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PRIDE AND PREJUDICE: A STUDY OF CONNECTIONS

Mary Louise Fellows*

INTRODUCTION

Although customs surrounding attribution require that only I be named as author of this Article, that fact obscures other truths about this Article.¹ One way for readers to appreciate this Article as reflecting group activity at the same time it reflects my own individual effort is the literary allusion in the title to Jane Austen and her work. I feel a particular connection to Jane Austen because she seems neither to have enjoyed nor sought the solitary life many of us imagine novelists live. When Austen finds herself, after ten years of having written virtually nothing, back in a permanent home with her sister and widowed mother at Chawton she enjoys exceptional literary success.² She sees finally the publication of *Sense and Sensibility* and *Pride and Prejudice*, and she writes *Mansfield Park*, *Emma*, and *Persuasion*.³ The evidence of solitary hours in her newly acquired cottage is scarce while the evidence of familial connectedness is substantial. She continued to share a bedroom with her sister Cassandra, and she apparently worked

* Everett Fraser Professor of Law, University of Minnesota. Portions of this Article are drawn from Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 *Law & Ineq.* 1 (1998).

¹ I am reminded of a passage found in one of Virginia Woolf's notebooks where she explores biography: "The biographer cannot extract the atom. He gives us the husk. Therefore as things are, the best method would be to separate the two kinds of truth. Let the biographer print fully, completely, accurately, the known facts without comment; Then let him write the life as fiction." Notebooks, Monk's House Papers, University of Sussex Library Manuscript Collections, *quoted in* Hermione Lee, *Virginia Woolf* 10 (1996). One of my purposes is to find a way for the reader to look beyond the "husk" and appreciate the underlying connections among individuals reflected in the making of and the subject of this Article. For a further discussion of the quoted passage and Woolf's consideration of biography, see Hermione Lee's excellent chapter on biography in Lee, *supra*, at 3-20.

² See Claire Tomalin, *Jane Austen: A Life* 208 (1997).

³ See Dierdre Le Faye, *Chronology of Jane Austen's Life*, in *The Cambridge Companion to Jane Austen* 1, 8-11 (Edward Copeland & Juliet McMaster eds., 1997).

right in the thick of the household clamor on the first floor of the house between the front door and some offices.⁴ In the recently published biography on Austen, Claire Tomalin found it necessary after telling us these facts to add “[w]e find it surprising that Jane did not want to be alone, claiming the privacy that seems appropriate to a writer”⁵ Rather than being surprised, I was drawn to Austen because she did not want or need to be secluded. For me Jane Austen is representative of writers who have as much need for connection as they do for solitude, and they establish life rhythms that negotiate with relative ease the tension between those two states of happiness.

One form of connection is working collaboratively, and collaboration certainly best describes the scholarly process behind this Article, which reports the findings of an empirical study on inheritance.⁶ The purpose of the study was to assess public attitudes about including surviving committed partners as heirs—a study of connections and the legal recognition of them.⁷ For readers to place my emphasis on collaboration as well as the findings of the empirical study into further context, I need to describe a similar study that I published twenty years ago (the 1978 study).⁸ The 1978 study assessed public attitudes about how to distribute the property of a decedent who died without a will among surviving family members, including a legal spouse, children, parents, and grandchildren. Both the 1978 and the current study integrated my scholarship with my teaching: law students were involved in the design of both studies from the outset. For the current project I

⁴ See Tomalin, *supra* note 2, at 210, 216.

⁵ *Id.* at 210

⁶ The complete findings of the empirical study have been previously published. See Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 *Law & Ineq.* 1 (1998).

⁷ When I use the term committed partner, I am referring to unmarried persons who in recognition of their affection for each other have decided to share their lives together—with living together generally involving interrelated financial and living arrangements as well as sexual intimacy. The definition of a committed partner is contested and raises a number of theoretical, political, and practical questions. Does it mean partners who cohabit? Does it mean partners who are sexually intimate? Does it mean partners who are financially interdependent? These questions and many others were explored in the empirical study.

⁸ Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 *Am. B. Found. Res. J.* 319 (1978).

went to the Board of *Law and Inequality: A Journal of Theory and Practice* in 1995 and asked them if students on the Board would be interested in participating in an empirical study on inheritance law and committed couples that could then be published in the journal. Five students enthusiastically volunteered—brainstorming sessions, summer reading groups, and sessions devoted to drafting and redrafting of the survey instruments followed. Both projects also integrated my commitment to interdisciplinary work and building relationships with people outside the law: sociologists were initially interested by the legal questions we were asking and ultimately became intrigued by the possibility of using their expertise to create knowledge that could lead to law reform.⁹

Perhaps a less obvious connection between the two projects is Robert Stein, the former Dean of the University of Minnesota Law School. This connection requires a little more explanation but is no less important to placing the themes of this Article into context. As a young associate professor looking for funding to conduct an empirical study, I traveled to the American Bar Foundation to talk with Bob, who was at that time involved in research sponsored by the Foundation. I requested the meeting to explain why a telephone survey could prove useful to legislatures considering heirship rights. At that time, the notion of learning about heirship by talking to living persons rather than looking at wills and the estates of dead persons was a new idea. Bob was immediately enthusiastic about the methodology and played an important role in assuring the Bar Foundation's funding.

Twenty years later, I sought funding for the current empirical study from the American College of Trust and Estate Counsel's Foundation, which has as its mission the support of research in the area of inheritance law. The funding request described a study that would consider both same-sex and opposite-sex committed couples, recognizing that heirship for the two categories of couples

⁹ In the 1978 study, Professor Rita J. Simon, who at that time was director of the Law and Society Program at the University of Illinois and Professor of Sociology, Law and Communications Research, was a co-investigator. William Rau, who at that time was a law student and a Ph.D. candidate in Sociology, was also a co-author of the study. In the current study, Monica Johnson, a Ph.D. candidate in Sociology at the University of Minnesota, joined our research group early on and provided invaluable expertise throughout the planning of the survey and the analysis of the findings.

raises different issues with different implications. The idea to do this empirical study arose out of a proposal made by Lawrence W. Waggoner, a preeminent scholar on trusts and estates and national leader on probate reform.¹⁰ The proposal had not been well received, in part because of a lack of information about who are committed couples and how they want to share their estates. The methodology was no longer in dispute—the Counsel along with the American Bar Association and the National Conference of Commissioners on Uniform State Laws had embraced the 1978 study and incorporated the findings into the Uniform Probate Code. This time the controversy concerned the questions we were asking. This time the funding was denied. The letter telling us to look elsewhere for funding said in part:

After *very careful* and *fairly lengthy* deliberations, it was concluded that the Foundation would not fund the grant requested.

There was concern expressed with respect to the need for the survey referred to in your Grant Application and whether the survey described and the constituency proposed to be surveyed was broad enough, as well as the overall cost of the survey.

Although it is not necessary for the Foundation to provide an applicant with any reason as to why a Grant Application is turned down, in fairness, I thought it appropriate to provide you with the foregoing explanation.¹¹

¹⁰ In 1995 Professor Waggoner made a tentative statutory proposal. See Fellows et al., *supra* note 6, at 92 (providing the complete draft of the proposal). Professor Waggoner is currently the Reporter for the Restatement (Third) of Property (Wills and Other Donative Transfers). He is also the Director of Research of the Joint Editorial Board for Uniform Trust and Estate Acts, which is a supervisory body that monitors the Uniform Probate Code (UPC). He was the Chief Reporter of the revisions to Article II of the UPC, which were promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1990.

