

# PARADIGMS LOST: HOW DOMESTIC PARTNERSHIP WENT FROM INNOVATION TO INJURY

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“And even when the apparatus exists, novelty ordinarily emerges only for the man who, knowing with precision what he should expect, is able to recognize that something has gone wrong.”

Thomas S. Kuhn<sup>1</sup>

## I. INTRODUCTION

In *The Structure of Scientific Revolutions*, Thomas Kuhn framed the history of science as a series of cycles.<sup>2</sup> In each cycle, the adoption of a central paradigm is followed by the “normal science” of puzzle solving surrounding that paradigm, until enough anomalous results occur to prompt a crisis and the emergence of a new paradigm.<sup>3</sup> As Kuhn made clear, the shift to a new paradigm is not easy. It is only when the existing paradigm becomes obviously flawed that we are willing to consider the possibility of disrupting it with a new paradigm.<sup>4</sup>

Though Kuhn focused on the evolution of science and scientific discoveries, his theory of paradigm shifts also applies to the legal recognition of adult relationships. The recent case, *Hollingsworth v. Perry* (formerly *Perry v. Brown*),<sup>5</sup> is illustrative. *Perry* concerns the constitutionality of Proposition 8, the

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1. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 65 (4th ed. 2012).

2. *See generally id.* (discussing this theory of scientific progress).

3. *Id.* at 5–6.

4. *Id.* at 6.

5. *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144), *granting cert. to Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *aff'g Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

ballot initiative that amended the California Constitution to prohibit legal recognition of same-sex marriage.<sup>6</sup> In finding Proposition 8 unconstitutional, both the Ninth Circuit and the district court below focused on California's regime for recognizing adult intimate relationships.<sup>7</sup>

Following Proposition 8, California now reserves civil marriage solely for opposite-sex couples.<sup>8</sup> Same-sex couples, by contrast, are permitted virtually all of the benefits and responsibilities of marriage, but under the rubric of domestic partnership.<sup>9</sup> Though domestic partnership, like marriage, conveys important benefits and obligations, according to the *Perry* courts, it lacks marriage's cultural and social heft.<sup>10</sup> "[M]arriage," the Ninth Circuit concluded, "is the name that society gives to the relationship that matters most between two adults."<sup>11</sup> This view is consistent with the district court's account, which noted that because domestic partnership was new and unfamiliar and lacked marriage's "culturally superior status,"<sup>12</sup> it is a "substitute and inferior institution."<sup>13</sup>

In reflecting on *Perry*'s legacy, it is worth thinking about the paradigm of relationship recognition that *Perry* endorses. Though the district court and the Ninth Circuit decided the case on starkly different grounds,<sup>14</sup> both courts were

6. Proposition 8's text was as follows: "Shall the California Constitution be changed to eliminate the right of same-sex couples to marry providing that only marriage between a man and a woman is valid or recognized in California?" See League of Women Voters, *Proposition 8 Eliminates Right of Same-Sex Couples to Marry*, SMARTVOTER, <http://www.smartvoter.org/2008/11/04/ca/state/prop/8/> (last visited Sept. 30, 2012). For further discussion of Proposition 8 and the campaign promoting it, see Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357 (2009).

7. *Perry v. Brown*, 671 F.3d at 1077–78 ("In adopting [Proposition 8], the People [of California] simply took the designation of 'marriage' away from lifelong same-sex partnerships, and with it the State's authorization of that official status and the societal approval that comes with it."); *Perry v. Schwarzenegger*, 704 F. Supp. 2d at 970–72 (discussing, in its findings of fact, domestic partnerships).

8. CAL. CONST. art. I, § 7.5 ("Only marriage between a man and a woman is valid or recognized in California.").

9. CAL. FAM. CODE § 297.5(a) (West 2004) ("Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.").

10. *Perry v. Brown*, 671 F.3d at 1078 ("Had Marilyn Monroe's film been called *How to Register a Domestic Partnership with a Millionaire*, it would not have conveyed the same meaning as did her famous movie, even though the underlying drama for same-sex couples is no different. The name 'marriage' signifies the unique recognition that society gives to harmonious, loyal, enduring, and intimate relationships."); *Perry v. Schwarzenegger*, 704 F. Supp. 2d at 994 ("[D]omestic partnerships are distinct from marriage and do not provide the same social meaning as marriage.").

11. *Perry v. Brown*, 671 F.3d at 1078.

12. *Perry v. Schwarzenegger*, 704 F. Supp. 2d at 994.

13. *Id.*

14. Nan D. Hunter, Response, *Animus Thick and Thin: The Broader Impact of the Ninth Circuit Decision in Perry v. Brown*, 64 STAN. L. REV. ONLINE 111, 111 (2012) (noting that the Ninth Circuit "crafted a decision that struck down Proposition 8 with reasoning that applies only to

united in their view of marriage as the single paradigm model for adult intimate relationships. This framing is unsurprising. Throughout the country, efforts to secure marriage equality have necessarily focused on marriage as the paradigm model. In so doing, they have characterized marriage alternatives, like domestic partnerships and civil unions, as cut-rate counterfeits that may serve as interim measures in the struggle to secure marriage equality, but not as ends unto themselves.

