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CALIBRATED COMMITMENT: THE LEGAL TREATMENT OF MARRIAGE AND COHABITATION

Milton C. Regan, Jr.*

INTRODUCTION

The rate of cohabitation without marriage has increased dramatically in Western countries over the past few decades.¹ Moreover, research suggests that cohabitation has become less of an “engagement” that serves as a prelude to marriage and more of an intimate arrangement that may serve as an alternative to it.² In other words, it is less accurate than before to describe those who cohabit as simply involved in a “trial” marriage.³ Many cohabitators instead regard living together as a way to have an intimate relationship that may or may not result in a decision to marry. This is reflected, for instance, in the declining

* Professor of Law, Georgetown University Law Center. My thanks to Professor Donna Ruane Morrison of the Georgetown University Public Policy Institute, who guided me through the social science literature on cohabitation and who offered valuable comments on a draft of this Essay.

1 See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03 Reporter's Notes, cmt. a (Tentative Draft No. 4, 2000) [hereinafter ALI PRINCIPLES (Tentative Draft 2000)]; Larry Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 POPULATION STUD. 29, 29–30 (2000); Kathleen Kiernan, *Cohabitation in Western Europe: Trends, Issues and Implications* 1 (Oct. 30, 2000) (unpublished manuscript presented at the symposium, *Just Living Together: Implications of Cohabitation for Children, Families, and Policy*, at Pennsylvania State University (Oct. 30–31, 2000)) (on file with author).

2 See, e.g., Ronald R. Rindfuss & Audrey VandenHeuvel, *Cohabitation: A Precursor to Marriage or an Alternative to Being Single?*, 16 POPULATION & DEV. REV. 703 *passim* (1990); Pamela J. Smock & Sanjiv Gupta, *Cohabitation in Contemporary North America* 25 (Oct. 30, 2000) (unpublished manuscript presented at the symposium, *Just Living Together: Implications of Cohabitation for Children, Families, and Policy*, at Pennsylvania State University (Oct. 30–31, 2000)) (on file with author).

3 See Larry L. Bumpass, *The Changing Significance of Marriage in the United States*, in THE CHANGING FAMILY IN COMPARATIVE PERSPECTIVE: ASIA AND THE UNITED STATES 63, 71 (Karen Oppenheim Mason et al. eds., 1998) (“There is clear evidence now . . . that the probability of marrying following cohabitation is declining, as is the probability of marrying a cohabiting partner.”).

percentage of cohabitators who eventually marry⁴ and in the fact that a portion of the declining rate of marriage is due to the increasing rate of cohabitation.⁵ In addition, the percentage of cohabitators who have been together for three years or more has increased,⁶ as well as the percentage of cohabiting households in which children reside.⁷

These trends raise the question whether American law should more explicitly "institutionalize" cohabitation by ending the different treatment of marital and non-marital relationships, thereby making available to cohabitators a host of benefits currently available only to those who are married.⁸ There are signs that, to varying degrees, the institutionalization of cohabitation already has begun. The most comprehensive example is the Scandinavian countries, where cohabitation arguably has come closest to representing a widely-accepted alternative to marriage. The law in these countries treats cohabitation as virtually indistinguishable from marriage.⁹ Similarly, in Canada, the Modernization of Benefits and Obligations Act has eliminated federal legal distinctions between married couples and those who cohabit for at least a year.¹⁰ As a result, "[t]he upshot is that all conjugal unions are now almost fully equivalent under Canadian federal law, the remaining distinction being that married people do not have to live together for a year for the benefits and obligations to apply to them."¹¹

In the United States, Vermont has enacted legislation that treats all same-sex couples who enter into a civil union the same as those who are married, except for the former's inability to be formally married.¹² Less comprehensively, several municipalities and some states have passed domestic partner provisions that extend selected benefits to unmarried partners, or at least offer cohabitators the opportunity to register as partners for the purpose of obtaining certain privileges

4 Smock & Gupta, *supra* note 2, at 15.

5 Larry L. Bumpass et al., *The Role of Cohabitation in Declining Rates of Marriage*, 53 J. MARRIAGE & FAM. 913, 913 (1991).

6 Smock & Gupta, *supra* note 2, at 16; *see also* Michael Murphy, *The Evolution of Cohabitation in Britain, 1960-95*, 54 POPULATION STUD. 43, 49-50 (2000).

7 Bumpass & Lu, *supra* note 1, at 29-30; Smock & Gupta, *supra* note 2, at 16.

8 On the concept of institutionalization, *see* LINDA J. WAITE, *Cohabitation: A Communitarian Perspective*, in MARRIAGE IN AMERICA: A COMMUNITARIAN PERSPECTIVE 15-17 (Martin King Whyte ed., 2000); Steven L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. FAM. ISSUES 53, 55-74 (1995); Smock & Gupta, *supra* note 2, at 21.

9 *See* E.J. GRAFF, *WHAT IS MARRIAGE FOR?* 52 (1999).

10 *See* Smock & Gupta, *supra* note 2, at 22.

11 *Id.*

12 *See* VT. STAT. ANN. tit. 15, § 1204(a) (Supp. 2000).

from public or private entities.¹³ Finally, the growth in the number of courts that are willing to find a basis for honoring financial claims by partners against one another at the dissolution of the relationship reflects increasing willingness to provide economic remedies similar to those available to spouses who divorce.¹⁴

On one view, full institutionalization is warranted because cohabitation and marriage involve substantially the same attitudes and orientation. The claim is that they differ only in the willingness of the couple to go through the formality of marriage, which is an insufficient basis for distinguishing between them.¹⁵ From this perspective, cohabitation has become a more important relationship for persons who desire intimate commitment but reject the need for formal legal recognition of this commitment. For these couples, "real" marriage is a frame of mind, not the possession of a marriage certificate. Such a view arguably harkens back to an earlier historical time, before church and state found it in their interest to insist upon ceremonial formalities as the prerequisite for marriage. In that era, couples who lived together "as man and wife" were regarded as married because of their conduct, not because they had participated in a prescribed ritual.¹⁶

Some might maintain that modern cohabitators can be seen as inheritors of this tradition. The argument is that those who live together without marriage are just as committed as those who are married, but they reject the baggage that goes along with that legal status. Some research indicates, for instance, that those who cohabit have more egalitarian views on gender roles than do spouses.¹⁷ For such couples, eschewing marriage may be a way to reject the gender assumptions that have been so prominent a feature of marriage as a social institution.

An alternative argument for institutionalization is that respect for individual privacy and autonomy mandates that the state not favor any particular form of intimate relationship above others. If marriage is losing favor because it meets the needs of fewer people, then the state

13 For an overview of such provisions, see Julianna S. Gonen, *Same-Sex Unions and Domestic Partnerships*, 2 GEO. J. GENDER & L. 329 (2001).