¹¹ Letter from Thomas P. Sweeney, President of the American College of Trust and Estate Counsel Foundation, to Mary Louise Fellows (Oct. 18, 1995) (emphasis added) (on file with the *Virginia Journal of Social Policy & the Law*).

This letter reveals the Foundation's anxiety regarding the project. A request to fund a study of the lives of unmarried couples, particularly same-sex couples, unanchored the Foundation's Board members from their secure position that being committed to improving the law of inheritance for the citizenry meant maintaining comfortable social conventions. The way they resolved the challenge to their purpose and self-image was to convince themselves that it would be inappropriate to invest money to learn more about a negligible and unimportant sector of the citizenry. I should also mention that I was encouraged to apply to the Minnesota State Bar Association for funding of a smaller project that would limit the survey to Minnesotans. Before things progressed to the stage of a formal application, it became clear that the Bar had little interest, and I was advised not to apply.

As I fretted about funding sources, I received a very welcome call from Rossana Armson of the Minnesota Center for Survey Research. She and her staff had been advising us regarding our survey instrument for over a year. After she had learned of our funding problems, her enthusiasm for the project led her to seek permission for us to be the Center's "pro bono" project for the year. We would only be required to pay the variable costs of conducting the telephone survey. It meant that we would have to limit the number of respondents in the survey and conduct the survey only in Minnesota, but at least we could test the study design and get some preliminary findings. That brought me to the dean's office. I explained the project, my obligation to the students, and the funding issues, and Dean E. Thomas Sullivan without hesitating saw the value of the project and the importance of supporting interdisciplinary research in collaboration with students. He agreed to advance me research funds so that we could go forward with the study.

The relevance of our work became clear when, on July 1, 1997, same-sex couples who reside in Hawaii were given the right to register as "reciprocal beneficiaries."¹² As reciprocal beneficiaries, they had the right to enjoy many of the benefits of marriage, including the right to inherit. This legislation was a reaction to the

¹² Act Relating to Unmarried Couples (Reciprocal Beneficiaries), 1997 Haw. Sess. Laws, Act 383 (codified at Haw. Rev. Stat. Ann. §§ 572C-1-7 (Michie 1999)).

widely publicized Hawaii Supreme Court case that found that the state's prohibition of same-sex marriage violated the Constitution of the State of Hawaii.¹³ Through much political wrangling, the legislature reached a compromise by passing the Act Relating to Unmarried Couples (the "Reciprocal Beneficiaries Act"), while also passing legislation for a constitutional amendment which restricts marriage to opposite-sex couples.¹⁴ The legal reality of inheritance rights for committed couples reinforced our research group's conviction that our work could prove valuable in affecting the direction of future law reform.

The story about the funding of our empirical study had a happy ending but a very troubling beginning. Traditional funding sources were not available for this study because it concerned nontraditional couples, most especially it concerned same-sex couples. This is just one example of what it means to create a life contrary to the social conventions of the day; it means that you are at risk of being deemed unworthy of that society's concern and that an indicia of citizenship rights, such as heirship, may be denied to you.

¹³ In *Baehr v. Lewin*, 852 P.2d 44, 65-69 (Haw. 1993), the Hawaii Supreme Court found that the state was denying same-sex couples the right to marry based on the sex of the applicants. In accordance with the Equal Protection Clause of the Hawaii Constitution (Haw. Const. art I, § 5), the court held that the state was required to demonstrate a compelling state interest why same-sex couples should be denied the right to marry. It remanded the case for trial to hear evidence on that issue. The trial court ruled in late 1996 that the state had failed to meet its burden of showing that prohibiting same-sex couples from marrying was necessary to achieve a compelling state interest. See *Baehr v. Miike*, No. Civ. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). The court granted the state's motion to stay the ruling pending an appeal to the Hawaii Supreme Court. See *id.* at *21. The Hawaii Supreme Court held that the constitutional amendment, see *infra* note 14, had made the case moot. See *Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391 (Haw. Dec. 9, 1999).

¹⁴ A Bill for an Act Proposing a Constitutional Amendment Relating to Marriage, H.B. 117, 19th Leg., Reg. Sess. (Haw. 1997). The Hawaii electorate approved the proposed constitutional amendment in November 1998. See Haw. Const. art I, § 23.

Vermont also has enacted legislation recognizing same-sex couples. In response to *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999), which held that exclusion of same-sex couples from the benefits and protections enjoyed by married couples under state law violated the Common Benefits Clause of the state constitution, the Vermont legislature created the legal concept of civil unions to enable same-sex couples to obtain the same benefits that married couples enjoy. See Vt. Stat. Ann. tit. 15, §§ 1201-1204 (LEXIS Supp. 2000).

I know of no better way of conveying to the reader the implications of resisting social conventions, as well as the implications of asking the question whether committed partners should be treated as heirs, than to remind the reader of the lessons to be found in Jane Austen's novel *Pride and Prejudice*.¹⁵ Now many readers may find it quite curious, and perhaps even absurd, that for an article concerning unmarried couples, and especially same-sex couples, I would rely on this Austen novel. After all, *Pride and Prejudice* could be described succinctly and accurately as a novel having to do with courtship and marriage. Notwithstanding all the reasons not to proceed, I am going to ask readers to put aside their skepticism while I give my reasons for thinking *Pride and Prejudice* has so much to tell us about living unconventional lives and about the findings of the survey itself.¹⁶

First, let me briefly describe the novel. Written about 1797, but published anonymously in 1813, *Pride and Prejudice* introduces us to the Bennet family: five young daughters; a disengaged and irresponsible father; and a mother concerned only about dresses, a respectable dinner table, and marriages for all of her daughters.¹⁷ We learn early in the novel that in Regency England the marriage prospects for the Bennet daughters are not very good because they each will have little more than £1,000, and that only after their mother dies.¹⁸ The estate they live on is entailed, and in the absence of a male heir, is destined to pass at Mr. Bennet's death to Mr. Collins, his cousin.¹⁹ Nevertheless, hope runs eternal in the heart of Mrs. Bennet to see her daughters married well. Excitement in the neighborhood and in the Bennet household is palpable when news comes that a wealthy and eligible man, Mr. Bingley, has just purchased one of the neighborhood's finest estates and that he is accompanied by a friend, Mr. Darcy, the head of a highly

¹⁵ Jane Austen, *Pride and Prejudice* (Tony Tanner ed., Penguin Books 1972) (1813).

¹⁶ For further discussion of the implications of Austen's work to issues of sexuality, see generally, e.g., Eve Kosofsky Sedgwick, *Tendencies* 109-29 (1993); Terry Castle, *Sister-Sister*, *London Rev. Books*, Aug. 3, 1995, at 3 (reviewing Jane Austen's *Letters* (Deirdre Le Faye ed., 3d. ed. 1995)); Claudia L. Johnson, *The Divine Miss Jane: Jane Austen, Janeites, and the Discipline of Novel Studies*, 23 *Boundary 2* 143 (1996).

¹⁷ See Note on the Text, *in* Austen, *supra* note 15, at 47.

¹⁸ See Austen, *supra* note 15, at 148.

