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For the Best of Friends and for Lovers of All Sorts, a Status Other Than Marriage

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FOR THE BEST OF FRIENDS AND FOR LOVERS OF ALL SORTS, A STATUS OTHER THAN MARRIAGE

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Two-thirds of Americans over thirty are married. The Census Bureau divides everyone else into one of three groups, all defined in relation to marriage. They are the "never married," the "divorced," and the "widowed." They are the hopeful, the failed, and the bereaved. They number seventy-one million Americans in all—thirty-four million unmarried women and thirty-seven million unmarried men.[1]

How many of these unmarried individuals have another person in their life to whom they are quite close—a lover, a truly special friend, or a sister or brother or some other relation whom they consider extremely special in their lives—is not determinable from census data, but it is surely a very large number. For among those listed as "unmarried" are between three and four million couples over thirty, opposite-sex and same-sex, who are cohabiting together.[2] And among the unmarried who are not cohabiting, a large and uncounted number live with a trusted relative or friend who is more than a roommate, but not a sexual or romantic partner. Others live alone but have one person

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1 *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 52, tbl. 55 (2000). Of these unmarried women and men, most who are in their thirties are among the "never married." Most in their forties and fifties have been married, but are now "divorced" and not remarried. And most in their sixties and over have been married and are now "widowed." *Id.*

2 I estimate this number from two sources: Eric Schmitt, *For First Time, Nuclear Families Drop Below 25% of Households*, N.Y. TIMES, May 15, 2001, at A1 (reporting five and a half million unmarried couples (of all ages) in the 2000 census) and U.S. CENSUS BUREAU, *supra* note 1, at 52 tbl. 57.

whom they regard as their closest friend and see on an almost daily basis. That is to say, large numbers of single people, viewed by the law as legally unattached, have another person in their lives whom they would most want to look after their interests if they became incapacitated, whom they themselves would want to care for if the other became ill, and whom they would likely remember in their wills if they ever got around to writing one. This Article is about them.

The laws of American states do, of course, permit these lovers and friends to execute legally recognized instruments relating to each other. They can sign powers of attorney, make valid gifts, and provide for each other by will. They can execute contracts regarding the financial terms of their relationship and, even if they are an unmarried couple "living in sin," find that, on breaking up, courts in most states will enforce their agreement.[3] What they have been unable to do is to register their relationship formally with the state under a rubric other than marriage. The burden of this Article is to make the case for creating another form of status than marriage, one for lovers and the best of friends, that is quite different from marriage in its consequences.

American governments have recently begun to experiment with new familial statuses for gay male and lesbian couples, who have demanded the right to marry but have been appeased with more modest forms of recognition.[4] What I propose here is quite different. It is a status for people who have close bonds but do not want to be married to each other. I call this status "designated friends." Once registered, "designated friends" would obtain a limited number of privileges and undertake a limited number of responsibilities relating to the care for the other when ill or incapacitated or upon death, but would not receive any of the governmental financial benefits or undertake any of the financial responsibilities that attach to marriage. Gay male and lesbian couples would be among those eligible to register, but the premise of this proposal is that same-sex couples would also be permitted to marry.[5] Same-sex couples who do not choose to marry would be

3 *See, e.g.*, Salzmon v. Bachrach, 996 P.2d 1263, 1267 (Colo. 2000); Bright v. Kuehl, 650 N.E.2d 311, 315 (Ind. Ct. App. 1995).

4 *See, e.g.*, HAW. REV. STAT. ANN. §§ 571C-1 to -7 (Michie 1999); VT. STAT. ANN. tit. 15, §§ 1201–1207, 1301–1306 (Supp. 2000).

5 Gay marriage has been widely defended elsewhere, and I will not repeat the arguments for it here. *See, e.g.*, DAVID L. CHAMBERS, WHAT IF?: THE LEGAL CONSEQUENCES OF MARRIAGE AND THE LEGAL NEEDS OF LESBIAN AND GAY MALE COUPLES (1996); WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996); ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 178–87 (1997).

eligible, like any other pair of unmarried adults, to register as designated friends if they wished.

I. MODELS OF STATUSES OTHER THAN MARRIAGE

In this country, states have, until quite recently, offered marriage as the only legal status for adults who want to establish a formal mutual relationship. That no other couple relationship has been recognized should not be a surprise. Like every other Western culture, ours has viewed the family as the central building block of civil society, with the married couple and their children the most reputable family on the block.[6] The Census categories for marital status capture how we Americans think. Unmarried is missing something. Unmarried is suspect, regrettable, correctable. For most of American history, relationships between persons who are unmarried have been regarded either as immoral or, in the case of friends, as unnecessary to recognize.