14 See ALI PRINCIPLES (Tentative Draft 2000), *supra* note 1, § 6.03 Reporter's Notes, cmt. b.

15 See GRAFF, *supra* note 9, at 209–15.

16 See *id.* at 193–95.

17 See Smock & Gupta, *supra* note 2, at 6 ("[C]ohabitation tends to be selective of people who are slightly more liberal, less religious, and more supportive of egalitarian gender roles and nontraditional family roles."); see also Marin Clarkberg et al., *Attitudes, Values, and Entrance into Cohabitation versus Marital Unions*, 74 SOC. FORCES 609, 622–24 (1995).

should not try artificially to prop it up by creating incentives for partners to enter into an arrangement that they otherwise would not choose. On this view, the rise in cohabitation reflects the fact that many partners now desire more individual independence, and less commitment, as a part of their intimate relationships.¹⁸ Rather than take the whole package of benefits and burdens that marriage provides, couples prefer to tailor the terms of their relationships so they reflect their own unique preferences. Cohabitation, thus, can accommodate the wide range of wishes about how people want to arrange their personal lives better than marriage. Its growth reflects the greater prominence of the ideals of individual autonomy and privacy in intimate matters.

Are these arguments persuasive? Should legal trends continue so that cohabitation and marriage ultimately receive virtually identical legal recognition? On balance, I think that the answer is no. First, I am skeptical that cohabitators are married in substance but simply not in form. Research indicates that cohabiting relationships are less stable than marriages and that they generally reflect less commitment by partners to one another.¹⁹ Second, law need not be agnostic among types of intimate relationships. There are good reasons for law to promote marriage, because there are good reasons to promote intimate commitment. Blurring the line between married and unmarried couples would undermine the ability to express this preference.

At the same time, it seems inadvisable to proclaim a preference for marriage by denying cohabitators all the legal privileges available to spouses. Neither categorical extension nor denial of all marriage-like benefits to cohabiting partners is appropriate. With respect to certain issues, the state's desire to create incentives or express social values may be outweighed by more important considerations. This means that making decisions about the respects in which cohabitators should enjoy legal treatment similar to spouses requires sensitivity to the interests at stake in each instance. In this Essay, I examine a variety of benefits and suggest some general rules of thumb about when the legal claims of cohabitators should be honored as if made by spouses.

A couple of points are worth making at the outset of my argument. First, I speak in this Essay primarily about the extension of benefits to domestic partners, rather than the imposition of duties upon them. That is because this has been the focus of most of the debate about the legal treatment of married and unmarried couples. I read-

18 FRANCES K. GOLDSCHNEIDER & LINDA J. WAITE, *NEW FAMILIES, NO FAMILIES? THE TRANSFORMATION OF THE AMERICAN HOME* 62-63 (1991).

19 See text accompanying *infra* notes 22-26.

ily acknowledge, however, that a fuller debate would consider not only when domestic partners should be given rights, but also when they should assume certain responsibilities. Indeed, as I will make clear, one reason for rejecting certain claims by unmarried couples is that they seek benefits comparable to those available to spouses without corresponding obligations to which married partners are subject.²⁰

Second, my focus is on the legal treatment of those who are married and those who have the option to marry but do not do so. As I have argued elsewhere, I believe that marriage should be open to partners in same-sex relationships.²¹ In the absence of this right to marry, domestic partner legislation is a humane and pragmatic way to recognize the commitment of many of these couples. For this reason, asking how married and unmarried opposite-sex couples should be treated in comparison to one another raises issues different from those that deal with the relative treatment of opposite-sex and same-sex couples. I concern myself in this Essay with the first question, but also suggest how permitting same-sex couples to marry may in fact strengthen, rather than weaken, the privileged position of marriage.

I. MARRIAGE, COHABITATION, AND UNEQUAL TREATMENT

In this Part, I argue that married and unmarried partners should not be accorded similar legal treatment because (1) marriage tends to be a more enduring relationship than cohabitation, and (2) society is justified in privileging marriage as a way of expressing the importance of intimate commitment. Furthermore, I suggest, those who invoke the value of private ordering to criticize preferential treatment for marriage overlook the fact that in certain respects those who marry have more latitude to arrange their relationships as they wish than those who cohabit.

A. *Relative Stability and Commitment*

The first reason for resisting full legal institutionalization of cohabitation is that evidence suggests that cohabitation is less stable than marriage. Cohabitors break up at a higher rate than spouses divorce and live together for a briefer duration than married couples.²² Furthermore, even those cohabitors who eventually marry divorce at a

20 See text accompanying *infra* notes 100–10.

21 See MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 119–22 (1993).

22 See Bumpass & Lu, *supra* note 1, at 33; Jay D. Teachman et al., *Legal Status and the Stability of Coresidential Unions*, 28 *DEMOGRAPHY* 571, 583 (1991); WAITE, *supra* note 8.

higher rate than spouses who never lived together before marriage.²³ Some uncertainty exists about the extent to which these differences reflect the fact that those who are less committed are attracted to cohabitation, as opposed to cohabitation itself shaping attitudes about the desirability and feasibility of permanence and commitment in intimate relationships.²⁴ In any event, it seems inaccurate to contend that cohabitators differ from spouses only in their unwillingness to clothe their relationship with the formal status of marriage. Rather, unmarried partners generally are less committed to one another than are spouses.²⁵ Furthermore, this commitment generally results in greater well-being for spouses than for domestic partners.²⁶

Advocates of the view that cohabitation and marriage are substantively the same might claim that unmarried cohabitation simply represents the return of an historical social arrangement whereby a couple's conduct, rather than its participation in a ceremony, was regarded as constituting marriage.²⁷ The rise of ceremonial marriage occurred in the mid-sixteenth century as both state and church for various reasons sought to exert more control over intimate relationships.²⁸ One impetus for this phenomenon was urbanization and the more frequent encounter with strangers.²⁹ When couples lived their lives primarily in a relatively small community, their conduct alone sufficed to communicate that others could treat them as an economic and social unit. Those who needed to know individuals' marital status knew it, which made a formal ceremony generally unimportant.

In the intervening five hundred years, formal marriage has taken on powerful symbolic significance as a public expression of partners' commitment to a shared intimate life with one another.³⁰ For this

23 See William G. Axinn & Arland Thornton, *The Relationship Between Cohabitation and Divorce: Selectivity or Causal Influence?*, 29 DEMOGRAPHY 357, 357-58 (1992); Lee A. Lillard et al., *Premarital Cohabitation and Subsequent Marital Dissolution: A Matter of Self-Selection?*, 32 DEMOGRAPHY 437, 438 (1995).

24 See Axinn & Thornton, *supra* note 23, at 358-72; Nock, *supra* note 8, at 54-55; Smock & Gupta, *supra* note 2, at 8.

25 See Nock, *supra* note 8, at 65-67; Judith Treas & Deirdre Giesen, *Sexual Infidelity Among Married and Cohabiting Americans*, 62 J. MARRIAGE & FAM. 48, 59 (2000); WAITE, *supra* note 8.

26 WAITE, *supra* note 8.

27 See GRAFF, *supra* note 9, at 193-95.

28 See *id.* at 195-203.

29 See *id.* at 200.

30 This ascendance of a widely accepted companionate marriage in the last century and a half or so has been an important influence in promoting this understanding. See CARL N. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* 8-25 (1980); KAREN LYSTRA, *SEARCHING THE HEART: WO-*

reason, the cultural meaning of cohabitation is different than it was prior to the rise of ceremonial marriage. Given the current social significance of marriage, it is reasonable to assume that those who live together without marrying at least have reservations about making the kind of commitment that a formal ceremony would express.

