the same time cohabitation has also increased in acceptability. Only 25 years ago unmarried cohabitation was contrasted in the academic literature with marriage; it was said to be qualitatively different from marriage and to engender different expectations (Ruth Deech, Chapter 13; see also Freeman and Lyon, 1983). Cohabitation was understood as a relationship that created and required less commitment on the part of its participants. It was thought to be frivolous, contingent or temporary, and certainly to be less stable than marriage, and thus merited the social and legal disregard, if not disapproval, it received (Ruth Deech, Chapter 13; Barlow *et al.*, 2005; Morgan, 2000). Since then, however, surveys report that cohabitation with no intent to marry is acceptable to 80 per cent of people under age 35 (Simon Duncan *et al.*, Chapter 4) and in 2004 24 per cent of non-married men and 25 per cent of non-married women aged 16–59 in Great Britain were cohabiting (Law Commission, 2006, p. 28, para. 2.6). One could be forgiven, in the light of these statistics, for suggesting that cohabitation has now emerged as the first acceptable example of those 'new family forms' of which scholars are writing, but although the family 'box' itself may look different, its contents look remarkably familiar. When cohabiting heterosexual couples were asked why they did not marry only a minority reported disapproval of marriage as an institution, or of the ideals of marriage (Lynn Jamieson, Chapter 2; Simon Duncan *et al.*, Chapter 4; John Eekelaar and Mavis Maclean, Chapter 6). Most couples approve of and desire the contents of the marriage 'box' – commitment, sharing, companionship, sexual intimacy – but they simply see the box itself as irrelevant to them. Indeed, where marriage is an option, many cohabitants just do not bother; they see themselves as being 'as good as married' (Simon Duncan *et al.*, Chapter 4).

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<sup>2</sup> She doesn't tell us, however, what she or these respondents mean by a 'good marriage'. Perhaps this omission is significant; perhaps it is evidence of marriage's continued iconic status – we all just 'know' what makes a good marriage.

Kiernan (2002) identifies a four-stage process as patterns of heterosexual partnership shift. The first stage is when cohabitation is viewed as an unusual habit of a small minority; the second stage is cohabitation as a prelude to marriage; the third is cohabitation as a relationship that is socially accepted as an alternative to marriage; and the fourth is cohabitation as indistinguishable from marriage in terms of commitment and parenting. Kiernan speculates that Britain is currently in between stages three and four. If this view is accurate, then the question now seems to be not how, if at all, cohabitation is to be regarded as an alternative to marriage, but how it has come to be a variety of marriage. If cohabitation has lost its early association with rebellion, transgression or alternativeness, then there seems to be no reason to distinguish between it and marriage for legal purposes (see on this Ruth Deech, Chapter 13; Stephen Parker, Chapter 10).

On the other hand, there are still conjugal cohabitants who make a conscious choice not to marry. For some, its gendered, hierarchical, heteronormative or other institutional characteristics make marriage distasteful to them personally (see, for example, Lynn Jamieson, Chapter 2; Simon Duncan *et al.*, Chapter 4; Lynn Jamieson *et al.*, Chapter 5). Others perceive marriage as an emotional or economic risk that they are not yet ready to take (Lewis, 2005; Smart and Stevens, 2000). Many lone mothers, for example, see their partners as not yet marriageworthy – for them, cohabitation represents a sensible arrangement combining independence for them and a father for their children (Smart and Stevens 2000). For these people, distinguishing legally between marriage and cohabitation makes social, emotional and financial ‘sense’.

Still other cohabitants are not able legally to marry. For example, marriage is not (yet? – see Wade Wright, Chapter 17; Brenda Hale, Chapter 12) available to same-sex partners in the UK, yet many have demonstrated its appeal by choosing the alternative to marriage that became available to them in 2005. Between 5 December 2005 when the Civil Partnership Act came into force and 31 December 2006, 18,059 civil partnerships were registered in the UK (ONS, 2007). Civil partnership is only available to same-sex partners and gives couples most of the rights and responsibilities of marriage. While the government was clear that civil partnership was not marriage by another name, Smart *et al.*’s research (2006) demonstrates the strength of the marriage ideal; many of the same-sex couples in their study referred to their civil partnerships as ‘marriages’ and most expressed ‘traditional’ reasons, such as public proclamation of commitment, for entering into them.