But this was not always the case. Although the *Perry* opinions do not advert to it, there was an earlier moment in the gay rights movement when domestic partnership was an end unto itself. More specifically, for a constituency of unmarried gay and straight individuals, domestic partnership was an innovation—a paradigm shift in the legal understanding and recognition of intimate relationships and the conferral of public and private benefits. In its founding moments in California municipalities in the 1980's and early 1990's, long before it was transformed into a second-rate marriage substitute, many considered domestic partnership to be an *alternative* to marriage for purposes of relationship recognition.<sup>15</sup> It was a means of remedying the discrimination that unmarried persons, whether gay or straight, suffered because marriage was the primary conduit to a range of public and private benefits.<sup>16</sup>

In this essay, I trace the history of domestic partnership in California,<sup>17</sup> from its origins in progressive cities like Berkeley and West Hollywood to its denunciation as a “separate and parallel” institution in the *Perry* litigation.<sup>18</sup> In so doing, I provide an historical context in which to locate domestic partnership. More importantly, I recover a moment when interest in the legal recognition of relationships extended beyond the narrow paradigm of marriage to consider a more pluralistic model of relationship recognition. This history, I contend, offers important insights as we consider marriage equality and *Perry*'s legacy.

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California. All but ignoring Judge Walker's far-reaching trial court opinion in *Perry v. Schwarzenegger* . . .”).

15. Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1256 (2010) (“For many, the push for domestic partnership represented an effort to challenge the dominance of marriage by creating a range of relationship formats, with different rights and benefits attaching to each.”).

16. Paula L. Ettelbrick, *Domestic Partnership, Civil Unions, or Marriage: One Size Does Not Fit All*, 64 ALB. L. REV. 905, 909 (2001) (“Under the feminist banner of ‘equal pay for equal work,’ domestic partnership was born. Employees who are in committed non-marital ‘domestic partnerships’ should receive the same benefits and compensation as those who are married.”).

17. I focus on California because of its history of experimentation with domestic partnership. California has served as a “laborator[y] for experimentation to devise various solutions” for the problem of nonmarital relationship recognition. *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

18. *Perry v. Schwarzenegger*, 704 F. Supp. 2d at 994.

## II.

## A NEW PARADIGM: THE ORIGINS OF DOMESTIC PARTNERSHIP IN CALIFORNIA

California's experiment with domestic partnership began in 1979, when Tom Brougham, a Berkeley municipal employee, urged the city to provide healthcare coverage to his partner, Barry Warren.<sup>19</sup> A year earlier, Berkeley had passed a sexual orientation nondiscrimination policy.<sup>20</sup> Brougham argued that using marriage (a status for which same-sex couples were ineligible) as the sole eligibility criterion for benefits violated the policy.<sup>21</sup> To remedy the problem, Brougham suggested that the city create a "domestic partnership" designation.<sup>22</sup> In 1984, Berkeley did just that, establishing the first municipal domestic partnership scheme.<sup>23</sup> Under the policy, registered domestic partners were eligible for dental benefits, leave benefits and, eventually, healthcare benefits.<sup>24</sup> Initially available only to municipal employees, the policy was expanded in 1991 "to provide the general public the opportunity to register as Domestic Partners."<sup>25</sup>

Within eight years of Berkeley's innovation, several other California municipalities followed suit, proposing—and, in some cases, successfully enacting—domestic partnership regimes that provided unmarried couples with a limited range of public and private benefits.<sup>26</sup> Though these new regimes were broadly associated with efforts to secure rights for same-sex couples, they were available to *all* eligible unmarried couples, whether gay or straight.<sup>27</sup> Their availability to unmarried couples underscored their role in providing an alternative to marriage for legal recognition of relationships.

While all of the municipal domestic partnership regimes used marriage as a

19. See Leland Traiman, *A Brief History of Domestic Partnerships*, GAY & LESBIAN REV. WORLDWIDE, July–Aug. 2008, at 23, 23.

20. *Berkeley Council Approves Strong Gay Rights Law*, L.A. TIMES, Oct. 12, 1978, at B28 ("The Berkeley City Council has given final approval to what is believed to be the strongest homosexual rights ordinance in the nation.").

21. Traiman, *supra* note 19, at 23.

22. *Id.*

23. ELLEN LEWIN, *RECOGNIZING OURSELVES: CEREMONIES OF LESBIAN AND GAY COMMITMENT* 10 (1998).

24. THOMAS F. COLEMAN, *THE DOMINO EFFECT: HOW STRATEGIC MOVES FOR GAY RIGHTS, SINGLES' RIGHTS, AND FAMILY DIVERSITY HAVE TOUCHED THE LIVES OF MILLIONS* 166 (2009).

25. *Domestic Partnership Information*, CITY OF BERKELEY, [http://www.cityofberkeley.info/Clerk/Home/Domestic\\_Partnership.aspx](http://www.cityofberkeley.info/Clerk/Home/Domestic_Partnership.aspx) (last visited Sept. 30, 2012).