In the 1970s, state courts began to be sympathetic to the claims of partners in long-term, unmarried, opposite-sex relationships, willing to enforce contracts between them,[7] and, in some states, to devise equitable property distribution rules even in the absence of a contract.[8] The first move toward a formally recognized new status for the unmarried occurred in the 1980s, when several politically liberal cities adopted ordinances that permitted same-sex couples and sometimes opposite-sex unmarried couples to register as "domestic partners."[9] To register, the couple typically was required to affirm that they were in a relationship of love and mutuality and that they lived together and shared expenses.[10] In many cities, no benefits attached to the registration except the psychic benefit of the public affirmation of their relationship. A few cities, within the limited range of their municipal powers, did attach some legal consequences to the registration, such as rights of hospital visitation and access to health insurance for the partners of municipal employees.[11]

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6 *See* DAVID M. SCHNEIDER, AMERICAN KINSHIP: A CULTURAL ACCOUNT 33–34 (1968).

7 The beginning of this change is commonly marked by the decision in *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

8 *See, e.g.*, Salzmon v. Bachrach, 996 P.2d 1263, 1267 (Colo. 2000); Bright v. Kuehl, 650 N.E.2d 311, 315 (Ind. Ct. App. 1995); Shuraleff v. Donnelly, 817 P.2d 764, 767 (Or. Ct. App. 1991).

9 *See, e.g.*, MINNEAPOLIS, MINN., CODE § 142.10 (2001); N.Y., N.Y., CODE §§ 3-240 to -244 (1998).

10 N.Y., N.Y., CODE § 3-241.

11 *See* MINNEAPOLIS, MINN., CODE § 142.70 (2001); N.Y., N.Y., CODE §§ 3-241, 3-401 to -405.

Beginning in the late 1980s, many western European countries moved considerably further. They created systems of registration for lesbian and gay couples to which all but a few of the privileges and responsibilities of marriage attached.[12] American state governments have been much more hesitant, but in the late 1990s, legislatures in Hawaii and California created statuses for gay and lesbian couples to which some legal consequences attached. Another, Vermont, created not one but two new statuses; one conferring on registrants all the legal consequences of marriage; the other conferring only a few. Hawaii and California adopted their legislation primarily as a weak substitute for marriage for gay and lesbian couples. I believe gay and lesbian couples deserve the real thing if they want it. On the other hand, the legislation in these three states made me realize that a new status might serve admirably as a vehicle for some couples who could marry but do not wish to, as well as for pairs of intimate friends and kin.

In 1997, Hawaii's legislature created a new status called "reciprocal beneficiaries,"[13] in response to a decision of its supreme court suggesting that the Hawaii constitution required that same-sex couples be permitted to marry on the same terms as opposite-sex couples.[14] The new status carried with it some of the significant state-created benefits of marriage, including health benefits for the partners of state employees and the right to inherit by intestate succession.[15] The legislature hoped to convince the Hawaii Supreme Court that, with the opportunity to become "reciprocal beneficiaries," homosexuals were now equal enough, and, though their legislation failed to satisfy gay couples who wanted to marry, it did for the first time provide a state-created mutual status other than marriage for pairs of adults.

In 1999, the California legislature took a baby step in the same direction. It enacted a "domestic partnership" law that permitted registration by two quite different groups of cohabiting couples—same-sex adult couples of any age and opposite-sex couples old enough to be eligible for Social Security old-age insurance benefits.[16] To regis-

12 *See* Caroline Forder, *European Models of Domestic Partnership Laws: The Field of Choice*, 17 CANADIAN J. FAM. L. 371, 390–401 (2000). Of the rights of married people that were omitted, the most common related to the eligibility for joint adoption. *See id.* at 411–30 (discussing various European proposals for joint adoption by same-sex couples).

13 HAW. REV. STAT. ANN. §§ 571C-1 to -7 (Michie 1999).

14 Baehr v. Lewin, 892 P.2d 44, 67 (Haw. 1993).

15 *See* HAW. REV. STAT. ANN. §§ 571C-4 to -6, 560:2-102 (intestate succession); *id.* § 323-2 (hospital visitation); *id.* § 431:10-234 (rights to life insurance policy).

16 *See* CAL. FAM. CODE §§ 297–298 (West Supp. 2001).

ter, couples had to agree to be responsible for each other's basic living expenses.[17] Registered domestic partners obtained two rights from the state—rights of hospital visitation and, quite significantly for those who were employees of the state, access to health insurance coverage for their partners.[18] This legislation, though quite limited in the legal consequences attaching to it, is nonetheless quite revolutionary in one respect: for the first time in American history, a state had offered to some couples—opposite-sex cohabiting couples over sixty-two—a choice between marriage and some legal status other than marriage.