¹⁹ See *id.* at 106-07.

regarded landed family.²⁰ Through the benefit of assemblies, balls, dinners, and evening entertainments, Mr. Bingley has the opportunity to fall in love with the sensitive, generous, and sincere Jane, the Bennets' oldest daughter. His friend Mr. Fitzwilliam Darcy, against his economic and social interest and against his highly sharpened sense of propriety, finds himself falling in love with Elizabeth, the Bennets' second oldest daughter.²¹ As the novel reveals conversations, events, letters, and Elizabeth's reflections on all of the above; the reader learns about the routines and rituals of a small section of society. It is no surprise to the reader, even if it is to Jane and Elizabeth Bennet, that the novel ends in both daughters finding themselves in highly satisfactory marriages. Reflective readers *are* surprised to find that, thanks to Austen's expertise as a dramatist as well as a narrator, the portrayal of this section of society, brings them to a clearer understanding of the shifting nature of truth, ideas, and judgments of a society and of the individuals within it. And even more importantly, they come to learn along with Elizabeth Bennet, that, to paraphrase a passage from Tony Tanner's excellent critique of the novel, once we, like Elizabeth, "perceiv[e] [our] own pride and prejudice . . . [we] can . . . begin to be free of them."²²

The most obvious clue that Austen's novel could be helpful in thinking about the question of heirship for unmarried couples is its title. The title was a commonplace phrase in the literature of Austen's day and she probably replaced its first title, *First Impressions*,²³ to signal a number of literary allusions found in the book.²⁴ Taking a more literal rather than a literary view of the title, I want to consider the different hues of the meaning of the word "pride" both in terms of the way Austen used it two hundred years ago and the way we use it today. Austen uses the term "pride"

²⁰ See *id.* at 51-52, 58.

²¹ I adopt Austen's convention of naming by referring to Elizabeth Bennet by her given name and Fitzwilliam Darcy by his surname. For further discussion of naming, see Susan Kneeder, *The New Romance in Pride and Prejudice*, in *Approaches to Teaching Austen's Pride and Prejudice* 152, 164 n.2 (Marcia McClintock Folsom ed., 1993) [hereinafter *Approaches*].

²² Tony Tanner, Introduction to Austen, *supra* note 15, at 7, 16.

²³ See Kenneth L. Moler, *Literary Allusion in Pride and Prejudice*, in *Approaches*, *supra* note 21, at 89, 89; Note on the Text, *supra* note 17, at 47.

²⁴ See Moler, *supra* note 23, at 89.

pejoratively to describe Mr. Darcy's manners toward those outside his own small party of acquaintances. For example, at the first assembly gathering after Bingley joined the neighborhood, Darcy was received as follows:

The gentlemen pronounced him to be a fine figure of a man, the ladies declared he was much handsomer than Mr. Bingley, and he was looked at with great admiration for about half the evening, till his manners gave a disgust which turned the tide of his popularity; for he was discovered to be *proud*, to be above his company, and above being pleased; and not all his large estate in Derbyshire could then save him from having a most forbidding, disagreeable countenance, and being unworthy to be compared with his friend.²⁵

Pride is improper in this context because it is used as a basis for thinking ill of others. Austen does not, however, dismiss the usefulness of pride. She demonstrates in the character of Bingley the dangers of lacking pride. His inability to appreciate that he was in a superior position to judge allowed him to be persuaded by Darcy that Jane did not love him.²⁶ It is this proper pride described in the novel that comes closest to the political currency the term has attained within the civil rights and liberation movements during the last half of the 20th century. Pride in this context is a rhetoric conveying both self-esteem and identity at the same time that it is a rejection of social norms and constraints that have the effect of naturalizing shame and degradation upon certain groups of persons. When used to describe Mr. Darcy, Austen is telling us that pride leads to ignorance and prejudice based on that ignorance that can remain in place not because those views are better-reasoned or better-informed but because social position allows them to remain untested and undisturbed. Pride within a liberation movement emanates from group members' daily experiences with the harmful consequences of social norms and it is those experiences that

²⁵ Austen, *supra* note 15, at 58 (emphasis added).

²⁶ See Elizabeth Langland, A Feminist and Formalist Approach to Close Reading, *in* *Approaches*, *supra* note 21, at 140, 144-45 (discussing how proper and improper pride are central paradigms by which a reader can "align and distinguish" the characters in the novel).

ultimately lead people to intellectually and emotionally interrogate those norms.

Pride as a challenge to social norms, in fact, correlates directly with the novel's central theme of liberation through self-reflection on one's own prejudice.²⁷ For Elizabeth Bennet and Mr. Darcy to come together in marriage at the end of the book, both are required to unlearn what they know and feel. This is made most vivid when Austen describes Elizabeth's thinking after she reads Mr. Darcy's letter that offers an explanation for his actions for which she had criticized him and cited to him as reasons why they could never marry.²⁸ When she first starts to read the letter she is described as having "a strong prejudice against every thing [it] might say"²⁹ But through reading and rereading and thinking and rethinking she comes to a quite different place:

'How despicably have I acted!' she cried.—'I, who have prided myself on my discernment!—I, who have valued myself on my abilities! . . . How humiliating is this discovery!—Yet, how just a humiliation!—Had I been in love, I could not have been more wretchedly blind. But vanity, not love, has been my folly. . . . I have courted prepossession and ignorance, and driven reason away Till this moment, I never knew myself.'³⁰

Mr. Darcy's self-revelation comes from the writing of the letter itself when he is forced to see himself as Elizabeth sees him. Through the letter writing and its reading, Austen presses us to believe in each other's ability to break the constraints of prejudice. She persuades us in *Pride and Prejudice* to believe that each of us can break those constraints if we can keep ourselves from "driving reason away." Austen helps us better understand that it was improper pride and prejudice obscured by social conventions that led to our funding difficulties and that it was proper pride that gave us the self-confidence to challenge tradition and continue our work.

²⁷ For further exploration of self-reflection in the novel, see Tanner, *supra* note 22, at 26-29.

²⁸ Austen, *supra* note 15, at 227-32.

²⁹ *Id.* at 233.

³⁰ *Id.* at 236-37.

Improper and proper pride also provide a useful framework for considering the findings of the empirical study.

I. THE LAW OF INHERITANCE

Under prevailing statutory law, a surviving committed partner does not share in the decedent's estate at death. The property of the partner who dies passes to that partner's children.³¹ If there are no children, the property passes to that partner's parents or if the parents are dead to that partner's siblings.³² If the couple had been married, the surviving partner as legal spouse would inherit all or nearly all of the decedent's estate regardless of whether the decedent was survived by children, parents, or siblings.³³

One question many readers may be asking with regard to same-sex couples is why concern ourselves with issues of heirship—why not address the question of the right to marry directly. One answer to that question is political: marriage for same-sex couples is not likely to win approval in most state legislatures in the foreseeable future.³⁴ Another answer is that there are good reasons to view the functions of the heirship laws separate from marriage. The function of heirship laws is to accomplish a decedent's donative intent in the absence of a will, and they do that in a way that reflects society's view of fairness and its commitment to pro-

³¹ If the decedent is survived by grandchildren, great grandchildren, etc., these lineal descendants would take ahead of ancestors and collaterals. See, e.g., Unif. Probate Code § 2-103(1) (amended 1993), 8 U.L.A. 83 (1998) (discussing the share of heirs other than the surviving spouse).

³² See, e.g., *id.* § 2-103(2), (3), 8 U.L.A. 83.

³³ See, e.g., *id.* § 2-102 (amended 1993), 8 U.L.A. 81.