26. Elizabeth Erhardt & David L. Gamblin, *Creation and Recognition of Domestic Partnership Regimes in California*, in CALIFORNIA DOMESTIC PARTNERSHIPS § 1.2 (2005) (listing municipalities with domestic partnership ordinances).

27. NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 48, 150 (2008); Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 529, 532 (2009) ("The early 1980s saw a push for a status called 'domestic partnership' as an alternative to marriage. It was a status available to both same-sex and different-sex couples.").

guide for determining eligibility,<sup>28</sup> they were not necessarily intended to be close approximations of marriage. The range of municipal benefits they afforded, including dental and health coverage and employee leave, was decidedly more modest than the vast panoply of municipal, state, and federal benefits to which married couples were entitled.<sup>29</sup> This limited array of employment-oriented benefits underscored that domestic partnership was “first and foremost a workplace concept,”<sup>30</sup> intended to address “inequities that occur when benefits are limited to married couples because same gender cohabitating couples cannot marry and opposite gender cohabitating couples choose not to marry.”<sup>31</sup>

These animating concerns were consistent with the social and cultural milieu of the period. The advent of the AIDS crisis made questions of relationship recognition critically important to members of the LGBT community.<sup>32</sup> Because marriage was not an option, there was a strong impulse to experiment with other forms of relationship recognition.

Yet the impulse toward domestic partnership was not solely about the needs of gay men and lesbians. Also important was the changing composition of American families in the late 1970’s and early 1980’s. Rising rates of divorce, remarriage, and cohabitation, as well as a bevy of social and economic changes, all exerted tremendous pressure on the marital nuclear family.<sup>33</sup> Indeed, it was hard to speak of a monolithic “family” in the face of such dramatic changes.<sup>34</sup>

In some, though certainly not all, of the municipalities that considered domestic partnership regimes, there were frank discussions about the changing nature of modern families and the need to recognize a wider range of family structures.<sup>35</sup> Though the architects of the various domestic partnership regimes understood that same-sex couples would obviously benefit from different models of relationship recognition, they recognized that other constituencies would also

28. See Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Implications for the Law and Politics of Marriage* 23, 40, 52 (Nov. 21, 2012) (unpublished manuscript) (on file with author).

29. POLIKOFF, *supra* note 27, at 48 (describing the limited complement of benefits available to domestic partners).

30. Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL’Y 107, 142 (1996).

31. *Domestic Partnership Information*, *supra* note 25.

32. Cummings & NeJaime, *supra* note 15, at 1256 (noting that “[d]omestic partnership also responded specifically to the AIDS crisis affecting the gay community”).

33. Edward R. Walsh, Op-Ed., *The Ties that Bind Are Unwinding*, N.Y. TIMES, Jan. 11, 1981, at WC20 (noting that “[t]he American family is under siege”).

34. This was made evident in 1980, when President Jimmy Carter convened the White House Conference on Families. A major debate erupted over whether the conference should define the term “family” broadly to include nontraditional family forms. See Nadine Brozan, *White House Conference on the Family: A Schism Develops*, N.Y. TIMES, Jan. 7, 1980, at D8.

35. THOMAS F. COLEMAN, CHRISTOPHER MCCAULEY, NORA J. BALADERIAN & MICHAEL WOO, L.A. CITY TASK FORCE ON FAMILY DIVERSITY, FINAL REPORT: STRENGTHENING FAMILIES, A MODEL FOR COMMUNITY ACTION 18–19 (1988) (defining family as “mutual interdependency” and including “unmarried persons not related by blood, but who are living together and who have some obligation, either legal or moral, for the care and welfare of one another”).

benefit from a more pluralistic relationship recognition structure.

So what changed? How did domestic partnership go from an initial step toward relationship recognition pluralism to an injurious badge of inferiority, marking same-sex couples as second-class citizens? How did we go from seeking to recognize a wider range of relationships to marriage equality and the accompanying desire to herd more and more couples into marriage?

### III.

#### A STEPPING STONE TO MARRIAGE EQUALITY: THE TRANSFORMATION OF DOMESTIC PARTNERSHIP

The transformation of domestic partnership from a marriage alternative to a cut-rate marriage counterfeit can be explained in part by its migration from the local level to the state level in the late 1990's. Buoyed by the success of municipal domestic partnership schemes and the proliferation of domestic partner benefits among Fortune 500 companies, gay rights advocates began to press for a statewide domestic partnership policy in California.<sup>36</sup> Although advocates' initial efforts failed,<sup>37</sup> California finally enacted Assembly Bill 26 in 1999, creating the first statewide domestic partnership registry.<sup>38</sup>

From the start, it was clear that the effort to shape a statewide domestic partnership regime would differ substantially from prior efforts at the local level. As AB 26 progressed through the legislature, two competing visions of domestic partnerships emerged within the LGBT community. Some activists, encouraged by unexpected developments in Hawaii,<sup>39</sup> argued that domestic partnership should be used to move the legal status of same-sex couples incrementally closer to marriage.<sup>40</sup> In their view, domestic partnership would serve as an interim measure, "eventually setting the stage for marriage equality."<sup>41</sup> Others, however,