In 2000, Vermont's legislature, responding to a decision of its state supreme court holding that all legal rights and benefits of marriage must be extended to same-sex couples,[19] created two new legal statuses. The first status has received great national attention. Same-sex couples are now permitted to join together in civil union and obtain all the legal rights, responsibilities, and benefits of marriage under state law.[20] The civil union legislation marks by far the broadest recognition of gay couple relationships in the United States and is amply discussed elsewhere.[21] My interest for the purposes of this Article is in the other legal status created in the same bill—a little-noticed set of sections creating the status of "reciprocal beneficiaries."[22] The Vermont version of reciprocal beneficiaries is narrower than the Hawaiian version. The only people who can register as "reciprocal beneficiaries" are blood relatives who are unable to marry or join in civil union—two sisters, for example, or an uncle and a nephew.[23] And those who do register obtain only a narrow range of privileges, such as hospital visitation rights and rights to make medical decisions if the other person is incapacitated.[24]

Vermont's legislature included the reciprocal beneficiary provisions in the civil union legislation because, in some parts of the state, voters strongly opposed giving any rights to gay people. The reciprocal beneficiary provision for blood relatives permitted legislators to claim that the new act was not just about homosexuals. Of course, almost no one who was hostile to recognizing gay relationships was mollified by these sections. Most never heard about them. But that is

17 *See id.* § 297(b)(2).

18 *See* CAL. HEALTH & SAFETY CODE § 1261 (West 2000); CAL. GOV'T CODE §§ 22867–22877 (West Supp. 2001).

19 *See* Baker v. State, 744 A.2d 864, 886–87 (Vt. 1999).

20 VT. STAT. ANN. tit. 15, §§ 1201–1207 (Supp. 2000).

21 *See, e.g.*, Symposium, *Vermont Civil Unions*, 25 VT. L. REV. 5 (2000).

22 VT. STAT. ANN. tit. 15, §§ 1301–1306 (Supp. 2000).

23 *Id.* § 1303.

24 *See id.* § 1301.

why they are there, and, like the reciprocal beneficiary legislation in Hawaii, they are another example of a state-created status other than marriage for pairs of people with a close relationship to each other.

II. A New Status for Pairs of People Not Married to Each Other

Hawaii's and Vermont's reciprocal beneficiary laws and California's Domestic Partnership Act mark an historic moment. For the first time, states have created a formal status other than marriage for two adults who have a close relationship. I would push their models farther than any of the three states intended.

Neither Hawaii nor Vermont in adopting its reciprocal beneficiary legislation intended to give couples a choice of two or more officially recognized relationships. In Hawaii, heterosexual couples can marry but cannot become reciprocal beneficiaries.[25] Same-sex couples and close blood relatives can become reciprocal beneficiaries, but cannot marry.[26] In Vermont, different-sex couples can marry,[27] same-sex couples can enter civil unions,[28] and relatives too close in blood for marriage or civil union can become reciprocal beneficiaries.[29] Each group has to choose between nothing and the one status offered to them. California has now offered to opposite-sex couples old enough for Social Security benefits a choice between marriage and domestic partnership,[30] but deliberately excluded younger, opposite-sex couples from the choice.

My goal has been different. It has been to explore the utility of a state-sanctioned status other than marriage that would be available to any unmarried pair with a close relationship—whether cohabiting or not, whether romantically involved or not, whether same-sex or opposite-sex, whether related by blood or not. Many unmarried individuals have another person in their lives whom they would like to have able to care for them and make decisions for them in times of crisis and to whom they feel strongly attached but do not wish to marry.

I thus have tried to design a status that carried a set of consequences that meet two criteria: (1) it would be attractive and helpful to large numbers of unmarried pairs of persons who are quite devoted to each other but who do not want to marry; and (2) it would not

25 *See* Haw. Rev. Stat. Ann. § 571C-4(2) (Michie 1999).
26 *See id.* § 572C-1.
27 *See* Vt. Stat. Ann. tit. 15, § 8.
28 *See id.* § 1202.
29 *See id.* § 1303.
30 *See* Cal. Fam. Code § 297 (West Supp. 2001).

induce undesirable strategic behavior or impose substantial economic costs on the state.

Under my proposal, couples would come to a government office and register as "designated friends." The form for registering would tell them that by doing so they are accepting a set of mutual responsibilities. They are empowered to make and undertake the obligation to make financial and medical decisions on behalf of the other in case the other becomes incapacitated; they are entitled to family leave, on the same terms as married persons, to take care of the other if the other becomes seriously ill; they are entitled to the same testimonial privileges as spouses in civil and criminal cases if they enter the designated friend relationship at least two years prior to the event giving rise to the case; if the other dies without a will, they are entitled to some specified modest share of his or her estate; and, finally, if they are government employees, they will be subject to the anti-nepotism rules that apply to employees who are married to each other.