³⁴ For example, in a preemptive effort to prevent having to recognize Hawaii same-sex marriages, a substantial number of states have enacted anti-same-sex marriage bills. See *Hawaii Seeks Law to Block Gay Marriage*, N.Y. Times, Apr. 18, 1997, at A15 (noting that as of April 1997, 18 states had enacted laws not to recognize same-sex marriage). In 1996, the federal government also took preemptive action by enacting the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7, 28 U.S.C. § 1738C (Supp. IV 1999)). The Act allows states to refuse to recognize same-sex marriages of another state. See 28 U.S.C. § 1738C. It also provides that the term "marriage" as used in all federal statutes or agency rulings, regulations, or interpretations means "only a legal union between one man and one woman as husband and wife" and the term "spouse" means "only a person of the opposite sex who is a husband or wife." 1 U.S.C. § 7. Same-sex married couples, therefore, would not be treated as married for purposes of federal taxation, immigration, or other federal programs.

mote familial-type ties.³⁵ This study is based on the premise that heirship laws can accomplish their function if they conform to the notion of family as it evolves sociologically and not if they are tied exclusively to a definition of family determined through legally recognized marriages. Support for this functional view can be derived from the development of the law of inheritance itself.

Over the last few hundred years, the inheritance laws have continually changed to reflect and support societal changes. In making the transition from feudalism to liberal democracies, Britain and Europe began in the eighteenth century to develop new ideologies.³⁶ The Enlightenment idea of the rational man unconnected to a bloodline or community was a cornerstone of liberalism and became the basis for eliminating, for example, primogeniture.³⁷ More recently, changes in the 20th century have delinked bloodline from the definition of family. Specifically, the law has expanded the inheritance rights of legal spouses and adopted children.³⁸ In the last half of the 20th century the law has also expanded the inheritance rights of nonmarital children.³⁹ This reform marks the moment that the law made a distinction between moral beliefs and fairness.⁴⁰ These legal changes demonstrate the law's

³⁵ See Lawrence W. Waggoner et al., *Family Property Law: Cases and Materials on Wills, Trusts, and Future Interests* 33-34 (2d ed. 1997) (describing what objectives guide policymakers in developing a system of intestate succession).

³⁶ Cf. David Theo Goldberg, *Racist Culture: Philosophy and the Politics of Meaning* 2-6 (1993) (commenting on how the concept of race has been modified over time).

³⁷ Primogeniture means "[t]he superior or exclusive right possessed by the eldest son, and particularly, his right to succeed to the estate of his ancestor, in right of his seniority by birth, to the exclusion of younger sons." *Black's Law Dictionary* 1191 (6th ed. 1990). In the United States, rejection of the preference of males over females and of primogeniture among male descendants began during the colonial period. See Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 *Mich. L. Rev.* 1, 10-11 (1977). Reform of intestacy laws, including the elimination of primogeniture in virtually all of the states in favor of a rule that treated the children equally, reflected the influence of the political tradition of republicanism. See *id.* at 12-13. The preambles to the Revolutionary and post-Revolutionary acts governing inheritance expressed the republican abhorrence of aristocracy, family dynasties, and large estates. See *id.* at 14-15. For further discussions of the relationship between early American inheritance law and republican political ideology, see generally Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 *N.Y.U. L. Rev.* 273 (1991); Katz, *supra*.

³⁸ See, e.g., *Unif. Probate Code* §§ 2-102, 2-114 (amended 1993), 8 *U.L.A.* 81-82, 91-92 (1998).

³⁹ See *id.* § 2-114, 8 *U.L.A.* 91-92.

⁴⁰ See generally *Trimble v. Gordon*, 430 U.S. 762 (1977) (holding to be an unconstitu-

responsiveness to and support of societal changes. This list of changes carries a message beyond demonstrating the tradition of continuous change in the definition of heirs. It also suggests that the law's treatment of spouses, adopted children, and nonmarital children sets the stage for us to imagine the question of committed partners as heirs.

Pride and Prejudice provides a useful metaphor for the point that I am making. The novel is about the routines and social rituals that dominate the lives of this small section of society, securing its continuity and minimizing the possibility of anything approaching transformation. Nevertheless, within those routines and rituals, a highly unlikely and socially disturbing marriage between Elizabeth Bennet and Fitzwilliam Darcy takes place. The marriage of a woman to a gentleman that crosses economic and social lines represents dramatic social change at the same time that it evolves out of the familiar assemblies, balls, dinners, and neighborhood visits that mark the rhythm of Regency England.⁴¹ Austen knows that Elizabeth and Darcy's marriage means changes to the society in which it takes place.

Arguing that a change to the inheritance law can be defended independently from marriage because it would serve the primary functions of the inheritance law is not contending that such a change would not have implications beyond the fact that it accomplishes a transfer of property. At the same time that heirship statutes reflect social norms and values, they also shape the norms and values by recognizing and legitimating relationships. Here, I think it is important to distinguish between opposite-sex and same-sex couples. For opposite-sex couples, the recognition not only may accomplish donative intent and fairness, but it also carries the potential benefit of validating the relationship and strengthening family ties. Along with this potential benefit, however, legal recognition increases the incentive of couples to assimilate and reproduce the marriage model that at least some opposite-sex couples have

tional denial of equal protection an inheritance statute allowing a child to inherit from the child's father only if the father married the child's mother and acknowledged the child).

⁴¹ For an excellent discussion of the economic and social realities of Elizabeth and Darcy's marriage, see Edward Copeland, *The Economic Realities of Jane Austen's Day*, in *Approaches to Teaching Austen's Pride and Prejudice* 33-45 (Marcia McClintock Folsom ed., 1993) [hereinafter *Approaches*].

rejected. In that regard, it presents a double bind—validation is in tension with the risk of assimilation. For same-sex couples, donative intent, fairness, and familial ties are also at stake. Beyond that, however, statutory reform of the inheritance laws would validate a person's sexual identity. The double bind for same-sex couples is validation at the cost of reinforcing the heterosexual model.⁴² There is no escaping the double bind; what is clear is that it is present regardless of whether reform occurs or not.

Pride and Prejudice again provides us important insights. The character of Elizabeth tells us a good deal about living within the double bind. Elizabeth sees value in the social rituals and proprieties that constitute the social space that she occupies. Unlike her mother, however, she is not captured by the role she plays within her family and social situation. She is capable of reflection and detachment that allow her to remain true to herself when that truth is in conflict with her assigned role.⁴³ Her refusal to act as a grateful female when Mr. Darcy frames his first marriage proposal to her in terms of his superior social position is but one example of the complex character that Jane Austen has created.⁴⁴ Elizabeth's embodiment of the contradictions and tensions between the individual and community encourages us to abandon abstractions that might lead us either to mindless commitment to social convention or to its disavowal. To find happiness and peace within the contradictions and tensions is Elizabeth's lesson. Through the details of the survey, all of us can take a better measure of the implications to committed couples and to society of having surviving committed partners take as heirs.

⁴² See Mary C. Dunlap, *The Lesbian & Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 *Law & Sexuality* 63, 78 (1991) (juxtaposing "widespread legalistic and feminist criticisms of marriage as an institution with the fact of lesbian and gay momentum toward inclusion in the institution").

⁴³ The discussion in the text extends Tony Tanner's discussion of social roles and self-reflection. See Tony Tanner, *Introduction to Jane Austen, Pride and Prejudice* 27-31 (Tony Tanner ed., Penguin Books 1972) (1813).

⁴⁴ See Austen, *supra* note 43, at 220-24.