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36. FREDERICK HERTZ & EMILY DOSKOW, *MAKING IT LEGAL: A GUIDE TO SAME-SEX MARRIAGE, DOMESTIC PARTNERSHIPS & CIVIL UNIONS* 13-14 (2d ed. 2011). Developments in other jurisdictions also spurred interest in a statewide domestic partnership scheme. In 1992, the District of Columbia enacted a domestic partnership regime. See POLIKOFF, *supra* note 27, at 51. In 1997, the Hawaii legislature adopted a reciprocal beneficiary regime, allowing individuals to designate another individual to share in a limited complement of rights and responsibilities. HAW. REV. STAT. §§ 572C-1 to -7 (2006). The reciprocal beneficiary scheme was enacted as part of a compromise that put before Hawaii voters a constitutional amendment reserving the question of same-sex marriage for the legislature, which had already decided to restrict civil marriage to opposite-sex couples. HAW. CONST. art. I, § 23.

37. Cummings & NeJaime, *supra* note 15, at 1257.

38. Act of Oct. 2, 1999, ch. 588, 1999 Cal. Stat. 4157.

39. In 1996, a series of Hawaii state court decisions were favorable to the same-sex marriage movement. See *Baehr v. Miike*, 910 P.2d 112, 115-16 (Haw. 1996) (suggesting that banning same-sex marriage might constitute impermissible sex discrimination); *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at \*21 (Haw. Cir. Ct. Dec. 3, 1996) (concluding that the Hawaii law restricting marriage to opposite-sex couples was unconstitutional sex discrimination).

40. Cummings & NeJaime, *supra* note 15, at 1258.

41. *Id.*

clung to the view of domestic partnership as “a true alternative to marriage.”<sup>42</sup> For this constituency, domestic partnership remained a crucial step toward a regime “in which marriage would be open to everyone, and something that provided a less highly defined but still significant safety net—like domestic partnership—would also be available to everyone.”<sup>43</sup>

The tension between these two competing views of domestic partnership was reflected in AB 26. Like the municipal domestic partnership schemes that preceded it, AB 26 offered a limited range of rights and benefits.<sup>44</sup> For example, registered domestic partners were entitled to visit each other in the hospital, and certain state employees were also able to obtain health insurance for their registered domestic partners.<sup>45</sup> However, unlike the municipal domestic partnership schemes, AB 26 limited eligibility for domestic partnership to same-sex couples and opposite-sex couples over the age of 62.<sup>46</sup>

Critically, as originally drafted, AB 26, like the predecessor municipal domestic partnership schemes, was available to all eligible unmarried couples.<sup>47</sup> But the prospect of making domestic partnership available to opposite-sex couples “drew a strong reaction” from California Governor Gray Davis.<sup>48</sup> Recognizing that, as proposed, AB 26 posed a challenge to marriage as the paradigm model for heterosexual relationships, Davis threatened to veto the bill.<sup>49</sup> The bill’s sponsor, Assemblyperson Carole Migden, narrowed the bill’s scope, limiting the availability of the domestic partnership registry to “same-sex couples and seniors over 62 years of age.”<sup>50</sup> In the end, the legislature passed AB 26, and Davis signed it into law on October 2, 1999.<sup>51</sup>

These decisions to expand domestic partnership recognition to the state level and limit its availability to same-sex couples and opposite-sex couples over the age of 62 marked a critical juncture in the evolution of domestic partnership. Though some continued to regard domestic partnership as a site for experimentation and innovation, the underlying vision of relationship pluralism was now fundamentally in tension with the mainstream LGBT rights movement’s interest in same-sex marriage.

Moreover, the decision to limit domestic partnerships to same-sex couples

42. *Id.*

43. *Id.* (quoting John Davidson and Matt Coles).

44. Assemb. 26, 1999 Leg., 1999–2000 Reg. Sess. (Cal. 1999) (as passed by Assembly, Sept. 9, 1999). See Carl Ingram, *Senate OKs Benefits for Same-Sex Partners*, L.A. TIMES, May 26, 1999, at A3.

45. Cummings & NeJaime, *supra* note 15, at 1259.

46. Assemb. 26.

47. Assemb. 26 (as introduced by Assembly, Dec. 7, 1998) (“Domestic partners are two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.”).

48. Cummings & NeJaime, *supra* note 15, at 1259.

49. *Id.*

50. Assemb. 26 (as passed by Assembly, Sept. 9, 1999).

51. Cummings & NeJaime, *supra* note 15, at 1259.

and opposite-sex couples over the age of 62 entrenched the understanding that domestic partnerships (and alternative statuses more generally) were for same-sex couples ineligible for marriage and older couples wary of losing their Social Security benefits. In this way, California's state-level expansion limited domestic partnership's radical potential. Domestic partnership was no longer an alternative for heterosexual couples that could marry, but, for whatever reason, did not. Nor was it a status that might be further developed to meet the needs of those in other nontraditional family forms. In its transformation to a state-level policy, domestic partnership became a compromise measure that gave same-sex couples access to some of marriage's benefits.<sup>52</sup>