It may appear more plausible to claim that those who cohabit want the substantive equivalent of marriage without the traditional gender roles that are so closely associated with that institution. Partners' relative equality of earning power, for instance, enhances the stability of cohabitation but reduces it for marriage.³¹ Nonetheless, both cohabiting and married couples adopt a gendered division of labor in which women perform more housework than men, although the gap is narrower for unmarried partners.³² Thus, co-residence, rather than formal marriage, seems to be what triggers an uneven allocation of domestic responsibilities.³³

Furthermore, the last few decades have witnessed the dismantling of the legal system that served formally to reinforce traditional gender roles within marriage.³⁴ This, of course, is not to deny that many spouses continue to adhere to such roles out of custom and informal expectations. Entry into the formal status of marriage, however, generally does not subject partners to a legal regime that promotes such behavior, nor does avoidance of that status ensure that the relationship will be egalitarian. This is all the more true in light of the fact that more cohabiting couples are having children together, since the arrival of a child militates powerfully toward a traditional division of labor within the household.³⁵ As a result, it seems difficult to claim that cohabiting couples represent committed partners who differ from spouses only in their departure from conventional gender roles.

MEN, MEN, AND ROMANTIC LOVE IN NINETEENTH-CENTURY AMERICA 192-226 (1989); ELAINE TYLER MAY, GREAT EXPECTATIONS: MARRIAGE AND DIVORCE IN POST-VICTORIAN AMERICA 60-72 (1980).

31 See Julie Brines & Kara Joyner, *The Ties That Bind: Principles of Cohesion in Cohabitation and Marriage*, 64 AM. SOC. REV. 333, 350 (1999).

32 See Sanjiv Gupta, *The Effects of Transitions in Marital Status on Men's Performance of Housework*, 61 J. MARRIAGE & FAM. 700, 707 (1999); Scott J. South & Glenna Spitze, *Housework in Marital and Nonmarital Households*, 59 AM. SOC. REV. 327, 327-44 (1994).

33 See Gupta, *supra* note 32, at 710.

34 See David L. Chambers, *What If?: The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 453-54 (1996); Milton C. Regan, Jr., *Marriage at the Millennium*, 33 FAM. L.Q. 647, 656 (1999).

35 "A recent survey found that fully two-thirds of Americans believe it would be best for women to stay home and care for family and children." JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 2 (2000).

In sum, it appears unpersuasive to argue that full legal institution-ization of cohabitation is warranted because cohabitators differ from spouses only in the relatively trivial respect that they have failed to obtain a marriage certificate. Cohabitators are not just people who are married in substance but not in form. They generally are less committed, and their relationships are less stable, than those who are married. If this difference is socially important, it is reasonable for the law to treat couples who are married differently than those who are not.

B. Commitment and Private Ordering

Perhaps, however, comparable treatment of married and unmarried couples should rest on another foundation: the claim that the level of partners' intimate commitment should not be a matter of state concern. Individuals may desire a range of different types of relationships, none of which should be favored by law. Having children may provide greater justification for encouraging stable relationships, but that concern applies regardless of the marital status of the couple. On this view, comparable treatment of cohabiting and married couples expresses respect for individual autonomy and privacy in the selection of intimate partners. Indeed, cohabitation embodies the movement toward greater private ordering in intimate life, in contrast with a traditional status-based legal regime based on marriage.

1. Commitment

The first response to this claim is that society has a legitimate interest in promoting intimate commitment between adults, regardless of whether the relationship also involves children. I have made this argument at greater length elsewhere and so will only briefly recapitulate it here.³⁶

I begin with a powerful fundamental value of modern liberal society: individual authenticity.³⁷ Three concepts cluster around this value. The first is what we might call *self-fidelity*: "to thine own self be true," in Polonius's words.³⁸ Each of us has a unique identity and po-

36 See Milton C. Regan, Jr., *Law, Marriage, and Intimate Commitment*, 9 VA. J. SOC. POL'Y & L. (forthcoming Fall 2001).

37 See generally ISAIAH BERLIN, *THE ROOTS OF ROMANTICISM* 139-43 (1999) (describing the profound effect on modern Western culture of romanticism, for which "the greatest virtue of all" is authenticity); CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* (1991) (analyzing the implicit moral foundations of authenticity); LIONEL TRILLING, *SINCERITY AND AUTHENTICITY* (1972) (tracing the evolution in Western moral life from sincerity to authenticity as crucial value).

38 WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 3.

tential that we should strive to attain.³⁹ The second concept is *autonomy*, the idea that human beings can be self-governing. I am true to myself when my life is shaped by my own wishes and values rather than by the unreflective acceptance of others.⁴⁰

Finally, individual authenticity involves *integrity*. This requires that a person remain true to her principles or commitments in the face of temptation to do otherwise. Integrity thus involves consistency. An individual needs to harmonize her values so that she can live life without being constantly pulled in different directions. Further, she needs to be willing to act in accordance with those values.⁴¹ Integrity is complementary to self-fidelity and autonomy. A person who tries to be true to herself values integrity, because it helps her resist acting in a way that does not reflect her deep sense of self. An autonomous person seeks to live with integrity, because it helps to harmonize her values into principles of self-governance.

Authenticity and the set of ideals that cluster around it require a sense of the continuity and stability of the self over time. Self-fidelity requires a coherent self to whom one can be true. The aspiration to autonomy assumes a self who can establish standards to govern her behavior in a variety of circumstances, rather than one who is "radically situated"⁴² and moved only by immediate impulse. Finally, the harmonization of values and of beliefs and behavior that characterizes integrity implies a self that establishes limits on what she will do on the ground that some conduct is inconsistent with who she is. Without this stability, as Lynne McFall puts it, "there would be nothing to fear the loss of, not because we are safe but because we have nothing to lose."⁴³ Self-fidelity, autonomy, and integrity thus contribute to a sense of individual stability and are predicated upon its existence.

The ability to make and keep commitments is critical to the unity of the self over time. Commitment reflects the intention to restrict future possible courses of action for the sake of values that one regards as especially important. It means that one is not receptive in an undifferentiated fashion to all possibilities available in all circum-

39 As Charles Taylor puts it, "Being true to myself means being true to my own originality, and that is something only I can articulate and discover. In articulating it, I am also defining myself. I am realizing a potentiality that is properly my own." TAYLOR, *supra* note 37, at 29.

40 For an account of the evolution of autonomy as a core Western concern, see J. B. SCHNEEWIND, *THE INVENTION OF AUTONOMY* (1998).

41 See generally Lynne McFall, *Integrity*, 98 *ETHICS* 5, 6 (1987) (describing the importance of an authentic relationship to one's chosen principles).

42 MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 21 (1982).

43 McFall, *supra* note 41, at 20.

stances, but is responsive to experience in terms of its significance for what we care about. Indeed, commitments help *bestow* that significance, making possible the understanding of oneself as a unique protagonist in a coherent narrative that gives meaning to what otherwise would be a series of discrete random events. Commitments thus are what Lynne McFall calls "identity-conferring."⁴⁴ As she puts it, "they reflect what we take to be most important and so determine, to a large extent, our [moral] identities."⁴⁵ In this way, the foreclosure of possibility that commitment represents is the precondition of agency. The adoption of constraints on action ironically makes possible a sense of individual freedom.