We see thus far that marriage, civil registration and cohabitation now appear to be socially ‘acceptable’ lifestyle choices in Britain. Unsurprisingly, however, the choices, even if less accepted, do not end there. For many, being a part of a couple and sharing one’s life with another does not require either state sanction or cohabitation. ‘Living apart together’ (LAT) has become a recognized sociological and demographic term (see Bernadette Bawin-Legros and Anne Gauthier, Chapter 8; Haskey, 2005) and researchers in Britain are beginning to explore its legal and social policy implications (Haskey and Lewis, 2006). According to Haskey (2005) around one in three people aged 16–59 who are neither co-residentially cohabiting nor married and living with their spouse are in a LAT relationship (see also Haskey and Lewis, 2006). Many choose to enter into these relationships and many are forced into them by employment or other circumstances, but maintaining independence while at the same time being in a ‘relationship’ is a common feature. Unlike cohabitation and civil partnership, both of which remain marriage-like, ‘living apart together’ challenges one of the markers of marriage/conjugal coupledness by disassociating it from common residence. In this way, LAT,



unlike contemporary cohabitation, may be a real example of a new way to affiliate. Perhaps like cohabitants did years ago, those living in a committed, sexually exclusive, intimate yet non-co-residential relationship must learn to manage their version of autonomous intimacy with external norms of what it means to be a 'couple' (Bernadette Bawin-Legros and Anne Gauthier, Chapter 8). Perhaps, also like cohabitants, by doing so they may yet effect changes in the normative requirements of 'coupledom'.

Sasha Roseneil and Shelley Budgeon in Chapter 9 challenge the conjugal imaginary even further. They and others (see, for example, Carl Stychin, Chapter 23; Weeks, 2002) suggest that, particularly but probably not exclusively within the 'homosexual community', friends offer the 'emotional continuity, companionship, pleasure and practical assistance' (p. 152) usually characteristic of partners. This destabilizing or blurring of the friend/lover binary may be yet another way in which intimacy is being transformed. It may be intimacy and commitment between 'friends, non-monogamous lovers, ex-lovers, partners who do not live together, partners who do not have sex together ... [that come to] decentre the primary significance that is commonly granted to sexual partnerships and mount a challenge to the privileging of conjugal relationships in research on intimacy' (p. 152) and in law and policy. We must even, according to Felicity Kaganas and Christina Murray in Chapter 21, open our minds to the possibility of polygynous relationships. At least, we must be clear about the reasons for social, moral and legal disapproval of them. By disassociating intimacy, affection and care from the conjugal, co-residential couple of the marriage model, these 'non-normative intimacies' may yet transform family/partnership/marriage norms in a way that cohabitation and civil partnership have yet to do.

### **Theorizing the Changes**

Sociology is now, or again (Smart and Neale, 1999), interested in families and relationships and may be able to provide some explanation for, or at least insight into, our changing family practices. Social and political theory is also beginning to explore the relationships among intimacies, the responsibilities they engender and their relationships with ideas of democracy and citizenship (Fudge and Cossman, 2002). Many of these approaches identify individualization as the key phenomenon at the end of the twentieth century that affected our relationships with the state and the international polity as much as it did our relationships with intimates (see, for example, Jane Lewis, Chapter 11; Smart and Neale, 1999). Beck and Beck-Gernsheim (1995), for example, identify individualization, globalization and women's liberation as primary factors in what they see as our need constantly to make and remake our biographies, our identities and relationships. To them, our biographies and the commitments and relationships we choose in relation to them are flexible, unwritten, personal works in progress and have produced 'post-familial families'. These families have moved from being communities of need to elective affinities. As Elisabeth Beck-Gernsheim puts it in Chapter 1 (p. 17):

Since individualization also fosters a longing for the opposite world of intimacy, security and closeness ... most people will continue ... to live within a partnership or family. But such ties are not the same as before, in their scope or in their degree of obligation and permanence. ... As people make choices, negotiating and deciding the everyday details of do-it-yourself relationships, a 'normal chaos' of love, suffering and diversity is growing and developing.