The final step in domestic partnership's path from innovation to injury took place in 2003, when the legislature passed the California Domestic Partner Rights and Responsibilities Act ("CDPRRA").<sup>53</sup> CDPRRA expanded the existing domestic partnership regime and its limited benefits to include virtually all of the rights and responsibilities afforded to married spouses under state law, including limited access to marital dissolution procedures and the state's community property regime.<sup>54</sup>

With this change, domestic partnership's transformation was complete. Initially understood as an innovative way to recognize *all* unmarried couples, domestic partnership had, over time, evolved into a facsimile of marriage that was associated almost exclusively with same-sex couples. Ironically, what had

52. Developments in Hawaii and Vermont contributed to this understanding. In Hawaii, there had been a series of state court decisions favorable to same-sex marriage rights. *See* Baehr v. Miike, 910 P.2d 112, 115–16 (Haw. 1996) (suggesting that prohibiting same-sex marriage might constitute impermissible sex discrimination); Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235, at \*21 (Haw. Cir. Ct. Dec. 3, 1996) (concluding that the Hawaii law restricting marriage to opposite-sex couples was unconstitutional sex discrimination). *See also* WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 16–22 (2002) (describing Hawaii same-sex marriage litigation). In response, the Hawaii legislature passed a ballot initiative amending the state constitution to preclude same-sex marriage. *Id.* at 22. Consequently, the legislature established a reciprocal beneficiary status that provided some of the benefits of marriage to unmarried couples. Act of July 8, 1997, No. 383, 1997 Haw. Sess. Laws 1211. In 1999, the Vermont Supreme Court held that same-sex couples were “entitled . . . to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples.” *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999). To comport with the decision, the legislature created civil union, an alternative status that would provide all of the benefits and obligations of marriage under a different rubric. Act of Apr. 26, 2000, No. 91, 2000 Vt. Acts & Resolves 72. The decision was explicitly understood as a compromise in lieu of full marriage equality. Jane S. Schacter, *The Other Same-Sex Marriage Debate*, 84 CHI.-KENT L. REV. 379, 396 (2009) (discussing Vermont's civil union scheme).

53. California Domestic Partner Rights and Responsibilities Act of 2003, ch. 421, §2, 2003 Cal. Stat. 3081, 3082 (codified as amended at CAL. FAM. CODE §§ 297–297.5 (West 2004)); Gregg Jones & Nancy Vogel, *Domestic Partners Law Expands Gay Rights*, L.A. TIMES, Sept. 20, 2003, at A1.

54. California Domestic Partner Rights and Responsibilities Act §2. *See also* Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555, 1562 (2004) (discussing the rights and benefits available to domestic partners under CDPRRA).



begun as an attempt to provide equal access to public and private benefits had morphed into a separate but equal status that underscored the unequal legal treatment of same-sex couples.

Developments in other jurisdictions highlighted domestic partnership's shortcomings. In 2003, as California was debating the comprehensive domestic partnership scheme required by CDPRA, the Massachusetts Supreme Judicial Court struck down that state's laws restricting marriage to opposite-sex couples.<sup>55</sup> Importantly, the court did not identify the appropriate remedy for the constitutional violation, staying entry of the judgment "for 180 days to permit the Legislature to take such action as it may deem appropriate."<sup>56</sup> The Massachusetts legislature responded with a proposed bill to establish "the institution of 'civil union,' eligibility for which was limited to '[t]wo persons . . . [who] are of the same sex.'"<sup>57</sup> The court, however, balked at the prospect of separate statuses with different nomenclature, denouncing it as "a considered choice of language that reflects a demonstrable assigning of same-sex . . . couples to second-class status."<sup>58</sup> According to the court, only full marriage equality would suffice to meet the state's constitutional obligations.<sup>59</sup>

The events in Massachusetts had repercussions for domestic partnership and other alternative statuses. Now, what had seemed impossible—marriage equality—suddenly seemed realistic. With the prospect of marriage equality on the horizon, domestic partnership appeared even more like a compromise—a "less than" status that was sufficient only as a stepping-stone to full marriage equality.

Domestic partnership's diminished status was evident in the California Supreme Court's 2008 decision in *In re Marriage Cases*.<sup>60</sup> There, the court concluded that California's decision to reserve the "historic and highly respected" status of marriage for opposite-sex couples, while consigning same-sex unions to the "new and unfamiliar" status of domestic partnership, violated the state constitution.<sup>61</sup> On this account, the exclusion from civil marriage was only one of the injuries that same-sex couples suffered. Equally injurious was the fact that same-sex couples were offered the incidents of marriage under a different rubric.<sup>62</sup> And, as the court noted, only one thing could remedy these

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55. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

56. *Id.* at 970.

57. *In re Ops. of the Justices to the Senate*, 802 N.E.2d 565, 568 (Mass. 2004).

58. *Id.* at 570.

59. *See id.* at 571 (concluding that it is unconstitutional to create a separate class of citizens by status discrimination and "withhold from that class the right to participate in the institution of civil marriage along with its concomitant tangible and intangible protections, benefits, rights, and responsibilities").

60. 183 P.3d 384 (Cal. 2008).

61. *Id.* at 434.