In addition, I would place a restriction on the status for those who are already or who later become the legal parents of a common child. Until their common child reaches adulthood, a pair who register as designated friends would be subject, if they separate, to the financial rules bearing on divorce and, if they stay together, to the intestate succession and other inheritance rules for persons who are married. I attach this limitation in order to protect the interests of children, who have a need not only for financial support for their own needs (to which they would be entitled as child support in any event), but also to have a caretaking parent with adequate resources. Designated friends, with or without children, would be permitted to contract for additional responsibilities for each other, such as financial obligations, but they would not be permitted to contract out of the mutual responsibilities for decisionmaking that the status entails.

Under this scheme, except for couples with a common child or couples with a separate contract providing otherwise, those who register as designated friends would have no financial obligations to each other, or derivatively, to others—no obligations to third parties regarding the other's debts, even for necessaries; no automatic disqualification for medical or other welfare benefits because of the income or resources of the other; no obligation to divide financial assets between them if the relationship ends. By the same token, governments would not provide economic benefits to a person simply because he or she is in a designated friend relationship with another person. For example, on the death of a person in a designated friend relationship, the other person would have no entitlement to survivor workers compensation or to Social Security survivor benefits. Employers could, of

course, choose to provide medical or other employee benefits to the designated friend of an employee, but they would have no obligation to do so. I would expect some unions to seek health benefits for the designated friends of their members, because such benefits would be attractive to their members. At the same time, I would expect businesses to resist such requests because of a justifiable fear of adverse selection: that, given the huge significance of medical insurance to most people, single employees might enter into a designated friend relationship solely to accommodate an uninsured friend or relative.[31]

III. IN DEFENSE OF THE NEW STATUS

Why should states create a new status for pairs of adults? Among the functions of government in relation to its citizens, few are more significant than its role as facilitator, its role in helping citizens live satisfying lives as they define them. Governments have long adopted this stance in relation to married persons. Family leave acts,[32] immigration preferences for spouses,[33] exemptions from estate tax for spousal bequests,[34] the current efforts to end the "marriage penalty" in income taxes—all these and many others have been undertaken, not in order to encourage people to marry, but in order to make life easier for those who do.

Like married persons, unmarried persons deserve the support of the state in making their lives easier. Large numbers of unmarried persons cohabit with other unmarried persons.[35] Large numbers of others live alone but have close ties with particular other persons. In the recent past, the numbers of unmarried adults as a proportion of the total number of adults in the United States has grown significantly.[36] Over the next few decades, that proportion is likely to con-

31 The risk of accommodating is likely to be seen as significantly greater here than it is in employee benefits schemes that provide coverage for "domestic partners," because registering as "reciprocal beneficiaries" would be permitted for two persons who do not live together, whereas living together is a nearly universal prerequisite for eligibility for domestic-partner benefits. *See, e.g.*, HAW. REV. STAT. ANN. §§ 571C-1 to -7; VT. STAT. ANN. tit. 15, §§ 1201–1207, 1301–1306 (Supp. 2000).

32 29 U.S.C. § 2612 (1994).

33 *E.g.*, 8 U.S.C. § 1153(a)(2) (1994) (granting spouses of permanent resident aliens eligibility for the increased number of visas allotted to family sponsored immigrants).

34 26 U.S.C. § 2056 (1994).

35 *See supra* note 2 and accompanying text.

36 In 1980, 65.5% of American adults over eighteen were married; in 1998, only 59.5% of American adults were married. The largest growth was among the never married and the divorced. *See* U.S. CENSUS BUREAU, *supra* note 1, at 51 tbl. 53 (2000).

tinue to grow.[37] Governments should facilitate unmarried individuals' relationships much as it facilitates the relationships of married couples. California's recent gesture to permit unmarried, cohabiting couples over sixty-two to register as domestic partners is precisely such a form of facilitative legislation. The legislators were responding to the dilemma of the retired couples who are cohabiting but are reluctant to marry for fear of reduced Social Security or private pension benefits. They created the new status of "domestic partner" in order to extend to such couples a few marriage-like benefits, even though the couples chose to remain in an unmarried state.[38] A new status offered to all pairs of unmarried adults would be justified by a similar supportive attitude.

The particular status suggested here carries with it no financial obligations between the parties and no financial benefits from the state. How would such a status facilitate the lives of unmarried couples or pairs? First, just as the number of unmarried Americans is large and growing, so too are the numbers of Americans who are both unmarried and economically self-sufficient. They have a very best friend, but lead separate financial lives. Even many lovers today share a bed, but not a credit card.[39] They prize their emotional relationship with the other person but also prize their financial independence. The package of consequences that attach to the status of "designated friend" addresses a concern that many single people have: who will look after me or make decisions for me if I become sick or disabled?