II. METHOD AND DESIGN⁴⁵

The survey data were collected in the fall of 1996 by the Minnesota Center for Survey Research. They consisted of a telephone survey of a sample of the general public and three samples of persons in unmarried committed relationships: persons with opposite-sex committed partners, women with same-sex partners, and men with same-sex partners. The general public sample was randomly generated from persons over the age of 25 residing in Minnesota. Generating the sample of persons with opposite-sex committed partners required the thoughtful creativeness of the Center. Taking notice that most people know persons in opposite-sex committed relationships, the Center generated the sample by asking respondents in the general public sample to provide the name and phone number of someone they knew in an opposite-sex committed relationship. We also faced difficulties in generating samples of same-sex couples. We solicited volunteers through flyers and with the assistance of lesbian, gay, bisexual, and transgender advocacy groups throughout the state.

All of the respondents were presented a series of scenarios in which they were asked to divide the property of the decedent among survivors identified by their familial-type relationship with the decedent. All of the scenarios involved a committed partnership that terminated as a result of the death of a partner. For respondents in same or opposite-sex committed relationships, additional information was gathered regarding their personal relationships, wealth accumulation, and children.

III. FINDINGS

There are three major findings of the study. First, a substantial majority of the respondents in each sample group consistently preferred the partner to take a share of the decedent's estate. Respondents with same-sex partners, however, were consistently more generous to partners than were respondents from the general public sample or the respondents with opposite-sex partners. This finding is demonstrated by looking at the responses for a scenario

⁴⁵ For a more complete discussion of the survey's method and design, see Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 *Law & Ineq.* 1, 31-35 (1998).

that asked the respondents how they would divide the estate among a decedent's committed partner and decedent's parents. The interviewers presented to respondents Scenario A:

In the first situation, neither the person nor their opposite-sex partner has any children. We are interested in how you would divide the estate among the survivors. If when the person dies only their own parents and their partner are living, what percentage of the estate would you give to their own parents? What percentage would you give to the partner of the person who dies?⁴⁶

A few preliminary remarks about the presentation of the findings in the tables are necessary. Distributive preferences for the scenarios followed easily identifiable patterns. The tables present the results utilizing those patterns, combining the responses of women and men in same-sex relationships since minimal differences were found in the two groups' distributive preferences.

Table 1. Distribution Patterns for Scenario A: Decedent Survived by Partner and Parents

		General Public Sample	Respondents with Opposite-Sex Partners	Respondents with Same-Sex Partners
Percent Distribution to:				
Partner	Parents	(%)	(%)	(%)
100	0	14.0	30.3	64.7
51-99	1-49	8.1	6.1	24.1
50	50	45.3	42.4	10.5
1-49	51-99	4.7	3.0	0.8
0	100	27.9	18.2	0.0
Total Number of Respondents		86	33	133

⁴⁶ Although unintentionally grammatically incorrect, the form of the question avoided identifying the gender of the decedent. The grammatical error was made in every scenario presented to respondents.

Under prevailing law, the parents would receive the decedent's entire estate and the partner would receive nothing.⁴⁷ As the table shows, nearly three-quarters of the respondents from the general public sample,⁴⁸ over four-fifths of the respondents with opposite-sex partners, and all of the respondents with same-sex partners gave some share of the estate to the surviving partner. In the general public sample, a somewhat greater percentage of the respondents gave half or less of the estate to the partner than gave half or more. Of the respondents with opposite-sex partners, over three-quarters gave the surviving partner half or more and nearly all the respondents with same-sex partners gave the surviving partner half or more. The most prevalent distribution of the respondents with same-sex partners was to give the partner the entire estate (64.7 percent).

How do these findings compare to public attitudes about the appropriate treatment of legal spouses? The trend in inheritance laws is to give the surviving spouse all or nearly all of the decedent's property.⁴⁹ This trend corresponds to the public attitudes found in the 1978 study.⁵⁰ In that telephone survey of the general

⁴⁷ See *supra* notes 31-33 and accompanying text.

⁴⁸ The margin of error is +/-9.8 percent (95 percent confidence interval). This margin of error reflects the small sample size as well as the tendency of the responses to be polarized. Statistical significance is not reported for respondents with opposite-sex partners or respondents with same-sex partners because the two sample groups were not generated randomly. Therefore the results should not be used to make statistical inferences about populations.

⁴⁹ Under the 1990 UPC, the spouse receives the first \$200,000 plus three-fourths of any balance of the intestate estate, and the parents receive one-fourth of that part of the intestate estate that exceeds \$200,000. See Unif. Probate Code §§ 2-102(2), 2-103(2) (amended 1993), 8 U.L.A. 81, 83 (1998). Alaska, Colorado, Hawaii, Michigan, Montana, and North Dakota have followed the UPC recommendation. See Alaska Stat. §§ 13.12.102, 13.12.103 (Michie 1996); Colo. Rev. Stat. §§ 15-11-102, 15-11-103 (1999); Haw. Rev. Stat. Ann. §§ 560:2-102, 560:2-103 (Michie 1999); Mich. Comp. Laws Ann. § 700.2102 (West Supp. 2000); Mont. Code Ann. §§ 72-2-112, 72-2-113 (1999); N.D. Cent. Code. §§ 30.1-04-02, 30.1-04-03 (1996). States that have otherwise enacted the 1990 UPC's general pattern of intestacy—Arizona, Minnesota, New Mexico, South Dakota, and West Virginia—provide that the surviving spouse inherits the entire estate when the decedent dies without surviving children but with a surviving parent or parents. See Ariz. Rev. Stat. Ann. § 14-2102 (West 1995); Minn. Stat. § 524.2-102 (West Supp. 2000); N.M. Stat. Ann. § 45-2-102 (Michie 1995); S.D. Codified Laws § 29A-2-102 (Michie 1997); W. Va. Code Ann. § 42-1-3 (Michie 1997).

⁵⁰ See Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978* Am. B. Found. Res. J. 319, 351 (1978). It also corresponds to the public attitudes found in a number of other

public in which married respondents were asked hypothetically to distribute their estates between their spouses and mothers, over 70 percent gave their entire estate to their spouses.⁵¹ The share of the estate given to the committed partner by the respondents in the general public sample in the current study varied substantially from the share of the estate given to the legal spouses by respondents in the 1978 study. The proportion of respondents with opposite-sex partners who gave the partner all of the estate also was substantially less than the proportion of the married respondents in the 1978 study that gave the legal spouse the entire estate. In contrast, the proportion of the respondents with same-sex partners who gave the partner the entire estate (64.7 percent) is similar to the proportion of married respondents who gave the legal spouse the entire estate in the 1978 study (70.8 percent).

Further evidence of the likely intent of the respondents with same-sex partners is found in their reporting of their current estate plans. Over 58 percent of respondents who had parents surviving but not children and who had wills or life insurance designated their partners as their sole beneficiary in their wills or life insurance policies.⁵²

empirical studies. See Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 *Mich. L. Rev.* 1303, 1308-09 (1969) (studying the records of decedent estate administration in Washtenaw County, Michigan, and finding that 9 of 13 wills in the sample provided that the spouse receive the entire estate); Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 *U. Chi. L. Rev.* 241, 253 (1963) (studying probate proceedings initiated in Cook County, Illinois in 1953 and in 1957, and finding only six cases where there was a surviving spouse but no children; in all but one of these cases the testator gave the surviving spouse all of the property).

⁵¹ See Fellows et al., *supra* note 50, at 351.

⁵² There were too few respondents with opposite-sex partners who had wills or life insurance to draw any conclusions based on their current estate plans.