Among our most profound commitments, of course, are those to other people. In particular, romantic intimacy, at least in Western contemporary society, is regarded as a relationship that engages identity in an especially deep way.⁴⁶ The relationship between identity and intimacy is expressed by Anthony Giddens, who notes the strong hold of the idea of romantic love as "an odyssey, in which self-identity awaits its validation from the discovery of the other."⁴⁷ Because of this role of intimacy in fostering authenticity, intimate commitment enjoys a privileged status among the various kinds of commitments that we may make. In sum, there is a powerful claim that society should promote commitment as a valuable good, because it is essential to realization of the deeply-rooted aspiration that individuals lead lives that they can call their own.

Even if we accept a role for law in promoting intimate commitment, are we justified in privileging marriage as the form that such commitment should take? One may argue that what gives meaning to intimate allegiances is not the assumption of a formal legal status, but the *personal choice* to commit to another. If that is so, then law should ratify the intimate choices that people make, married or unmarried, rather than holding up one particular form of commitment as the ideal.

Choice *per se* does not bestow value upon alternatives, however, nor does it play any role in constructing an authentic identity. The sense that the choices one makes have significance—that they matter—depends on the existence of a social background that designates what is of value.⁴⁸ These values are diverse and sometimes incommen-

44 *Id.* at 13.

45 *Id.*

46 See IRVING SINGER, *THE PURSUIT OF LOVE* 66 (1994).

47 ANTHONY GIDDENS, *THE TRANSFORMATION OF INTIMACY: SEXUALITY, LOVE AND EROTICISM IN MODERN SOCIETIES* 45 (1992).

48 See TAYLOR, *supra* note 37, at 37.

surable. A person's choices among them have implications for her identity, because they reflect her own distinctive evaluation, ordering, and attempted reconciliation of values that she regards as having independent value. Making difficult choices is character-forming, because it represents confrontation with the pull of obligations whose force we cannot control solely by ourselves. By contrast, a person for whom things assume value simply by virtue of her own fiat could always dissolve any dilemma merely by proclaiming that one of the alternatives no longer possesses any significance.

For intimate commitment to be constitutive of identity thus requires that it be seen as something that derives its value from a source outside the self's choice to engage in it.⁴⁹ It requires, in other words, social validation. The legal institution of marriage plays an especially significant role in providing such validation for the value of commitment. It bestows a legal status on partners that is the basis for impersonal rights and obligations. Those who marry participate in a public ritual that marks entry into a social institution that is intended to embody the value of intimate commitment. That institution transcends any specific couple who may be a part of it and has a history that dwarfs any couple's particular experience. Marriage is not static; understandings of the proper role of wives, for instance, have shifted dramatically over the past generation and are still the focus of contention.⁵⁰ Nonetheless, marriage offers a reasonably coherent set of expectations and traditions about commitment that aids in the construction of a narrative identity both for each partner and for the couple together. Indeed, this role of marriage is reflected in the fact that many gay and lesbian critics argue that denying same-sex couples the right to marry is injurious, precisely because it deprives such couples of this social acknowledgment of the value of their intimate commitments.⁵¹

The first response to the claim that respect for private ordering of intimate relationships justifies legal institutionalization of cohabita-

49 See STEPHEN L. DARWALL, *IMPARTIAL REASON* 165 (1983) ("That which endows our life with meaning must be something whose value we regard as self-transcendent."); see also JEFFREY BLUSTEIN, *CARE AND COMMITMENT* 42-60 (1991) (discussing the importance of impersonal value to the significance of what we care about).

50 See generally WILLIAMS, *supra* note 35 (arguing that the models of "ideal worker" and "marginalized caregiver" prevent both men and women from experiencing work and family as they would like).

51 See, e.g., Barbara J. Cox, *But Why Not Marriage? An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate But (Un)Equal*, 25 VT. L. REV. 113, 136-47 (2000).

tion, therefore, is that society is justified in promoting commitment by favoring marriage.

2. Private Ordering

The second response is that the private ordering that cohabitation involves increasingly has been eroded in several respects. For some purposes, cohabitation has taken on the character of a status, while marriage provides greater opportunity for couples to arrange their lives as they wish. Cohabitators who wish to make financial claims on their partner when their relationship ends, or to receive certain benefits as a family member of their partner, generally must convince a court that their relationship is or was the substantive equivalent of marriage.⁵² Courts, as a formal matter, tend to frame the inquiry in cases involving financial awards as whether a contract between the parties gave rise to the expectation of such assistance.⁵³ As the ALI project on family dissolution has observed, however, many courts

appear to vindicate an equitable rather than a contractual principle. That is, having concluded that a particular set of facts demands a remedy, they may stretch ordinary contract principles to fit the remedy within a contractual rubric. This result is not surprising. Parties may share their lives for many years without having any clear agreement, express or implied, that sets out the financial consequences that would follow from the decision by one of them to terminate their relationship. To find such an agreement may therefore require filling many gaps with terms that follow more from the court's sense of fairness than from any mutual intentions inferable from the parties' conduct.⁵⁴

In short, the law tends to treat cohabitation between intimate partners as akin to a status. That is, persons who live together in a relationship that involves financial and emotional interdependency are given rights and are subject to obligations by operation of law, even in the absence of explicit consent by the partners.

The ALI proposal suggests that the law in this area should explicitly acknowledge its reliance on status, so that "property claims and support obligations presumptively arise between persons who qualify as domestic partners, as they do between legal spouses"⁵⁵ The determination whether an unmarried couple is a domestic partnership depends on whether the couple "for a significant period of time

⁵² See *infra* text accompanying notes 62–68.

⁵³ See, e.g., *Marvin v. Marvin*, 557 P.2d 106, 112–13 (Cal. 1976).

⁵⁴ ALI PRINCIPLES (Tentative Draft 2000), *supra* note 1, § 6.03 cmt. b.

⁵⁵ *Id.*

share[d] a primary residence and a life together as a couple.”⁵⁶ Whether they are deemed to have shared a life together must be determined “by reference to all the circumstances,”⁵⁷ which includes consideration of thirteen different factors.⁵⁸

Conceptualizing cohabitation as a status reflects two ways in which private ordering has become circumscribed for nonmarital partners. First, an individual cannot avoid a financial obligation to his or her partner simply by avoiding marriage. The presumption is that domestic partners have assumed certain responsibilities toward one another, which will be imposed unless explicitly disavowed. By contrast, at the time *Marvin v. Marvin*⁵⁹ was decided, the presumption was that unmarried partners had no obligations toward one another, unless they had affirmatively embraced them.⁶⁰ Only spouses were assumed to have agreed to financial sharing.⁶¹ The default rule for cohabitators, in other words, now tends to mirror the rule that governs spouses. As a result, the absence of formal legal status does not necessarily mean the absence of de facto status.