62. *Id.* at 444.

twin injuries: expanding marriage to include same-sex couples.<sup>63</sup>

This brings us full circle back to *Perry*. If at one time domestic partnerships were poised to effect a paradigm shift in our understanding of state recognition of intimate relationships and kinship, *In re Marriage Cases* and the *Perry* opinions all make clear that this opportunity has been, at least temporarily, lost. Though domestic partnership was once an innovation that sought to challenge marriage's primacy, its transformative potential was eroded as it was modified to replicate marriage in all but name. Ultimately, domestic partnership did not prompt a paradigm shift that resulted in new models for relationship pluralism. Instead, it further entrenched the view of marriage as the paradigmatic model of intimate life.

#### IV. PARADIGMS REGAINED?

In this moment, as we all wait breathlessly for the United States Supreme Court to decide the question of same-sex marriage once and for all,<sup>64</sup> the history of domestic partnership in California offers important lessons. If *Perry* reflects the apotheosis of the same-sex marriage debate, then the history of domestic partnership surfaces as an overlooked counter-narrative, pointing to issues that have been sidelined and subordinated in the rush toward marriage equality.

In its earliest incarnation as a municipal-level innovation, domestic partnership served functional ends, unbundling the many benefits of marriage and providing some of them to workers regardless of marital status. The initial impulse was not to press for marriage equality for same-sex couples; indeed, such an idea would have been ludicrous. Instead, these progressive municipalities imagined alternatives to marriage that recognized those who, for whatever reason, were unmarried. In some cases, municipalities went beyond this initial charge to consider whether further experimentation with legal forms could meet the needs of those who were not organized around a romantic dyad.<sup>65</sup> Recognizing that marriage was not a universal path to benefits for all people, they forged a new path.

More importantly, though marriage cast a long shadow over efforts to establish domestic partnership schemes,<sup>66</sup> these municipalities were not intent on

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63. *Id.* at 453.

64. On December 7, 2012, the U.S. Supreme Court granted certiorari in two cases dealing with same-sex marriage. See *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144); *United States v. Windsor*, 81 U.S.L.W. 3116 (U.S. Dec. 7, 2012) (No. 12-307).

65. The domestic partnership schemes enacted in Madison, Wisconsin, and Washington, D.C., for example, defined the term "domestic partners" beyond the conjugal couple to include those in a "relationship of mutual support, caring, and commitment [who] intend to remain in such a relationship in the immediate future," and "a familial relationship . . . characterized by mutual caring and the sharing of a mutual residence." See POLIKOFF, *supra* note 27, at 50–51.

66. See NeJaime, *supra* note 28, at 25–51 (discussing marriage's role in defining the parameters of domestic partnership, public discourse about domestic partnership, and benefits for

mimicking marriage. The initial goal was to secure access to a more limited complement of rights and benefits than marriage offered. In this way, these early domestic partnership schemes were consciously framed as distinct from—and less than—marriage.

Today, as the *Perry* opinions attest, the prospect of being “less than” marriage in stature and dignity renders domestic partnership a second-class status—an injury. Yet this history of domestic partnership provides an alternative account. As I have discussed elsewhere, marriage has long served as a vehicle for state regulation of sex, sexuality, and relationships.<sup>67</sup> Though marriage offers a broad range of rights, benefits, and entitlements, it also entails a considerable degree of state oversight, discipline, and regulation.<sup>68</sup> Expanding marriage and its many benefits to new constituencies simply extends that regulatory reach to include new subjects.

In recent years, there have been important opportunities to pause and reflect on the possibility of a legal regime in which state regulation of sex, sexuality, and relationships is less acute. The Supreme Court’s historic decision in *Lawrence v. Texas*,<sup>69</sup> striking down a Texas antisodomy statute, was such a moment. Though the *Lawrence* Court decriminalized sodomy, it made clear that it was not making same-sex couples eligible for civil marriage.<sup>70</sup> In making this distinction, *Lawrence* interposed a space between marriage and crime—the two primary sites through which the state historically has regulated sex and sexuality. This interstitial space is less thickly regulated than the legal categories of marriage and crime that frame it.<sup>71</sup> For this reason, this space offers the possibility of a paradigm shift in state regulation of sex, sexuality, and relationships. That is, it offers the possibility of a legal regime in which state regulation of sex, sexuality, and relationships is less robust than it historically has been.

In the years since *Lawrence*, the lightly regulated space that the decision portended—and the paradigm shift that it would entail for the regulation of sex and sexuality—has not been realized.<sup>72</sup> The response to *Lawrence* is instructive

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domestic partners).

67. Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 52–53 (2012) [hereinafter Murray, *Marriage as Punishment*].

68. *Id.* at 52 (discussing marriage as a mode of discipline).

69. 539 U.S. 558 (2003).

70. *Id.* at 578 (“[This case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”). See also Murray, *Marriage as Punishment*, *supra* note 67, at 54; Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1299 (2009) [hereinafter Murray, *Strange Bedfellows*] (“[T]he conduct at issue in *Lawrence*, same-sex sodomy, was distinct from this litany of other [criminal] sexual activities . . . And, importantly, it was not a relationship that sought formal legal recognition—it was not a marriage, nor was it eligible to be a marriage.”).