A substantial number of the respondents with same-sex partners named their partners as beneficiaries in their wills and life insurance policies, even if they did not name their partner sole beneficiary. After respondents were asked if they had a will or life insurance, they were asked about who was named as a beneficiary. A list of potential takers that included partner and parents was read. Over 90 percent of the respondents with same-sex partners who had parents surviving but no children and who had wills or life insurance designated their partner as a beneficiary but not necessarily the sole beneficiary. Data were not collected on the proportion of the estate or proceeds that the partner would receive under the respondent's estate plan.

Because we did not randomly draw the sample of respondents with same-sex partners, we are unable to assess whether the substantial differences in distributive preferences they show reflect actual differences between persons with same-sex partners and the other populations or whether the differences presented here are due to biases in this particular sample. The sample of respondents with same-sex partners differed from the other samples on several demographic dimensions, including level of income and education, likelihood of not being religious, and likelihood of living in the Twin Cities. Although we have no way to determine conclusively whether these factors account for the differences between samples in distributive preferences, some statistical evidence exists to support the claim that the differences in distributive preferences are not due to these demographic factors.⁵³

Some of the differences between respondents with same-sex partners and those with opposite-sex partners may be explained by the fact that legal marriage is an option for opposite-sex couples.⁵⁴ Opposite-sex couples who may have similar preferences to same-

⁵³ In a series of analyses of the distributive preferences of the general public, respondents were compared by educational level, income level, residence in the Metro area, and religiosity. Educational level was categorized by three groups representing those who had not attended college, those who had some college, and those who completed college or a higher degree. Distributive preferences were compared using bivariate contingency table analysis. We measured the association of these variables with gamma (γ), and considered $\gamma > .3$ as indicating a meaningful relationship. Gamma ranges from -1.0 to +1.0 with 0 indicating no relationship.

Educational level was not found to be related to distributive preferences for Scenario A. Income, measured in three groups (0-\$20,000, \$20,000-\$35,000, and over \$35,000 per year), was also unrelated to the distributive preferences for Scenario A. Similarly, residence in the Metro area was not associated with the distributive preferences for Scenario A. Non-religiousness was associated with giving the partner a smaller share of the estate in Scenarios A and B (see *infra* notes 57-59 and accompanying text) (A: $\gamma = -.36$; B: $\gamma = -.35$).

⁵⁴ But see Ronald R. Rindfuss & Audrey VandenHeuvel, *Cohabitation: A Precursor to Marriage or an Alternative to Being Single?*, 16 *Population & Dev. Rev.* 703, 704 (1990) (questioning the assumption in much of the literature that cohabitation is either an alternative form of marriage or as the final state in a relationship that leads to marriage). Rindfuss and VandenHeuvel posit that cohabitation by opposite-sex couples might be better understood if it were associated with singlehood rather than marriage. See *id.* at 707. They present data supporting the proposition that attributes of those cohabiting are more similar to persons who are single than persons who are married. See *id.* The authors, however, recognize a substantial diversity among opposite-sex cohabiting couples and agree that for those who have cohabited a substantial amount of time, understanding the relationship as an alternative to marriage may be accurate. See *id.* at 704.

sex couples may be excluded from the comparison because they have married. Furthermore, for those who are unmarried, the nature of the commitment is influenced by the opportunity to gain legal recognition through marriage. Another possible explanation for the differences is that respondents with same-sex partners may have been more concerned that partners not be treated unfavorably as compared to legal spouses in response to systemic discrimination.

Based on the differences in distributive preferences expressed by the two groups in this study, it might be argued that donative intent would be furthered if the share passing to a same-sex committed partner was greater than the share passing to an opposite-sex partner. But that brings me to the second major finding of the study. The respondents in each sample group consistently preferred same-sex and opposite-sex committed couples to be treated the same under the inheritance laws. All the scenarios described the decedent and surviving partner as being of the opposite sex. For Scenario A, having to do with the partner and parents as survivors, however, the interviewers repeated the scenario describing the decedent and decedent's partner as being of the same sex. For all the remaining scenarios, respondents were asked if the way in which they had distributed the decedent's estate would differ if the partner had been of the same sex as the decedent. For each scenario, the overwhelming majority in each sample did not change their distributive choices.⁵⁵

⁵⁵ For Scenario A, of the respondents in the general public, 85.5 percent (+/- 7.8 percent) indicated no change in their distributive choices. The same was true for 97.0 percent of the respondents with opposite-sex partners and 94.7 percent of the respondents with same-sex partners. Of those respondents who gave a share of the estate to the surviving partner, 80.0 percent (+/- 10.4 percent) of the respondents from the general public sample, 100 percent of the respondents with opposite-sex partners, and 94.7 percent of the respondents with same-sex partners, did not change their distributive choices when the surviving partner was of the same sex as the decedent.

These findings may be subject to social desirability bias wherein respondents answer questions so as to appear well-adjusted, unprejudiced, rational, or otherwise open-minded. See Herman W. Smith, *Strategies of Social Research* 229 (2d ed. 1981). In Scenario A we repeated the experiment, altering it only to describe a same-sex couple, and asked the respondents to distribute the decedent's estate. In the subsequent scenarios, we asked a more simplified form of the question. For example, in Scenario B, in which the decedent was survived by a partner and siblings, we asked: "Would you give more, less, or the same amount to the partner if the partner was the same sex as the person who dies?" Having asked the question about whether sexual orientation of the committed

Another scenario presented to the respondents that will be of particular importance in any serious consideration of law reform had to do with a decedent survived by a partner and a child from a prior relationship. The respondents' distributive preferences in this scenario support the two major findings that a substantial majority of the respondents in each sample group preferred the partner to take a share of the decedent's estate and that respondents in each sample group preferred same-sex and opposite-sex committed couples to be treated the same. The interviewers presented the respondents with Scenario B:

[T]he person has a child under 18 from a prior relationship and the opposite-sex partner has no children. When the person dies, how would you divide the estate between the person's child and their partner? What percentage of the estate would you give to the child of the person who dies? What percentage of the estate would you give to the partner of the person who dies?

Under prevailing law, the decedent's child would receive the entire estate and the committed partner would receive nothing.⁵⁶ A minor child was chosen as the competing claimant to the partner because we hypothesized this would be one of the likely situations where the respondents might believe that decedents had an obligation to provide a substantial amount of their estates to their children. As the table shows, respondents had a variety of distributive preferences for this scenario.

partners mattered in assessing distributive preferences using two different approaches and having yielded comparable results, we have some assurance that social desirability bias is minimal.

⁵⁶ See *supra* notes 31-33 and accompanying text.