Another influential perspective has come from Anthony Giddens (1992), who also sees relationships changing as individualization becomes more reflexive. He described revolutions in sex, love and gender relations as producing a 'transformation of intimacy' in which relationships last only as long as the partners continue to get something from them. Obligation and commitment in relationships become negotiable rather than remaining static and externally imposed. To him, these 'pure relationships' based upon contingent, 'confluent love' may be more fragile than traditional relationships based upon romantic love, but they are also more democratic and fulfilling. Jeffrey Weeks (2002) uses these ideas to identify 'families of choice' within the gay and lesbian communities, and speculates that these new affinities could come to define all forms of intimacy.

These theories of late modernity highlight social change, risk and disembeddedness as the conditions of the time and they postulate changes in our ways of living to cope with these conditions. These changes mean a new importance in relationships of intimacy for negotiability, individuality and the search for an authentic and fulfilled self (see Lewis, 2001). For the most part, however, these social theorists are not doomsayers; Giddens, for example, declares that the pure relationship is a more democratic family form than the traditional family and Beck-Gernsheim's post-familial family does not signal the end of family, but simply its taking on a new form.

These theorists contrast with others who see similar historical changes occurring, but see them as dangerous. Scott FitzGibbon in Chapter 14, for example, identifies a similar crisis at the end of the twentieth century in which individuality and disaffiliation became contrasted with obligation/duty, but his solution, like Regan's (1999) and Morgan's (2000), is to reassert the good of marriage and the obligation that inheres in it. Rather than acknowledge and support the post-familial family, these authors say that there are both moral and social reasons why law and policy must discourage it and encourage individuals towards marriage and the traditional family (see also Finnis, 1994; Morgan, 2000).

Yet others query whether individualization has been as dominant a trend either socially or personally as is commonly believed (Lynn Jamieson, Chapter 2; Smart, 2007). Most, however, agree on the value of continued theorizing of intimacy and family life. Theorization generates a refinement of ideas and excites innovative empirical work and recent theory, including individualization theory, for example, has injected debate and excitement into the study of families and relationships (Smart, 2007, pp. 24–25).

## **The Empirical Research**

There is a burgeoning body of empirical research to accompany or flesh out both the demographic studies which confirm that people are exercising a broad range of choices in forming relationships and the social and theoretical research that attempts to understand what these choices mean personally and socially. Some of this research, such as that in Part II of this volume, examines and assesses the meaning for people of different forms of relationship, the functions their relationships serve for them and the importance of principles such as self-fulfilment, commitment, obligation, tradition, security, autonomy or sharing in different types of relationships. While some research, including that of Lynn Jamieson in Chapter 2 of this volume, suggests that the pure relationship is more a sociological ideal than a new type of relationship, other research suggests that individualization, globalization and changing gender

norms may indeed have changed the way we form, negotiate and structure our relationships. They have not, however, so clearly affected the values we bring to them. Commitment is still important to people (Lewis, 2001), risk is still avoided (Lewis, 2005) and gender roles in partnerships continue to belie their supposed equality, democracy or confluence (Lynn Jamieson, Chapter 2).