71. Murray, *Marriage as Punishment*, *supra* note 67, at 63.

72. *Id.* at 55–56.

on this point. Almost immediately after the decision was announced, LGBT advocates heralded the decision as leading inexorably towards the legalization of same-sex marriage.<sup>73</sup> A few months later, the Massachusetts Supreme Judicial Court announced its decision in *Goodridge*, legalizing same-sex marriage.<sup>74</sup>

Instead of treating *Lawrence* as a way station on the road to same-sex marriage,<sup>75</sup> what would it have meant to actually occupy its interstitial space of limited legal regulation? California's history of domestic partnership offers one vision of what might have been. When they were created at the municipal level, domestic partnership regimes were, as they are now, understood as distinct from marriage. But importantly, the differences between domestic partnership and marriage were not understood as injurious. Domestic partnerships were intended to be different from marriage, in both name and substance. They were not called marriage and they did not require the same treatment—the same rights and benefits—as marriage.

But neither were they subject to the thick legal regulation that attended marriage. Going to Berkeley's City Hall to sign a form registering a domestic partnership may have lacked the pomp and circumstance and benefits traditionally associated with getting married; however, terminating a domestic partnership did not require the judicial decree, spousal maintenance, and division of assets that accompanied divorce.<sup>76</sup> The government's oversight and regulation of domestic partnership was less robust than its regulation of marriage. This point warrants elaboration.

Recall CDPRA, which provided registered domestic partners with virtually all of the rights and benefits afforded to spouses under state law. Because existing domestic partnerships would automatically be converted into statuses subject to this new expanded legal treatment, CDPRA's implementation was delayed by two years to allow the California Secretary of State to inform those in existing domestic partnerships of the pending changes.<sup>77</sup> Intriguingly, in the two years between the enactment and implementation of CDPRA, there was a significant spike in the number of domestic partnership dissolutions.<sup>78</sup>

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73. Murray, *Strange Bedfellows*, *supra* note 70, at 1305.

74. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003).

75. See Ariela R. Dubler, *From McLaughlin v. Florida to Lawrence v. Texas: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1184 (2006) (noting that “*Lawrence* was quickly understood by many to be a stepping stone to same-sex marriage”).

76. See *Domestic Partnership FAQs*, CITY OF BERKELEY, [http://www.cityofberkeley.info/Clerk/Home/Domestic\\_Partnership\\_FAQs.aspx](http://www.cityofberkeley.info/Clerk/Home/Domestic_Partnership_FAQs.aspx) (last visited Oct. 1, 2012) (detailing Berkeley's procedures for terminating a domestic partnership).

77. *Assembly Bill No. 205*, OFFICIAL CAL. LEGIS. INFO., [http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_0201-0250/ab\\_205\\_bill\\_20030922\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0201-0250/ab_205_bill_20030922_chaptered.pdf) (last visited Dec. 2, 2012).

78. See GARY J. GATES, M.V. LEE BADGETT & DEBORAH HO, WILLIAMS INST., *MARRIAGE, REGISTRATION AND DISSOLUTION BY SAME-SEX COUPLES IN THE U.S.* 14 (2008), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-Ho-Couples-Marr-Regis-Dissolution-Jul-2008.pdf>.

According to scholars at the Williams Institute, the spike was “likely related to the significant change in the [domestic partnership] law that was to take effect January 1, 2005.”<sup>79</sup> One might speculate that for some parties to existing domestic partnerships, a legal status that was marriage in all but name was patently undesirable. For such couples, the allure of domestic partnership was that it was *not* marriage and did not purport to be like marriage. Relatedly, couples who were interested in access to employment benefits and hospital visitation privileges—some of the limited benefits provided by the first iteration of the statewide domestic partnership scheme—may not have been interested in having access to *all* of the benefits, privileges, and obligations associated with marriage. That is, they may have welcomed hospital visitation privileges, but not the prospect of treating their income and assets as community property. Likewise, for some, access to the state’s apparatus for divorce (and the prospect of property distribution and spousal maintenance) may also have presented unwelcome changes. What domestic partnership lacked in benefits and stature it made up for with limited state oversight and regulation in comparison to civil marriage.

With this in mind, one might think of municipal-level domestic partnerships as a pre-*Lawrence* attempt to identify and occupy a space of less robust state regulation for relationships. Put differently, this history of municipal domestic partnerships suggests two distinct efforts to advance new paradigms for the legal regulation of sex, sexuality, and relationships. First, the municipal level domestic partnerships sought to create new models, beyond the paradigm of marriage, for understanding and recognizing intimate relationships. Second, and equally important, domestic partnership was an effort to move beyond a zero-sum legal regime in which the options were either marriage, with its vast array of benefits and thick state regulation, or nothing at all. Instead, municipal-level domestic partnerships offered the prospect of a paradigm shift to a new legal regime in which there was also the possibility of limited benefits and limited state regulation.