Second, in order to bring a claim successfully, a partner must establish that the cohabitation was the substantive equivalent of marriage. This requires that unmarried couples conform to conventional cultural norms about appropriate marital behavior. Thus, for instance, factors that the ALI regards as relevant in determining whether individuals “shared a life together as a couple” include considerations such as “the extent to which the parties intermingled their finances,”⁶² “[t]he extent to which their relationship fostered the parties’ economic interdependence, or the economic dependence of one party upon the other,”⁶³ “[t]he extent to which the parties engaged in conduct and assumed specialized or collaborative roles in furtherance of their life together,”⁶⁴ and “[t]he emotional or physical intimacy of the parties’ relationship.”⁶⁵

Similarly, the New York Court of Appeals, in *Braschi v. Stahl Associates Co.*,⁶⁶ concluded that a same-sex partner should be considered a

⁵⁶ *Id.* § 6.03(1).

⁵⁷ *Id.* § 6.03(7).

⁵⁸ *Id.* § 6.03(7)(a)–(m).

⁵⁹ 557 P.2d 106 (Cal. 1976).

⁶⁰ *Id.* at 116.

⁶¹ *See id.* at 118.

⁶² ALI PRINCIPLES (Tentative Draft 2000), *supra* note 1, § 6.03(7)(b).

⁶³ *Id.* § 6.03(7)(c).

⁶⁴ *Id.* § 6.03(7)(d).

⁶⁵ *Id.* § 6.03(7)(h).

⁶⁶ 543 N.E.2d 49 (N.Y. 1989).

"family member" of the deceased and therefore entitled to remain in the latter's rent-controlled apartment, because the couple lived in a household "having all of the normal familial characteristics."⁶⁷ In general, the court said, such characteristics include "the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services."⁶⁸

By contrast, those who are married may organize their lives as they wish and still automatically receive the benefits (and incur the obligations) associated with that status. A husband can, for instance, work in another city during the week and reside with his wife only on the weekends and still be treated as a spouse. A married couple may maintain strictly separate financial accounts, or not practice sexual exclusivity, and will still be regarded as married for legal purposes. Unmarried cohabitators, therefore, generally must live consistently with mainstream understandings of appropriate marital behavior in order to receive certain legal benefits. By contrast, those who formally assume marital status have the freedom to arrange their intimate lives as they wish without fear of jeopardizing the benefits flowing from marriage.

Married parents enjoy similar latitude in their enjoyment of parental benefits. An unmarried biological father seeking custody of or visitation with a child, for instance, or a voice in the decision to place the child with an adoptive family, must demonstrate that he has consistently maintained a meaningful relationship with the child in order to assert any legal right that attaches to parenthood.⁶⁹ A father married to his child's mother, however, is automatically entitled at divorce to consideration for custody and visitation rights, and his consent must be obtained prior to the adoption of the child.⁷⁰ This is so regardless of whether he has had meaningful involvement in his child's life (unless his lack of involvement is so egregious that he is deemed to have abandoned the child).⁷¹

Law, therefore, should be free to favor marriage over cohabitation and should not blur the distinction between the two kinds of relationships. Does that mean that unmarried couples should receive none of the benefits available to spouses? Should the desire to avoid

67 *Id.* at 54.

68 *Id.* at 55 (citations omitted).

69 *Lehr v. Robertson*, 463 U.S. 248, 266-67 (1983).

70 MARGARET M. MAHONEY, *STEPFAMILIES AND THE LAW* 163-64 (1994).

71 *See, e.g., Ex parte C.V.*, No. 1981316, 2000 WL 1717011 (Ala. Nov. 17, 2000).

eroding allegiance to marriage lead to rejection of any claims by unmarried partners that are not based on explicit contractual agreement?

II. QUALIFIED RECOGNITION

Categorical denial of claims by domestic partners seems no less problematic than eliminating the distinction between married and unmarried couples. There may be reasons for recognizing claims by unmarried partners that on balance are weightier than the fear that doing so may lessen the distinctive status of marriage. We need to think carefully about the rationales for the extension or denial of comparable legal treatment of cohabitation and marriage, focusing on both the practical and symbolic significance of such treatment in particular situations.⁷²

Before addressing some of the specific benefits that should be subject to this analysis, we need to think about what criteria should guide our deliberation. I propose the following. In general, we should acknowledge claims when failing to do so risks leaving one partner in an interdependent relationship seriously vulnerable or disadvantaged because of her reliance on the other, particularly when the relationship has ended. We also should recognize legal rights when the party seeking those rights wishes to use them to assume responsibility for the care of his or her partner. In addition, we should extend legal protection to children who otherwise might be injured by the law's denial of parental rights and benefits based on the absence of marital status. At the same time, we reasonably may prefer married couples over unmarried ones with respect to matters such as adoption and foster care. This is justified because of the greater stability of married as opposed to unmarried couples and the absence of a partner's preexisting relationship with a child.

Furthermore, we generally should be skeptical about comparable legal treatment of married and unmarried couples when denial of benefits to the latter would not impose hardship on a partner who has become vulnerable by virtue of her reliance on the relationship. In some cases, for instance, unmarried partners seek to be treated as spouses, because this would provide them with benefits on more advantageous terms than otherwise are available. The fact that they are unwilling to assume the responsibilities and burdens that are imposed on couples who marry, however, weighs against recognizing their claims. This is because these couples represent less than the full com-

⁷² My discussion in this Part focuses on many of the legal benefits described in Chambers, *supra* note 34, at 452–85, and *Baker v. State*, 744 A.2d 864, 884 (Vt. 1999).

mitment, for better or worse, that marriage is meant to involve. Finally, we may want to reject claims by unmarried partners when extension of a right currently reserved to spouses would leave uncertainty about who is entitled to the right and would create potential for its abuse.

These are broad guidelines, which serve only as provisional rules of thumb. They underscore, however, that, *ceteris paribus*, law should be most willing to extend legal recognition of or protection for cohabitation when doing so reinforces an ethic of care and commitment in intimate relationships. What are the implications of this approach for specific issues relating to the legal treatment of cohabitation? The discussion that follows offers some answers to this question. My intention is not to offer a definitive resolution of these issues, but to suggest how we might go about identifying and weighing the considerations that are relevant with respect to particular claims by domestic partners.

A. Inter Se Claims

Consider the first category of cases, which involves claims by one partner against another. The most significant of these deals with the allocation of property and financial support between the partners. If a claimant can establish that the relationship involved financial and emotional interdependence, the law should recognize that the vulnerability and reliance that necessarily result in such cases militate toward recognition of the claim. As a practical matter, given the substantial number of persons who cohabit at one time or another, refusal to recognize a cause of action could inflict significant hardship upon a considerable number of people. Many of them are likely to be women, because they are the ones in unmarried relationships who tend to make more financial sacrifices and are less able to convince their partners to marry.⁷³ As a symbolic matter, declining to recognize claims would send the message that by refusing to marry one can escape the responsibilities that flow from intimate relationships. While I have acknowledged that it is legitimate for law to take into account the legal form of a relationship in assigning rights and benefits, denying financial claims between unmarried partners would elevate form over substance to an unacceptable degree.