Table 2. Distribution Patterns for Scenario B: Decedent Survived by Own Child from a Prior Relationship and Partner

		General Public	Respondents	Respondents
		Sample	with Opposite-Sex Partners	with Same-Sex Partners
Percent Distribution to:				
Partner	Parents	(%)	(%)	(%)
100	0	4.7	0.0	12.2
51-99	1-49	2.3	3.0	9.9
50	50	38.4	42.4	57.3
1-49	51-99	17.4	24.2	14.5
0	100	37.2	30.3	6.1
Total Number of Respondents		86	33	131

The majority of respondents in each sample (62.8 percent of the general public sample;⁵⁷ 69.7 percent of the respondents with opposite-sex partners; 93.9 percent of the respondents with same-sex partners) gave the surviving partner some share of the estate. Nearly 56 percent of the general public sample gave the surviving partner a share that is half or less of the estate. Of the respondents with opposite-sex partners, this pattern prevailed two-thirds of the time. Of the respondents with same-sex partners, the majority divided the estate evenly between the partner and the decedent's child (57.3 percent); 22.1 percent gave the partner over half of the estate; and 20.6 percent gave the partner under half. Although a significant proportion of the respondents from the general public sample (37.2 percent) and of the respondents with opposite-sex partners (30.3 percent) preferred the child to inherit the entire estate, the most predominant distribution among those respondents who gave the partner some share was to share the estate equally between the partner and the child. Among committed partners with children (both opposite-sex and same-sex), 90 percent would give the partner some share of the estate, but only 12 percent would give the partner over half of the estate. A majority of this group (58 percent) would share the decedent's estate equally between the

⁵⁷ The margin of error is +/-10.4 percent.

partner and the child.⁵⁸

Although the data clearly support an heirship law that gives a committed partner a share of the estate, it also reveals, once again, that public attitudes toward a surviving committed partner are different from public attitudes toward a surviving legal spouse as found in the 1978 study.⁵⁹

III. DEFINING COMMITTED PARTNERS

If an inheritance law includes committed partners as potential heirs, as is suggested by the results of these two scenarios and the results of other scenarios presented to the respondents,⁶⁰ then the law must provide a definition of who qualifies as a committed partner. This issue brings me to the third major finding of the study: committed relationships for purposes of an inheritance law can be identified through easily observable attributes, and those attributes are shown to be associated with a preference for having a partner share in a decedent's estate.

In this study, we drew the samples based on a self-definition of committed relationship. For the purpose of developing a statutory definition of committed partner, we gathered information about the respondents' committed relationships to assess whether common observable attributes could be used to identify committed

⁵⁸ When the respondents were asked if they would distribute the estate differently if the surviving partner were of the same sex as the decedent, the overwhelming majority in each sample indicated that their distributive choices would stay the same. Of the respondents in the general public, 85.7 percent (+/- 7.6 percent) indicated no change in their distributive choices. The same was true for 97.0 percent of the respondents with opposite-sex partners and 98.5 percent of the respondents with same-sex partners. Of those respondents who gave a share of the estate to the surviving partner, 81.1 percent (+/- 10.8 percent) of the general public, 95.7 percent of respondents with opposite-sex partners, and 99.2 percent of respondents with same-sex partners, indicated that they would not change their distributive choices if the surviving partner were of the same sex as the decedent.

⁵⁹ In the 1978 study respondents were asked how they would share their estate between a spouse and a minor child from a prior relationship who was living with the former spouse. A substantial majority (89.1 percent) of the respondents gave the surviving spouse half or more. See Fellows et al., *supra* note 50, at 366. In the 1978 study the child from a prior marriage lived with the former spouse. It is uncertain whether respondents assumed some level of estrangement between the child and the decedent.

⁶⁰ See generally Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 *Law & Ineq.* 1 (1998) (describing the results of the eight scenarios as well as a variation on one of the eight scenarios).

partners. We sought respondents' own meaning of commitment by asking, "What is it about your relationship that makes you define it as committed?" To elicit further responses, we asked, "Is there anything else you would say?" These responses are displayed in Table 3.

Table 3. Open-ended Responses to "What is it about your relationship that makes you define it as committed?"

Response	Respondents with Opposite-Sex Partners	Respondents with Same-Sex Partners
(Percent giving the response)		
Feel committed	33.3	44.0
Deeply in love	3.3	24.8
Stated commitment publicly/ commitment ceremony	0.0	21.1
Living together	36.7	35.3
Monogamy over an "extended" period of time	26.7	45.1
Financial interdependence	30.0	37.6
Plan present lives together	3.3	29.3
Plan future lives together	6.7	33.1
Have or raise children together	6.7	11.3
Have mutual wills	0.0	4.5
Have mutual life insurance policies	6.7	6.8
Other	26.7	21.5
Total Number of Respondents	30	135

Because this approach predictably would elicit spontaneous responses highly salient to the respondents but not necessarily indicating observable attributes, we created a set of questions asking respondents whether an observable attribute applied to their relationships. The purpose of these questions was to assess the frequency with which certain attributes, which could be incorporated easily into a statute, occur among self-defined committed partners. The responses to these questions are displayed in Table 4.

Table 4. Distribution of Observable Attributes of Committed Relationships Among Committed Partners

Observable Attribute	Respondents with	Respondents with
	Opposite-Sex Partners	Same-Sex Partners
(Percent responding "yes")		
Commitment ceremony	6.7	26.7
Exchange a symbol (ring or other jewelry)	30.0	64.4
Arranged to be buried next to each other	6.7	5.9
Registration of Partner	0.0	21.5
—where possible	0.0	36.3
Joint charitable gifts	43.3	76.3
Joint bank accounts	36.7	71.1
Joint investment	6.7	37.8
Joint ownership of car or motor vehicle	20.0	42.2
Joint ownership of home	20.0	63.0
—of home owners	35.3	73.3
Joint credit cards	20.0	46.7
Joint ownership of pet	43.3	74.1
Joint debt (other than home)	13.3	20.0
—of those with debt	28.6	37.0
Having reared or actively rearing child together	23.3	14.8
Partner is healthcare decision-maker	26.7	71.1
Partner is beneficiary of life insurance	33.3	69.6
—of those with life insurance	43.5	88.7
Total Number of Respondents	30	135

As Table 4 shows, the list of observable attributes captures many of the themes suggested in the respondents' open-ended responses.

Within the context of heirship laws, for which donative intent is a central issue, we analyzed the data to assess whether any of these various observable indicators were associated with a preference for having a committed partner inherit. We compared a respondent's distributive preferences under the scenarios with the observable attributes that were applicable to the respondent's committed relationship. We were able to identify indicators that were each positively associated with a preference for having the

partner receive a larger share of the decedent's estate than if that indicator did not apply to the respondent's relationship.⁶¹

The overall pattern of findings, however, indicates considerable differences between the respondents with same-sex committed partners and the respondents with opposite-sex partners. The disparities pertain both to the prevalence of the relationship indicators examined and the capacity of the indicators to predict the re-

⁶¹ The relationships between the respondents' distributive preferences and the presence of each indicator were examined using bivariate contingency table analysis. For Scenario A, the following indicators were each positively associated with a preference for a respondent with a same-sex partner for having the partner receive a larger share of the decedent's estate than if that indicator did not apply to the respondent's relationship: exchanging a symbol of the relationship, such as a ring or other jewelry; registering the relationship with a municipality; sharing ownership of a car; sharing ownership of a pet; shared debt; naming a partner as a beneficiary of life insurance; and naming a partner as health care decision-maker. Similarly, having been in the relationship for at least five years was positively associated with a preference for having the partner receive a greater share of the decedent's estate. Each indicator has the following gamma: exchanged symbol of relationship ($\gamma = .34$); registered committed relationship ($\gamma = .31$); shared ownership of a motor vehicle ($\gamma = .53$); shared ownership of a pet ($\gamma = .35$); shared debt ($\gamma = .48$); named partner a beneficiary of life insurance ($\gamma = .38$); named partner healthcare decision-maker ($\gamma = .31$); length of relationship ($\gamma = .31$).