Second, if I am correct that there are many pairs of persons who would want to be there for each other but would not want to marry, the registration system recommended here would permit them to meet their needs in a way they cannot adequately obtain by private ordering. To be sure, they can individually execute powers of attorney for medical and financial matters, but the designated friend relationship creates a set of responsibilities that are mutual—each agrees to make decisions for the other. These reciprocal duties may not be

37 The high incidence of unmarried persons seems due in part to changed availability of effective contraception; to changed attitudes about cohabiting with another person outside of marriage; to increasing numbers of women able to survive financially on their own (and thus fearing less that they will live in poverty if unmarried); to frozen foods, permanent-pressed clothing, and other conveniences that make living alone more manageable than it once was; and to the high incidence of divorce. None of these patterns is likely to be reversed.

38 *See* Carl Ingram, *Davis Signs 3 Bills Supporting Domestic Partners, Gay Rights*, L.A. TIMES, Oct. 3, 1999, at A24.

39 *See* Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 54–55, tbls. 7–8, 57 (1998).

enforceable as a practical matter, but they are likely to have moral force for the couples who register. Each would likely feel more secure, because the other has pledged their care. In addition, the status would offer to pairs a few benefits that require the participation of the state—most particularly, access to the benefits of "family leave" legislation to take leave from employment in order to care for the other and for bereavement leave at death. Finally, even for those aspects of the status that could be achieved by executing a document (such as a will), many people, probably most people, never get around to executing such documents. Of course, if they never get around to writing a will, they might never get around to registering as designated friends. That will surely be true for many, but for some, the other benefits, psychic and practical, that attach to the status may cause them to take actions together that they would not take individually.

A package of consequences that includes no financial benefits also has the important advantage of avoiding a problem for the state. Any package short of marriage that includes significant financial benefits from the state seems likely to create serious risks of adverse selection: friends might register solely in order to gain access for one of them to some benefit obtainable through the other (such as health insurance that one of them has as a government employee).

My proposal does, nonetheless, have one monetary component. It provides that on the intestate death of one of the designated friends, the other will inherit a part of the decedent's estate. This provision flows not from any assumption about financial dependence or intermingling, but rather from a hunch that those who agree to be each other's designated friend care so much about the other that they would probably have left the other a portion of their estate, if they had ever gotten around to writing a will. Based on empirical research conducted by Mary Louise Fellows and others, the hunch seems to sound for those who are in long-term cohabiting relationships.[40] Indeed, most persons in such relationships would probably wish half or more of their assets to go to their partner.[41] The hunch is much more

40 *See id.* at 72–84. Fellows et al. surveyed persons in opposite-sex and same-sex unmarried relationships regarding their attitudes toward inheritance.

41 Fellows found that, even in a case in which the respondents were asked to imagine that they were survived by one or both parents, seventy-nine percent of those in opposite-sex relationships and ninety-nine percent of those in same-sex relationships would want their partner to receive half or more of their property. *Id.* at 41. To be sure, the persons surveyed who were in same-sex relationships included many who would probably have been married to their partner if it had been legally permitted, but the high percentage among opposite-sex couples was so, even though few of this group had joint bank accounts or joint credit cards. *Id.* at 55.

speculative with pairs of friends who do not share a residence (and who may have children from a prior marriage). Perhaps the wisest approach with regard to a percentage would be to leave a blank on the registration form for the parties themselves to fill in.

The proposal here lumps together some quite different pairs—the unmarried cohabiting thirty-year-olds, the two divorced sisters living together with their children, the two single people who live alone but spend lots of time together. Would it not be wiser to deal with these groups separately, in a more tailored manner? The reason I have joined them together is in part because the pairs often share a common need. They would be well served if others recognized this special person in their life at moments of crisis, if the other made decisions for them in those circumstances, and if the other could get time off to care for them if they become seriously ill. They might also appreciate the warm feeling that comes from knowing that another person has made a similar commitment to them. At the same time, they appreciate their own economic independence and do not want to assume financial responsibility for the other. Another reason, however, is political and pragmatic. One of the principal objections to creating a new status is likely to be that, by giving couples, particularly cohabiting couples, a choice of statuses, marriage will lose some of its luster. Thus, one reason for lumping the unmarried lovers with the divorced or widowed sisters is to make clear that becoming designated friends has nothing necessarily to do with sex, romance, or babymaking.

Creating the status also offers some benefits for third parties. If those who registered are given some sort of standard certificate recording their status, then hospitals would have a more efficient way of verifying a nonrelative's claim of right to visit an incompetent patient and claim of right to participate in decisions regarding medical procedures. Similarly, banks would be better able to validate a person's claim of right to conduct financial transactions on another's behalf.