Part II includes a selection of recent empirical studies, many of which, contrary to the 'decline of family' pessimists – those who link the perceived rise in individualism with the decline in commitment and family values – demonstrate that values such as commitment, obligation and sharing remain important for people. While marriage is for many still the 'highest' form of commitment, obligation and commitment to a shared life project remain fundamental to a good relationship. In other words, cohabitants tend to be as committed to the relationship or to a partner as married people, even though their commitment may take a slightly different form or be perceived as coming from within rather than imposed normatively (see Lewis, 2001). In Chapter 4 Simon Duncan *et al.*, for example, find that most of their cohabiting respondents felt 'as good as married' (see also Lynn Jamieson *et al.*, Chapter 5); they had embarked upon, and were committed to, a shared life plan or experience and had constructed what the authors call a 'DIY marriage'. Their choices about whether to marry or not had less to do with the level of commitment, love or obligation they felt to their partners than with the personal and structural context in which they were able to express those values (see also Lewis, 2005; Smart and Stevens, 2000).<sup>3</sup>

This empirical research is important evidence of how social norms may indeed have changed in 'late modernity' and may be important signals for law- and policy-makers who are concerned that legal changes 'make sense' to people (John Eekelaar and Mavis Maclean, Chapter 6; Mavis Maclean and John Eekelaar, Chapter 7; Jane Lewis, Chapter 11). The research also reminds us that people make a series of different choices over the course of their lifetimes. The snapshot captured by the statistics at any point in time does not reflect the actual messiness of family practices or the myriad ways both 'rational' factors, like economic well-being, and 'irrational' ones, like love, wax, wane and interact in individual lives.

## Legal Responses

Notwithstanding the range of partnering practices theorized and lived, so far legal and policy 'space' has been created only for those relationships that are 'marriage-like' (Cossman and Ryder, 2001). The Civil Partnership Act is the clearest example of legal norms responding to newly created social ones,<sup>4</sup> but cohabitation without registration or marriage is another. To the then newly elected Labour government in 1998, it was almost as good as marriage:

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<sup>3</sup> In this context, see also Gary Becker's classic pieces analysing marriage (1973) and caring between mates, polygamy, separation, divorce and remarriage (1974) from an economic perspective. He presents a model of marriage that assumes '(1) that each person tries to find a mate who maximizes his or her well-being, with well-being measured by the consumption of household produced commodities, and (2) the "marriage market" is assumed to be in equilibrium, in the sense that no person could exchange mates and be better off' (1974, p. 811).

<sup>4</sup> But as the DTI also said, the Act was also intended to help combat homophobia by normalizing same-sex relationships.

This Government believes that marriage provides a strong foundation for stable relationships. This does not mean trying to make people marry, or criticising or penalising people who choose not to do so. We do not believe the government should interfere in people's lives in that way. But we do share the belief of the majority of people that marriage provides the most reliable framework for raising children. (Home Office, 1998, para. 4.3)

And so, almost ten years later the UK government, belatedly perhaps compared to countries like Australia, Canada, Sweden and France, acknowledged that the increasing number of cohabitants cannot be ignored and that their relationships, or rather the breakdown of their relationships, have social and legal consequences.<sup>5</sup> In 2005 it asked the Law Commission to consider reform of the law governing cohabitants' property and finances when their relationships end (Law Commission 2006, p. 17, para. 1.3). The Consultation Document, published in May 2006, endorsed the 'official' incongruent view of marriage and cohabitation, and while the Commission found justification for the legal regulation of cohabitants' post-separation financial issues, it did not recommend simply extending matrimonial law to cohabitants in the way it was extended to civil partners. That solution, said the Law Commission, may not pay sufficient respect to marriage as an institution (Law Commission, 2007). Marriage (and, apparently, civil partnership) presupposes a type of partnership that is not appropriate for cohabitants (Law Commission, 2006, Overview; Law Commission, 2007).<sup>6</sup>