Related to that point, the ALI is right to suggest that the basis for recovery in these instances should be the fact that persons have lived together as domestic partners, rather than express or even implicit

⁷³ See Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1163, 1168-69 (1981).

contract theory.⁷⁴ The important consideration is that individuals may have responsibilities of care toward one another that arise not simply from consent but by virtue of a shared life, whatever legal form it takes. Even if relying on contract doctrine may produce a similar result in most cases, the rhetoric of that doctrine is resolutely individualist rather than relational. By contrast, to base recovery on what the ALI calls a "status classification"⁷⁵ reflects "the familiar principle that legal rights and obligations may arise from the conduct of parties with respect to one another, even though they have created no formal document or agreement setting forth such an undertaking."⁷⁶

Another instance requiring us to decide whether law should honor the claim of one unmarried partner against the other arises when one of the partners dies. When a spouse dies without providing in his will for any inheritance for his spouse, most states authorize the surviving spouse to claim a "forced" share of the estate, ranging from one-third to one-half.⁷⁷ No such provision benefits a similarly situated surviving unmarried partner. Should it? Answering this question is a bit more complicated than addressing the issue of financial awards upon dissolution of the relationship. On the one hand, if the partners had a common financial and emotional life together, the survivor likely would expect to share some or all of the estate in case of the other person's death. Indeed, she may well have made sacrifices that enhanced the value of that estate. As I have suggested, if the couple separated by choice, she should be entitled to an equitable share of the available assets. Why should it be any different if they separate by death?

On the other hand, unlike the case of ordinary separation, the deceased partner has not attempted to withhold benefits from his partner for the purpose of maximizing his own wealth. He has instead established certain priorities among those persons with whom he feels some emotional bond. The exclusion of his partner from the will suggests that the relationship perhaps was not as emotionally significant as the claimant may eventually suggest. There is more reason to regard this exclusion as a genuine expression of the relative importance of the relationship to the deceased than to give credence to how a relationship is described by a partner who is seeking to minimize his duties at the time a couple separates. Furthermore, the other partner may be on notice of his choice, which means that she could not rea-

74 See ALI PRINCIPLES (Tentative Draft 2000), *supra* note 1, § 6.03 cmt. b.

75 *Id.*

76 *Id.* § 6.02 cmt. a.

77 See Chambers, *supra* note 34, at 479.

sonably expect to share in the estate in the event of death. If she is not aware of the choice, that itself may be a telling commentary on the nature of the relationship.

Arguments based on the need to vindicate an ethic of care arising from interdependence thus seem less compelling in this case than with respect to financial awards upon dissolution. The most persuasive rationale for extending the benefit to an unmarried partner is the avoidance of undue financial hardship. This suggests, perhaps, that a qualified domestic partner be entitled to a forced share only upon a showing that failure to honor the claim would impose undue hardship. Thus, the standard would be similar to that required under the Uniform Premarital Agreement Act for declining to enforce the terms of a premarital contract that modify or eliminate spousal support.⁷⁸

How should we respond when the question is whether an unmarried partner should be given any share of the estate by statute when her partner dies without a will?⁷⁹ In this case, we obviously have no indication by the deceased that he did not wish to prevent his partner from being able to inherit from him. The mere failure to prepare a will, by itself, does not necessarily give rise to such an inference, since it is not uncommon for people to put off the preparation of a will. An important purpose of an intestacy statute is to reflect the deceased's likely wishes regarding the disposition of his or her estate, based on assumptions about the relative importance of various relationships in his or her life. If a person can establish that she was a domestic partner, it seems reasonable to assume that the deceased would have given her preference in his will had he made his wishes explicit.

A countervailing consideration is that an intestacy statute also expresses society's views about the value of various relationships and that, as I have suggested, there is reason to give priority to marriage among intimate relationships. If two persons who are romantic companions choose not to marry, one may argue that if they want to inherit from each other, they should make their wishes explicit in a will. In addition, one could anticipate that opening the door to claims by unmarried partners might generate numerous disputes among those asserting entitlement to a portion of the estate. The arguments surrounding this issue make resolving it more difficult than when a partner has deliberately chosen to exclude the other partner from her will. On balance, it seems fairer to recognize that many people fail to make or to change a will and that a domestic partner who has shared a

78 UNIF. PREMARITAL AGREEMENT ACT § 6(b), 9B U.L.A. 376 (1987).

79 For a description of benefits made available to spouses in such circumstances, see Chambers, *supra* note 34, at 455-56.

life with the deceased should not be penalized for her companion's failure.

B. Assuming Responsibility

A second category of cases are those in which one member of an unmarried couple seeks the opportunity to assume responsibility for decisions relating to care of the other. Laws designate, for instance, those who are authorized to make medical decisions for someone when she becomes incompetent and who may make decisions in that situation with respect to matters such as choice of residence and financial transactions.⁸⁰ If a party has not indicated who should exercise authority in these cases, statutes typically look first to a spouse and then to blood relatives to take on this role.⁸¹ If a domestic partner is willing to accept responsibility for making such decisions, the authority to do so is not so much a benefit that an unmarried companion seeks to obtain as it is a burden that she is willing to bear. Permitting her to do so would acknowledge the importance of care and commitment in intimate relationships, which is the value that underlies a general preference for marriage.

Furthermore, as David Chambers has observed, the rationale for vesting decisionmaking power in a spouse is that this individual is "more likely than any other person to know what decisions the incompetent person would have made if she were now able to decide for herself or, alternatively, at least to be the person most concerned about the incompetent person's welfare."⁸² That is, a major concern in these cases is accuracy: the decisions made should most closely approximate those the incompetent person would make based on familiarity with her values and wishes. For these reasons, it seems appropriate to leave open the possibility that a person who establishes that she is a domestic partner of the incompetent person will be able to make decisions on his behalf.

A related issue is the ability to take leave to care for an ill partner under the Family and Medical Leave Act.⁸³ The Act requires that certain employers grant unpaid leave for up to twelve work weeks a year to employees to care for a spouse, parent, or child with a "serious health condition."⁸⁴ It provides for no leave, however, to care for an unmarried partner. Should it? As with the desire to assume decision-

80 See UNIF. PROBATE CODE §§ 5-305(c), 5-409(a), 8 U.L.A. 466, 487-88 (1983).

81 See Chambers, *supra* note 34, at 455.

82 *Id.* at 456.

83 See 29 U.S.C. §§ 2601-2654 (1994).

84 *Id.* §§ 2611-2654, 2612(a)(1)(c) (1994).

making responsibility for an incompetent partner, there is a good argument that seeking to obtain this benefit reflects a willingness to take on the burdens that flow from intimate commitment to another person. This willingness, along with the likelihood that the ill person may have no caregiver more attentive and faithful than her domestic partner, militates in favor of amending the Act to include the provision of care for an unmarried partner as a basis for leave.

C. *Children*

A third category of cases in which the issue of comparable treatment of married and unmarried persons arises deals with relationships in which there are children. A person married to someone with a child not from the marriage is regarded by the law as a stepparent. He does not have the full panoply of parental rights unless he adopts the child,⁸⁵ but in some cases stepparent status is the basis for benefits flowing to him or to the child. The Family and Medical Leave Act, for instance, permits a worker to take leave to care for a stepchild.⁸⁶ Should it enable an unmarried partner to take leave to care for the child of a companion? There is a good argument that if the adult is willing to assume the responsibility for providing such care, the law should encourage this by enabling him or her to take leave under the Act for this purpose. Another example of parental rights and responsibilities flowing from marriage involves the use of reproductive technology. When a husband consents to the insemination of his wife, that consent alone is sufficient for the law to treat him as the resulting child's father, even though he has no biological relationship to it.⁸⁷ By contrast, an unmarried male who consents to his partner's insemination in these circumstances does not thereby attain this status.⁸⁸ His consent, however, reflects a willingness not only to receive the benefits of legal parenthood, but also to assume its significant responsibilities and burdens. Granting rights and imposing obligations in this setting would acknowledge the importance of this attitude in promoting the welfare of children.