IV. Responses to Concerns about Who Would Register

Two objections that might be made to offering the status of designated friends relate to concerns about the persons who would register as designated friends. The first concern would be that almost no one would register. This forecast is not totally implausible. Without substantial publicity, it is quite possible that most pairs of persons who would be eligible to sign up as designated friends would never hear about the opportunity or, if they did hear about it, would conclude that the benefits are too few or too remote to be worth the effort. The

benefits would appear remote, because designated friends have no obligations in relation to each other until events occur that most people think are unlikely to happen to them in the near future—serious illness, incapacity, or death. Thus, my own guess is that few people would avail themselves of the new status unless states and other institutions encouraged people to think about registering, and the state made the experience of registering convenient and inexpenive. Even then, enrollment might well be low unless, over time, the status of designated friend developed an aura around it greater than the sum of its legal parts.

The other objection is nearly the opposite: that many pairs *would* register and that among the registrants would be a substantial number of cohabiting couples who otherwise would have married. Considering this feared impact on the incidence of marriage has two steps. The first is to ask whether it really is likely that many couples who would otherwise marry would choose to become designated friends instead. The second is to ask whether, even if many couples did defect from marriage, that is a phenomenon about which the state should be concerned.

Is it really likely that many couples, if given a choice, would pick registering as designated friends rather than marrying? In somewhat comparable contexts, politicians have feared a decline in marriages. Governor A. Paul Cellucci of Massachusetts, for example, vetoed a bill extending health benefits to same- and opposite-sex partners of unmarried state employees, saying that, while he endorsed the idea of benefits for gay and lesbian couples, he was concerned that providing such benefits to the partners in heterosexual cohabiting relationships would discourage marriage.[42] The Governor's fear seems superficially plausible—health insurance is a critical need for the uninsured. Some people will go to great lengths to get it. Nonetheless, it seems implausible that many couples who have an intimate relationship so strong that they would have married would forego it because they would get enough of marriage's benefits just by obtaining medical insurance.[43]

Even if Cellucci's forecast has a bit of plausibility in the legislative context to which he was responding, it seems considerably less plausible that many couples who would otherwise have married would settle

42 *See* James M. Donovan, *An Ethical Argument to Restrict Domestic Partnerships to Same-Sex Couples*, 8 Law & Sexuality 649, 649–50 (1998).

43 It seems more plausible that some couples who are barely couples—just friends—would have registered as domestic partners just to get the health benefits, but would never have married.

for becoming designated friends. After all, the status of designated friend will carry only a few legal consequences and no financial benefits. Its name is likely to seem bloodless, and it is available, under my scheme, not just to couples in love, but also to relatives who cannot marry and to two friends who have no sexual or romantic relationship. Registering will require no solemnization or ceremony. The couple will just fill in a form, get it notarized or witnessed, and mail it in. For most couples, marriage with all its social meanings is unlikely to lose its allure.

Still, there would almost certainly be some couples who would make a deliberate decision to become reciprocal beneficiaries rather than marry. They are, as I have suggested, likely to be persons who want to deal with the contingency of illness and incapacity, but relish their financial independence. Some other couples who would make the same choice would be those who have a strong distaste, based on ideology or sad experience, for the very idea of marriage but want some way to formalize a different relationship. A third group of couples who might register instead of marrying might not regard themselves as deciding that they do not want to marry. Rather, some cohabiting couples might register during a tryout period while deciding whether to marry—and then just never get around to marrying.

In any event, let us assume that a substantial number of cohabiting couples choose to become designated friends rather than marry. Would this be an appropriate occasion for state concern? From one perspective the state should be delighted rather than upset. If, as I have argued, one of the most important functions of governments is to aid citizens in leading lives that the citizens find helpful in meeting their own needs, then the fact that many couples would choose designated friend status over marriage would simply indicate that this status served their needs better than marriage. Bravo!

But even if states did not revel in having provided choices for their citizens, they should at least not resist passing otherwise desirable legislation because of the fear of a rerouting of couples away from marriage, unless genuine harms were likely to flow from the rerouting. I can think of several possible harms, most of which derive from the aspect of choice in the proposal and the fact that some people's choices will cause harm to themselves or others.

Thus, a person (most likely a woman) might be injured if she and a partner register rather than marrying and then, later and unexpectedly, she becomes financially dependent on the partner. I have tried to protect partners who become dependent when they become the caretaker of a minor child of the two parties by the provision making such a partner eligible for the financial rules that apply to married

couples on divorce or death.[44] Still, harms from being a designated friend rather than a spouse could occur to partners who end up staying at home for other reasons—for example, because they are taking care of the other partner's child from a prior relationship or because they become physically disabled. These dependent persons who do not have a common child with their partner would, if they had been married to that person, have been eligible for the community property or equitable distribution rules in their state on breaking up.