Non-conjugal homesharers, on the other hand, still befuddle the official view (Law Commission, 2002), friends are not yet a part of the 'family' picture and LATs are only beginning to appear on the policy radar (Haskey, 2005). Again, though, it may be simply a matter of time before all of these different family or partnering choices are taken seriously. Researchers in Sweden and Korea, for example, have concluded that LAT is 'not so much a stage but a different kind of partnering' (Haskey and Lewis, 2006, p. 38) and the Law Commission of Canada published a report in 2002 seeking ways in which rights and responsibilities might be allocated independently of relational status, specifically excluding conjugality as a relevant factor in the allocation (see also Lisa Glennon's discussion of this report, in Chapter 27). While none of these countries may yet be at the stage, for example, where government frames 'work-life balance policies ... in terms of the range of important personal relationships and commitments within which people live their lives, rather than narrowly with reference to family responsibilities' (Sasha Roseneil, this volume, p. 559), it will be interesting to see if changing social practices may yet effect some normative change.

Until then, marriage-like conjugality remains the focus of legal attention. Most of the research on this area in this volume is British, but the preoccupation with changing family norms and changing family practices is not only a British phenomenon. Questions about the legal regulation of changing intimacies have increased all over the world and they have not always produced coherent answers. Even within a single, albeit federal, state there may be inconsistencies of approach (Cynthia Bowman, Chapter 25; Lisa Glennon, Chapter 27).

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<sup>5</sup> Until this time, it seemed to be only academic researchers and the Law Society (2001), those who worked on the 'front lines', and so saw that unmarried cohabitation had enormous financial consequences upon partners and children, who were interested in legislative reform in this area.

<sup>6</sup> It suggests that marriage, unlike cohabitation, creates an obligation to meet a former partner's needs (Law Commission, 2006, Overview, paras 3.62 and 3.63).

In the USA official federal government policy is to promote marriage (even to make receipt of welfare dependent upon it) yet, from state to state, there is no consistency in policy. As Cynthia Bowman explains in Chapter 25, unmarried cohabitation is recognized legally in a number of states and same-sex marriage is legal in a few, but the overall position is uneven. She describes the 'immense variety' of approaches that 'range from one extreme, where cohabitants have no rights against one another or third parties, to the other extreme, under which cohabitants are treated as though they were married for all purposes of state law' (p. 519). She describes the variability as creating legal instability, but is not overly pessimistic about what that instability might mean. While on the one hand it creates not only conflicts of law problems but also differences in treatment between same and different sex couples that are increasingly difficult to justify, on the other it may open up the possibility of change so that family law can perform successfully its two functions, which, in Bowman's view, are protecting the vulnerable and privatizing the costs of welfare (p. 544). These functions are themselves controversial and I return below to the social functions that families, and by extension family law, ought to play, but suffice it to say at this point that Bowman's review of the unstable state of US law makes another point. Her review demonstrates simultaneously the range of legal options available to normalize different partnership practices *and* the ease with which debate about them becomes polarized into one of marriage/not marriage.

Nancy Polikoff's recent work (2007) criticizes precisely that formulation of the question. She challenges those who advocate same-sex marriage in order to obtain the legal benefits of marriage. While in this work she supports same-sex marriage (cf. her earlier work, Chapter 20), she does so only on civil rights grounds while at the same time arguing that no couples should have to marry in order to obtain legal benefits. For her, as a matter of family policy, marriage is the wrong fight; there are other ways to solve the problems that same-sex couples describe – ways which would not discriminate against all other family types.

In Chapter 24 Anne Barlow describes variability in the laws across Europe, some of which move outside the stark marriage/not marriage dichotomy. Some state laws reflect the plurality of couple relationships, while others offer no response at all to changing family forms and norms (p. 489). She describes four approaches that laws could take. The first, exemplified by Italy and Ireland, is no recognition of any relationship other than the heterosexual marital one. The second is laws that regulate and recognize relationships based upon 'function plus form' and includes places like Sweden (and perhaps soon, England and Wales), which deal with relationship breakdown in those relationships that 'do family' appropriately. Thus Swedish legislation gives rights to cohabitants in relationships 'reminiscent of marriage' (p. 492) and permits same-sex couples to register their partnerships, giving them rights corresponding to marriage. Barlow's third category is the 'diverse marriage model' which began in the Netherlands and may now include Spain and Germany. This model does not allocate rights or recognition according to function, but simply extends the marriage form to more people. It first applied to registered partnerships of all cohabitants and now permits same-sex marriage. The fourth model, arguably the only one to challenge the meaning of 'couple' by removing it from the marriage 'box', Barlow calls 'the new style couple registration'. She places France and Belgium in this category. The French *Pacte Civil de Solidarité* (Pacs) is perhaps the best illustration of this model.