In other instances, directly promoting the welfare of the child seems a good reason for according comparable treatment to married and unmarried partners. State workers compensation and federal Social Security survivors benefit law, for instance, provide that a minor

85 See generally MAHONEY, *supra* note 70, at 161 ("The process of adoption creates the full parent-child status between the adopting stepparent and the stepchild.").

86 29 U.S.C. §§ 2611(12), 2612(a)-(d) (1994).

87 See, e.g., *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 291 (Ct. App. 1998).

88 See *Dunkin v. Boskey*, 98 Cal. Rptr. 2d 44, 55 (Ct. App. 2000).

stepchild living with and dependent upon a stepparent is eligible to receive benefits to replace lost income resulting from the stepparent's death.⁸⁹ The child's eligibility, in other words, depends upon the relationship between the adults. If, however, a child must establish actual prior economic dependency upon an adult resident of the household in order to receive benefits, there seems no reason to permit recovery if the child is dependent upon an adult married to her parent but to deny it if the adult is not. Even if we consider it appropriate to express society's preference for marriage through different treatment of married and unmarried couples, we should not compromise children's welfare as the price for doing so in this situation. If an adult partner has assumed the responsibility of helping support a child and the child has relied on that support, the vulnerability that results from the adult's death supports recognizing a child's claim for benefits to replace the lost income.

Similarly, if an unmarried partner has developed an attachment to and relationship with a child living in the household, it generally is in the child's interest that this partner be eligible to maintain that relationship through visitation with the child if the adults separate. Yet, in many states, a cohabitor has no standing to present such a claim.⁹⁰ The traditional rule has been that any person not a biological or legal parent of a child could not intervene in custody or visitation matters at divorce without a showing that the parent was unfit.⁹¹ This approach disadvantages both married partners—that is, stepparents—and cohabitators.

In recent years, several states have explicitly authorized stepparents to present claims in custody and visitation proceedings at the time of divorce.⁹² It is far less common, however, for unmarried partners to have standing to do so when the adults' relationship ends. If, however, the partner has a significant relationship with the child, it seems unreasonable to base his ability to pursue continued contact with the child on whether he has been married to the child's mother.

The ALI rejects reliance on marital status as the basis for determining standing in these situations. Section 2.04 of its *Principles of the Law of Family Dissolution* provides for notice and right of participation in custodial responsibility proceedings for both a legal parent and a "de facto parent."⁹³ The latter is defined as someone who for a signifi-

89 Chambers, *supra* note 34, at 464.

90 See MAHONEY, *supra* note 70, at 129–37.

91 See, e.g., *Petersen v. Rogers*, 445 S.E.2d 901, 905–06 (N.C. 1994).

92 See ALI PRINCIPLES (Tentative Draft 2000), *supra* note 1, § 2.04 Reporter's Notes, cmt. d (discussing cases under this principle).

93 *Id.* § 2.04(1)(c).

cant period has resided with the child and, with the legal parent's consent, has performed at least as much of the caretaking functions for the child as has the legal parent.⁹⁴ The relative weight that a legal and a de facto parent's interest should receive is subject to some disagreement and warrants more elaborate discussion than I can provide here. The important point for my purposes is that, however the balance is struck, it seems inappropriate that only stepparents are eligible for de facto parent status and that everyone else is categorically excluded. The interest of the child in continuing the relationship with the de facto parent should at least be taken into account, whatever the de facto parent's relationship with the legal parent. An unmarried cohabitor who is willing to sustain that relationship and the responsibilities that it entails should receive a hearing when he and his partner agree to separate.

There are other issues dealing with children, however, where it is reasonable to distinguish between married and unmarried partners. Stepparents in most states are able to adopt a child of their spouse without home visits and family studies that typically are required before an adoption is approved.⁹⁵ On one hand, the willingness of a cohabitor to adopt reflects a commendable desire to provide the care and to take on the considerable obligations that accompany legal parenthood. On the other hand, however, there is a higher likelihood that a cohabiting couple will separate than there is that a married couple will divorce.⁹⁶ This warrants a closer look at the household before a partner is permitted to adopt. Bestowing adoptive parenthood on an unmarried partner could make any dissolution process more contentious, because each partner would have comparable rights in a custody and visitation proceeding. By contrast, even if a cohabitor is able to assert de facto parent status, the legal parent still is given certain preferences that simplify the determination of custodial rights and responsibilities.⁹⁷ In general, this should produce more predictability and less conflict, which is in the interest of children. Such a consideration is of particular concern for children in households with unmarried partners because of the greater risk of disruption than exists for children in marital households. The home visit and family study ultimately may preclude few cohabitators from adopting, but it affords an opportunity to make a more detailed assessment

94 *Id.* § 2.03(1)(c).

95 See Joan H. Hollinger, *Introduction to ADOPTION LAW AND PRACTICE* § 1.05[2][a] (Joan H. Hollinger ed., 1988).

96 See *supra* text accompanying notes 22–23.

97 For instance, a nonparent typically can obtain custody of a child only if the natural or legal parent is deemed unfit. See MAHONEY, *supra* note 70, at 140–41.

of the likely stability of the setting in which the partners plan to raise the child.

The greater stability of married couples provides even greater justification for favoring them in adoption and foster care selections.⁹⁸ In these instances, there is no pre-existing relationship between partner and child that needs to be taken into account. Here again, the desire of an unmarried couple to assume responsibility for a child through adoption or serving as foster parents is laudable, and such couples will still have opportunities to do so. When a suitable married couple is also available, however, the willingness of the spouses to make a public commitment to one another and the comparative data on stability⁹⁹ militate toward favoring the married over the unmarried couple.

D. Special Benefits

Distinguishing between spouses and cohabitators also seems appropriate in cases in which cohabitators seek treatment as a married couple simply to obtain benefits otherwise unavailable or on more advantageous terms. In such instances, partners seek the benefits of marital status without its corresponding obligations. There are a variety of burdens to which married couples are subject, but unmarried ones generally are not. If spouses apply for certain government benefits, such as Supplemental Security Income or welfare, the grant is lower than if each partner had applied separately.¹⁰⁰ In many cases, if only one spouse applies for a needs-based benefit, the income of the other is attributed to him or her.¹⁰¹ A spouse has the legal duty to pay for necessities, such as emergency medical care, provided to her partner by third parties,¹⁰² but a cohabitor does not. In most community property states, a creditor can collect a debt from a married couple's community property, without regard to the contribution of that spouse to acquisition of the property.¹⁰³ In addition, spouses are subject to anti-nepotism provisions, while cohabitators generally are not.¹⁰⁴ Married couples must comply with divorce law in order to end their relationship, but unmarried couples may separate on their own. In these and other ways, marriage involves obligations that cohabitation

98 On such a preference, see Chambers, *supra* note 34, at 469–70, and citations therein.

99 See *supra* text accompanying notes 22–26.

100 See Chambers, *supra* note 34, at 473–74 (citing 42 U.S.C. § 1382 (1994)).

101 *Id.*

102 *Id.* at 484–85.