If many such persons ended up in this position, it would be a cause for serious concern. We cannot disregard their worsened position simply by pointing out that they made a choice to remain financially independent, because many decent human beings miscalculate how life circumstances will change over time. On the other hand, before counting this worry as a substantial objection to the designated friend scheme suggested here, one should at least ask hard-headedly whether there would likely be many cohabiting designated friends who end up in dependent positions and who would not (or could not) marry their partners when that occurs. Moreover, one also should ask whether, even if some people in cohabiting relationships would be harmed by improvidently becoming designated friends rather than marrying, there might not be an offsetting number of other designated friends who, if they had not registered, would have remained single and in a completely unrecognized position.[45] The designated friend at least becomes eligible for inheritance by intestate succession.

Another and more defenseless group who might be injured, if many couples registered as designated friends rather than marrying, is children who are born to designated friends. The harm would occur if couples who enter designated friend relationships, but would otherwise have married, would be more likely to split up in the future than they would be if they had married instead. Children are harmed in most cases by the breakup of their parents' marriages. How many children are likely to be harmed by their parents' regrettable decision to register rather than marry is difficult to assess. For most couples, marriage marks a particularly solemn commitment, a commitment that is strengthened by the participation of family and others in its solemnization and reinforced by societal expectations and religious beliefs. As such, unmarried couples who enter designated friend relationships rather than marrying might, in fact, be more likely to break

44 *See supra* Part II.

45 See *infra* Part V for a discussion of the relationship between the designated friend proposal and the recommendation of the American Law Institute for responding to unmarried domestic partners.

up. As said above, the designated friend proposal seeks to ameliorate the consequences of breakup in cases in which there are children by imposing the property rules that attach to divorce;[46] but money alone cannot cure the harms to children of parental breakup. Again, however, whatever harms might accrue to some children whose parents would otherwise have married need to be weighed against the advantages to some other children whose parents register but would never have married.

Finally, a third more ephemeral harm might be feared: that whether or not permitting couples to register as designated friends would lead fewer persons to marry, creating an alternative status that would still tarnish marriage's image in some way and cause harm. Perhaps, one might speculate, with a lot of designated friends around flaunting their financial independence, those who do marry will take their commitments to each other less seriously or otherwise be encouraged to behave in undesirable ways. A somewhat similar claim has been made about the probable impact on "traditional" marriage of permitting same-sex couples to marry.[47]

The prospect that heterosexuals would behave differently within their marriages or refuse to marry at all if gay couples were also permitted to marry has always seemed to me highly implausible, just as it did to the Vermont Supreme Court in the case in which it struck down the state's marriage law.[48] It seems even more implausible that creating an entirely new and quite modest institution for designated friends would have such an effect. If anything, permitting couples to register for a status that carries very few benefits would seem likely to enhance the status of marriage as the most prized of relationships.

V. The Interaction Between the Designated Friend Proposal and Other Proposals Dealing with Unmarried Couples

The American Law Institute (ALI) recently adopted proposals to apply to long-term, unmarried, cohabiting partners the property-distribution rules that they recommend for divorcing couples.[49] A few years before that, the Reporter for the Uniform Probate Code (UPC) recommended giving to the surviving partner in a long-term, cohab-

46 *See supra* Part II.

47 *See supra* note 21 and sources cited therein.

48 Baker v. State, 744 A.2d 864 (Vt. 1999).

49 Principles of the Law of Family Dissolution: Analysis and Recommendations §§ 6.01–.06 (Tentative Draft No. 4, 2000) [hereinafter ALI Principles].

iting relationship part of the estate of the deceased partner.[50] Both in part were responding to the same problem I am—the legally unrecognized position of pairs other than married couples. My proposal is not, however, suggested as a substitute for the ALI and UPC proposals, for theirs reach the many couples who would never get around to registering as designated friends or marrying. Nonetheless, a problem would arise if a state that adopted the ALI or UPC proposal also adopted the proposal here. The problem would be this: if an unmarried cohabiting couple registered as designated friends, would doing so override the ALI or UPC rules that would otherwise apply to them on separation or death?

I will discuss the two proposals separately. Sad to say, after an Article that up to this point has, I hope, been a breeze to read, this Part gets a little technical.

In 2000, the ALI adopted a set of *Principles of the Law of Family Dissolution*.[51] Most of the *Principles* deal with married couples, but one chapter deals with couples who are unmarried, a group that the *Principles* call "domestic partners."[52] Under the proposal, the ALI would apply to unmarried, cohabiting couples the property and alimony rules that it recommends for divorcing married couples so long as the unmarried couple "for a significant period of time share a primary residence and a life together as a couple."[53] Thus, for example, a couple who had shared a life together as a couple would be subject to the same fifty-fifty division of property accumulated during their relationship that applies to divorcing spouses.[54]

The designated friend proposal here sits in an awkward relationship with the ALI's in two respects. First, in determining whether individuals "share a life together as a couple," the ALI lists factors to consider under which those who have registered as designated friends might be characterized in quite different ways.[55] On the one hand, the act of registering might be seen as a sign of "the emotional . . . intimacy of the parties' relationship,"[56] one of the salient factors. On the other hand, regarding another factor, the fact that designated friend status imposes no financial responsibilities on the registrants

50 *See* Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 78–86 (1994).