The Pacs is an agreement signed by two people, whether living in a conjugal relationship or not but who are not related to each other or already married or 'paced', to determine their

property relations both during and at termination of the *Pacs*. They must also agree to provide mutual assistance and support. Unlike marriage or civil registration, a *Pacs* can be ended unilaterally. The *Pacs* thus seems to create a whole new, if indefinable, type of relationship. As Claude Martin and Irène Théry state in Chapter 22, ‘The *Pacs* is neither a legal union nor a simple property contract. It is neither public nor private. It is neither for couples nor for pairs of friends. It is neither a legal recognition of same-sex couples nor is it non-recognition’ (p. 446). Although it was the result of strong lobbying from the ‘homosexual community’ in France, it is not confined to same-sex partners. The *Pacs* is thus a new kind of universally available relationship, but, according to Martin and Théry, it is its very universality that dilutes the equality rights of lesbian and gay couples. Despite its basis in the principle of ‘republican equality’, because such partners have no other way to effect a legal union, they are, in effect, accorded a weaker version of equality and dignity than in countries where marriage or registration of exclusively same-sex relationships is possible (see also Lisa Glennon, Chapter 27 and Polikoff, 2007 on this point).

Martin and Théry provide a fascinating study of the history of the *Pacs* and highlight the role of politics, demographics and lobbying by interest groups in its formation. Carl Stychin’s study of Britain’s Civil Partnership Act 2004 (CPA) in Chapter 23 provides us with a similar history, but from the perspective of queer theory. Stychin sees the CPA as founded upon and exhibiting a number of dichotomies, which, we might say, reflect the ideological, political and social struggles around all new relationships. The Act is located upon both sides of binaries such as ‘marriage/not marriage; sex/no sex; status/contract; conjugality/care; love/money; responsibilities/rights’ (p. 460). This placement means that registered civil partnerships may be both normative and non-normative partnerships; they are certainly an example of the compromise taken by many states in recognizing same-sex relationships.

And so, despite looking remarkably like marriage, civil registration is not the same as marriage. Marriage, Stychin reminds us, is still the ideal family form, and the government made clear the distinction between it and civil partnership when it promoted the legislation.

The Bill does not undermine or weaken the importance of marriage and we do not propose to open civil partnership to opposite sex couples. Civil partnership is aimed at same-sex couples who cannot marry ... [W]e continue to support marriage and recognise that it is the surest foundation for opposite-sex couples raising children. (Quoted in Stychin, this volume, pp. 460–61)

Instead, the Act is justified on the basis of equality, non-discrimination and rights. A close analysis of it, however, reveals that it does more than simply provide for most of the same rights and responsibilities as marriage. Because it resides on both sides of the marriage/not marriage binary, it both raises questions about the meaning of ‘couple’ in the family context (the CPA requires neither conjugality nor co-residence), *and* increases the primacy of the conjugal co-resident, traditional heterosexual couple. This primacy is further confirmed when Smart *et al.* (2006) tell us that many registered partners call their partnerships ‘marriage’.

Most of the authors in this volume agree that the decision to regulate relationships and the form that regulation takes have much to do with the degree to which law is perceived as being able to influence behaviour. In Chapter 24 Anne Barlow speculates that a state’s response to changing relationships may depend upon its view of whether law is an effective tool for moralizing people, or at least for influencing their intimate behaviour. Others agree (for