For Scenario A, the following indicators were each positively associated with a preference for a respondent with an opposite-sex partner for having the partner receive a larger share of the decedent's estate than if that indicator did not apply to the respondent's relationship: exchanging a symbol of the relationship, such as a ring or other jewelry; making joint charitable gifts; owning a joint bank account; naming a partner as beneficiary of life insurance; and naming a partner as health care decision-maker. Sharing ownership of a pet was also moderately associated with a preference for having the partner receive a greater share of the decedent's estate. Both having been in the relationship for at least five years and having cohabited for at least five years were each strongly related to a preference for having the partner receive a greater share of the decedent's estate. Because there were too few cases to consider several of these indicators alone in the sample of respondents with opposite-sex partners, additional analysis was conducted based on common themes. Having at least one of the symbolic indicators was highly associated with a preference for having the partner receive a greater share of the decedent's estate. The same was true for having at least one of the indicators representing present and future planning and for having at least one of the indicators representing financial interdependence. Having at least one of the death-time arrangements was highly associated with a preference for having the partner receive a greater share of the estate, as was having at least one of the indicators pertaining to life insurance and joint ownership. Each indicator has the following gamma: exchanged symbol of the relationship ($\gamma = .85$); made joint charitable gifts ($\gamma = .61$); owned joint bank accounts ($\gamma = .57$); named partner beneficiary of life insurance ($\gamma = .63$); named partner health care decision-maker ($\gamma = .62$); shared ownership of a pet ($\gamma = .33$); length of relationship ($\gamma = .52$); length of cohabitation ($\gamma = .69$); symbolic indicators ($\gamma = .79$); life planning indicators ($\gamma = .55$); financial interdependence indicators ($\gamma = .66$); death-time planning indicators ($\gamma = .70$); life insurance or joint ownership ($\gamma = .68$).

spondents' distributive preferences regarding the committed partner. As I indicated earlier regarding differences in distributive preferences, we can only speculate as to possible explanations for the differences.⁶² The dissimilarities that were revealed regarding indicators of a committed relationship raise questions about what and how we should use the indicators for identifying a committed relationship. They also underscore the need for further research to assess whether same-sex committed relationships can or should be treated the same as opposite-sex committed relationships under heirship laws.

Relying on the indicators specified in this study and those that may be generated by future studies enhances the likelihood that meaningful characteristics of committed relationships are used. The indicators developed in this study are based on the respondents' self-defining characteristics as well as our research group's preconceived characteristics of a committed relationship. The combination of methods means that the identified indicators reflect the lived experiences of opposite-sex and same-sex partners and not just characteristics that researchers have superimposed on committed relationships. This technique provides a partial response to the concerns that are likely to arise concerning assimilation and using marriage as the standard for determining commitment. I want to be cautious, however, not to overstate the benefit of relying on empirical studies for this purpose. Reporting of findings inevitably emphasizes predominating responses and obscures outlying ones with the result that the latter have little influence in developing the factors for defining committed relationships. Because synthesis of empirical results tends to prefer similarities and to explain away deviations from prevailing patterns, we need to be careful about how we use the results.

The Hawaii approach, relying exclusively on self-identification, avoids having to develop defining characteristics of a committed relationship.⁶³ It has the further advantage of keeping the state from invading the privacy of committed couples in the process of determining whether sufficient evidence exists to conclude that a claimant was a committed partner of a decedent. It

⁶² See *supra* notes 53-54 and accompanying text.

⁶³ See Haw. Rev. Stat. Ann. §§ 572C-4-5 (Michie 1997).

does so, however, at the cost of leaving those, who for whatever reason fail to sign a declaration of reciprocal beneficiary relationship, unprotected by an heirship statute. One response might be to adopt a dual system in which a state adopts a registration system but also provides inheritance rights to a claimant who can otherwise show that a committed relationship existed between the claimant and the decedent. Although a dual system may seem to embrace the advantages of both systems, it also may perpetuate the disadvantages of each. Further study is necessary to assess how a dual system might operate.

CONCLUSION

I started this Article by describing how Austen worked in an atmosphere of family connections. I went on to describe how connectedness reflected itself in my own work through collaboration. This empirical study, representing my most recent collaborative effort, is itself a study of connectedness. The findings uncover relationships and connections that otherwise go largely unrecognized in law and by society. Our project looked at one type of state regulation contributing to that invisibility—the heirship laws—and explored the question of recognizing committed partners as heirs.

In some respects, a change in the heirship laws has only limited implications for other areas of inheritance law and other areas of the law in general. In other respects, however, changing the heirship laws to allow a committed partner to share in the decedent's estate could potentially have substantial legal, social, and political effects. Recognition within heirship laws has consistently had the effect of shaping, as well as reflecting, societal norms and values and the definition of family itself.⁶⁴ Gender equality would be unthinkable within a legal system that embraced primogeniture. Recognition of adopted children as heirs of an adopting parent's ancestors and collateral relatives ultimately broke the stranglehold

⁶⁴ Cf. Jane S. Schacter, "Counted Among the Blessed": One Court and the Constitution of Family, 74 *Tex. L. Rev.* 1267, 1269-70 (1996). Although Professor Schacter acknowledges the "perils" of establishing criteria based on traditional heterosexual families within the context of second-parent adoptions, she recognizes that linking same-sex couples to traditional family rhetoric is necessary for "creating social and legal conditions that can support an evolving array of diversely configured lesbian and gay—and other—families." *Id.* at 1270.

that blood ties had on the definition of family and even made it possible for us to speculate on the possibility of including as an heir a decedent's partner.

Allowing a committed partner to inherit under an heirship statute would not only have an effect on how others view family units headed by committed partners, but it would likely have an effect on how members of the family unit view themselves. Just as legal invisibility currently shapes the internal dynamics of the family unit, recognition inevitably will shape the relations of the partners to themselves and to their children. Although the full extent of the effect of this change on family units headed by committed partners is difficult to know, what is easy to predict is that it will be profound in different ways for opposite-sex and same-sex couples.

The uncertainty of the social and legal changes that would result from treating a committed partner as heir is matched by the uncertainty with which the reader is left in *Pride and Prejudice*. Darcy, the symbol in the novel for tradition and social conventions, finds himself desiring and needing Elizabeth, the symbol in the novel for nonconformity and independent thinking. We can read the couple's marriage as the harmonious marriage of civility and truth in the making of a more perfect society.⁶⁵ Austen, however, does not quite believe in that happy ending. At the conclusion of the novel, while Elizabeth and Darcy are sharing a walk and conversation after having committed themselves to each other in marriage, Elizabeth is described as "longing" to make fun of what Darcy was saying about himself and his friend Bingley, but "she checked herself" because "[s]he remembered that he had yet to learn to be laughed at, and it was rather too early to begin."⁶⁶ This moment in the novel raises difficult questions about Elizabeth and Darcy's future. Will Elizabeth continually check herself, thereby repressing the very nonconformity and independent thinking that made her attractive to Darcy in the first place? Will Elizabeth's admittance into Darcy's social group lead to Elizabeth conforming her behavior and thinking so that the group's values and rituals remain unchallenged? Will Darcy learn to laugh at himself even-

⁶⁵ The discussion in the text extends Tony Tanner's discussion of the symbolic meaning of Elizabeth and Darcy's marriage. See Tony Tanner, Introduction to Jane Austen, *Pride and Prejudice* 41-42 (Tony Tanner ed., Penguin Books 1972) (1813).

⁶⁶ Austen, *supra* note 65, at 380.

tually? Will the social group forever be changed by Elizabeth's admittance so that it no longer places civilities ahead of truth? There are no clear answers to these questions. What is clear is that these questions are only possible to contemplate because Darcy took the first steps of allowing himself to desire Elizabeth, of seeing himself as Elizabeth saw him, and of breaching the social norms that kept the society in place by asking for her hand in marriage. Austen's late eighteenth-century novel therefore raises one last question relevant to the 21st century issue of whether we should recognize committed partners as heirs: If Darcy could risk changing who and what he was, why can't we?