51 ALI PRINCIPLES, *supra* note 49.

52 *See id.* §§ 6.01–.06.

53 *Id.* § 6.03(1).

54 *See id.* § 6.05 ("Domestic-partnership property should be divided according to the principles set forth for the division of marital property.").

55 *See id.* § 6.03(7).

56 *Id.* § 6.03(7)(h).

might be seen as evidence that the parties were agreeing to curtail the "intermingl[ing of] their finances."[57] Second, and in much the same manner, even if a registered couple was found to have shared a life together, a partner who wished to escape the application of the property distribution rules might argue that the act of registering should be regarded as an "agreement" (enforceable under another chapter of the ALI proposal)[58] to maintain whatever is titled in his name as his separate property and, hence, not divisible between them at the end of their relationship.

Under ordinary rules of contract interpretation, it would seem unlikely that registering as designated friends would be taken as an agreement regarding the division of property. As I picture it, those who register as designated friends would agree to make decisions for each other and care for each other under certain circumstances and to share assets if they died intestate, but would not make any promises one way or the other with regard to the division of property. Instead of expressing agreement about holding property separately, the registration form would simply be silent in that regard. On the other hand, in a context in which a couple has made a deliberate choice between marrying and registering as designated friends, the decision to enter the less entangling status might justly be viewed as an implicit agreement to maintain separate property, at least for now.

In any event, one point is obvious. If a state adopted both a designated friend proposal and the ALI proposal, it should make explicit in the provisions regarding the breakup of domestic partners how a prior registration as reciprocal beneficiaries is to be regarded.

Prior to the recommendation of the ALI regarding separations, the Reporter for the UPC, Lawrence Waggoner, proposed similar amendments to the UPC.[59] Defining a "committed partner" in much the same way that the ALI defines domestic partners, he proposed that the surviving, long-term, committed partner of a person who dies intestate be permitted to inherit a substantial part of the decedent's estate.[60] For example, in a case in which a long-term, committed partner dies leaving behind neither children nor parents, the surviving partner would receive $50,000 and one-half of any balance of the estate.[61] That amount is less than a spouse would receive under the same circumstances, but a lot more than the nothing that current law

57 *Id.* § 6.03(7)(b).

58 *See id.* §§ 7.01–18.

59 *See* Waggoner, *supra* note 50, at 78–86.

60 *Id.* at 71–78.

61 *Id.*

provides for unmarried partners. Under my recommendation for designated friends, I too would provide a surviving designated friend a share of the estate of a partner who died intestate (based on the belief that that is what the deceased beneficiary is likely to have wanted). Because of the similarity of our positions, harmonizing Waggoner's position and the recommendation here should not be difficult. The most sensible solution, in a state that adopted the Waggoner proposal, would be for the committed partner statute to adopt and cross-reference the intestacy provisions for designated friends.

Waggoner's proposal has another provision, however, that meshes less well with the designated friend proposal. Under his proposal, if a person in a committed partnership relationship dies *with* a will, the surviving partner, if dissatisfied with what he inherits, can claim an elective share of the estate. This part of the Waggoner proposal obviously does not rest on assumptions about what the deceased would have wanted—we know from the will itself, unless drafted long before, that she wanted to give the partner less than the elective share amount. Rather, Waggoner's proposal rests on beliefs either about probable financial dependencies of the two partners that will arise over time, or on beliefs about the moral responsibilities that flow from a long-shared life. Here, as with the ALI proposal, a state that adopted both the Waggoner proposal and the proposal for designated friends needs to include provisions that resolve the relationship between the two.

CONCLUSION

A higher proportion of adult Americans are unmarried today than at any point in our history. This Article has suggested the creation of a new status to permit any two unmarried persons to register as "designated friends" and undertake a few legal responsibilities for each other, primarily ones that relate to decision making and entitlements at times of disability and death. The relationship is based on trust and affection but carries no financial commitments or responsibilities. I believe that such a status could be useful in two ways: as a way for people to provide for times of emergency and distress in their lives and as a way to commemorate the relationship of a close friend in a society that treats marriage as the only legally significant relationship between adults who are not related to each other by blood. Even if no state adopts such a status, I hope that the idea has nonetheless served for you, dear reader, as a heuristic device for pondering the appropriate place of the state in the recognition of significant relationships.