## V.

### CONCLUSION

In reflecting on *Perry*, its legacy, and its likely future before the United States Supreme Court, the history of domestic partnership provides an important counterpoint. Regardless of the Court’s decision in *Perry*, the questions regarding relationship recognition that undergird *Perry* and the origins of domestic partnership will persist. Marriage equality will answer these questions for some, but for those who seek a different model of rights and regulation, marriage provides no easy answers. For this latter group, new paradigms are needed.

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79. *See id.*

But if *Perry* and the marriage equality movement reflect lost opportunities, other developments suggest possibilities for recovery and reclamation. In 2010, the District of Columbia legalized same-sex marriage.<sup>80</sup> However, instead of phasing out its existing domestic partnership status, which consisted of a more limited set of rights and benefits for same-sex couples and opposite-sex couples alike, as Vermont and Connecticut had done,<sup>81</sup> Washington, D.C. chose to maintain its domestic partnership registry alongside civil marriage.<sup>82</sup> Today, both statuses are available in the District of Columbia. Once again, a municipal government has disrupted the existing paradigm in favor of something more innovative: a pluralistic model of relationship recognition.

There are other possibilities for further experimentation on the horizon. Recently, as part of a compromise limiting civil marriage to opposite-sex couples, Nevada and Illinois enacted domestic partnership and civil union schemes providing registered parties with many of the incidents of marriage.<sup>83</sup> Although the laws were meant to prevent the expansion of marriage to include same-sex couples in both jurisdictions, these alternative statuses are available to same-sex and opposite-sex couples alike.<sup>84</sup> Presently, there are pending lawsuits in both jurisdictions challenging same-sex couples' exclusion from civil marriage.<sup>85</sup> Not surprisingly, both lawsuits cite the existence of these alternative statuses as evidence of same-sex couples' second-class treatment.<sup>86</sup> In both cases, *Perry* provides a persuasive precedent for this view of alternative statuses as an indicium of the law's injurious second-class treatment of same-sex couples.

If these lawsuits succeed in securing marriage equality in Nevada<sup>87</sup> and

80. Religious Freedom and Civil Marriage Equality Amendment Act of 2009, No. 18-248, 57 D.C. Reg. 27 (Jan. 1, 2010).

81. Shannon Minter & Christopher Stoll, *Legal Developments in Marriage Law for Same-Sex Couples*, GP SOLO MAG., Jan./Feb. 2010, at 31, 32–33, available at [http://www.americanbar.org/newsletter/publications/gp\\_solo\\_magazine\\_home/gp\\_solo\\_magazine\\_index/minter\\_stoll.html](http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/minter_stoll.html) (discussing the status of civil unions in Connecticut and Vermont).

82. Office of Gay, Lesbian, Bisexual and Transgender Affairs, *Marriage and Domestic Partnership Information*, D.C.GOV, <http://dc.gov/DC/GLBT/Resources+and+Publications/Marriage+and+Domestic+Partnership> (last visited Dec. 2, 2012).

83. Nevada Domestic Partnership Act, NEV. REV. STAT. §§ 122A.010–.510 (2011); Illinois Religious Freedom Protection and Civil Union Act, ILL. COMP. STAT. ANN. 75/1–75/90 (West Supp. 2012).

84. Nevada Domestic Partnership Act; Illinois Religious Freedom Protection and Civil Union Act.

85. See Complaint for Declaratory and Injunctive Relief at 2, *Sevcik v. Sandoval*, No. 2:12-cv-00578-RCJ-PAL (D. Nev. Apr. 10, 2012); Complaint for Declaratory and Injunctive Relief at 1, *Darby v. Orr*, 12-CH-19718 (Ill. Cir. Ct. May 30, 2012).

86. See Complaint for Declaratory and Injunctive Relief, *Sevcik*, *supra* note 85, at 6, 12; Complaint for Declaratory and Injunctive Relief, *Darby*, *supra* note 85, at 19–20.

87. On November 26, 2012, a Nevada district court upheld that state's laws prohibiting same-sex marriage. *Sevcik v. Sandoval*, 2012 WL 5989662, at \*1 (D. Nev. Nov. 26, 2012). The decision is on appeal to the Ninth Circuit. In an unorthodox move, the Coalition for the Protection of Marriage, a group that opposes same-sex marriage, petitioned the United States Supreme Court to

Illinois—and I hope that they do—it will be a critical moment for advancing a more pluralistic vision of relationship recognition. In that moment, when marriage equality has been achieved, I hope that advocates, legislators, and judges will pause and reflect on the District of Columbia's example and the origins of domestic partnership.

Marriage equality need not and should not be the end of innovation and experimentation around the issue of relationship recognition. Empirical evidence supports this conclusion. Each year, marriage rates decline as individuals experiment with the form, organization, and regulation of intimate life. These increasing departures from marriage suggest that for many, one paradigm does not fit all. With this in mind, the time seems ripe for new paradigms—and a relationship revolution.

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review the case, bypassing intermediate appellate review. Lyle Denniston, *Court Gets New, More Basic Marriage Case*, SCOTUSBLOG (Dec. 5, 2012, 5:44 PM), <http://www.scotusblog.com/2012/12/court-gets-new-marriage-case/>.