103 See *id.* at 485.

104 See *id.* at 460.

does not. For that reason, in the absence of other countervailing considerations, unmarried partners should not necessarily be accorded the advantages of marriage.

Thus, for instance, a gift from one spouse to another is exempt from the federal gift tax.¹⁰⁵ Cohabitors could obtain this benefit through marriage, but have declined to do so. The law should take them at their word that they do not wish to enter into the kind of formal public commitment that marriage entails and should be able to deny them this benefit of making such a commitment. It is unlikely that unmarried partners have arranged their lives in expectation of such a benefit and that either would be significantly disadvantaged because of reliance on its anticipated availability.

Similarly, public and private employers make health care benefits available to spouses of employees,¹⁰⁶ and a few states now require certain employers to extend health insurance to the otherwise uninsured spouses of employees.¹⁰⁷ These spousal benefits are exempt from taxation.¹⁰⁸ Cohabitors asserting a claim to such benefits seek to invoke their relationship as a source of individual advantage, while using their unmarried status to avoid the burdens of marriage. Admittedly, a valid consideration in these instances is the importance of widespread availability of health insurance. In many cases, however, the issue is not the absolute availability of health insurance, but the ability to obtain it on more advantageous terms. Furthermore, it may well be appropriate in providing health insurance to shift emphasis away from membership in an intimate relationship to access to insurance on an individual basis. Reform efforts should focus directly on this change, however, rather than on the comparable treatment of individuals in relationships that generally feature different levels of commitment.

Additional policy considerations are relevant in deciding whether to extend benefits to both married and unmarried couples in other cases. For instance, a foreign national who marries an American citizen has a presumptive right to enter the United States immediately as a long-term resident.¹⁰⁹ Should one who cohabits with an American citizen be entitled to the same treatment? Concerns about the integrity of immigration law add weight to the refusal to do so. Even under existing law, there is potential for abuse of this provision through a "sham" marriage into which parties enter solely for the purpose of

105 See I.R.C. §§ 1041, 2523 (1994).

106 See Chambers, *supra* note 34, at 474.

107 *Id.* at 484 (citing HAW. REV. STAT. §§ 87-4, 393-7, 393-21 (1993)).

108 *Id.* at 474 (citing I.R.C. §§ 105, 213 (1996)).

109 See 3 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 36.02 (rev. ed. 2000).

obtaining favorable immigration status. Such marriages will not be recognized as sufficient to trigger long-term resident status. The Immigration and Naturalization Service (INS) is authorized to determine whether parties have entered into marriage in good faith, as opposed to doing so in order to obtain an immigration benefit.¹¹⁰ This task admittedly is difficult and perhaps even controversial in some cases. When there is no formal marriage, it is even more vexing and problematic. If a partner could obtain a benefit without assuming the obligations of marriage, the INS likely would receive many more applications than it does now. The agency would have to scrutinize every relationship intensively and pass judgment on whether the partners possessed sufficient commitment to one another to justify favorable immigration treatment. This would create the prospect of inconsistent and unpredictable outcomes that could well undermine the perceived fairness and integrity of the immigration laws.

A similar concern arises in deciding whether cohabitators should be able to invoke the privilege for confidential communications that is now available to spouses in civil and criminal proceedings. The privilege protects from disclosure any communication during marriage between the parties that they intended to remain confidential, even after the marriage is over.¹¹¹ On the one hand, respect for intimate relationships suggests that the state should not attempt to force disclosure of such communications in a legal proceeding. Intrusion on the privacy of committed, unmarried partners may be just as damaging as infringement on the privacy of spouses. This suggests that the underlying substance of the relationship, rather than its form, should be the basis for protection.

Given the possibility that this privilege might reduce the prospect of civil or criminal liability, however, the number of cohabitators who would attempt to invoke it could be substantial. This would be problematic for two reasons. First, the court would have to conduct an in-depth inquiry into every unmarried relationship that is asserted as the basis for the privilege. As with a case-by-case inquiry by immigration officials, this would increase the probability of contradictory and unpredictable decisions. The ramifications of this may be especially serious, because inconsistent exclusion of evidence could erode confidence in the ability of the legal system to arrive at just decisions.

A second, and related, point is that evidentiary privileges are intended to be a narrow exception to the rule that a tribunal should

110 See 8 U.S.C. § 1255(e)(3) (Supp. V 1999).

111 See Milton C. Regan, Jr., *Spousal Privilege and the Meanings of Marriage*, 81 VA. L. REV. 2045, 2055-56 (1995).

have access to all relevant information. Making the communications privilege available to unmarried partners would significantly expand the body of evidence that potentially could be withheld from the legal system. An individual would be able not only to invoke the privilege with respect to the relationship in which he or she is currently involved, but also to shield communications that occurred during earlier relationships as well. The relevant figure for estimating the potential impact of extending the privilege to cohabitators thus would not be simply the percentage of the population cohabiting at a particular time, but the percentage who have ever cohabited. For these reasons, it seems inadvisable to extend the privilege to unmarried partners.

Another right currently available to spouses, but not cohabitators, is the ability to sue for loss of consortium in the event of a negligent injury to one's partner. This tort is meant to provide compensation for "loss of conjugal society, comfort, affection, companionship and sexual relations."¹¹² A partner in an unmarried, committed relationship obviously can suffer such loss just as much as a marital partner. Furthermore, unlike the other benefits I have discussed, such as tax exemption, health insurance, immigration status, and evidentiary privilege, an unmarried partner attempting to assert this cause of action does not have the option at the time she seeks the benefit of obtaining it simply by marrying. Finally, just as I have suggested that financial reliance by a cohabitor justifies receipt of benefits in certain cases, so one might argue that emotional reliance supports the right to assert a claim for the loss of companionship by an unmarried partner. Law, in other words, should try to limit the vulnerability that arises from intimate interdependence.

On the other hand, an important concern of tort law is to establish reasonable limits on the persons to whom a negligent defendant owes a duty. As a result, "[t]he need to draw a bright line in this area of the law is essential,"¹¹³ lest persons be subject to liability to an expansive group of claimants who are not entirely foreseeable. Marriage obviously provides such a bright line. The proportion of people who are married at any given time is considerably higher than those who cohabit, which makes it relatively foreseeable that one who injures an adult will also cause injury to the victim's spouse. In addition, the possibility of obtaining substantial damages could substantially increase the number of claims. This, of course, would require more frequent case-by-case analysis of the emotional significance and dura-

112 *Elden v. Sheldon*, 758 P.2d 582, 588 (Cal. 1988).

113 *Id.*

bility of intimate non-marital relationships. Finally, one might contend that preserving this cause of action for spouses directly expresses the message that marriage is a distinctive relationship that ideally involves the highest degree of commitment.

The arguments on each side of this issue are strong ones, which makes its resolution especially difficult. One way to give some weight to each may be to preserve a loss of consortium claim for spouses, but to permit an unmarried partner who witnesses injury to his or her companion to bring an action for negligent infliction of emotional distress. This would be consistent with the expansion in recent years of the class of persons authorized to bring a lawsuit. New Jersey, for instance, has recognized a cause of action for distress for an engaged partner who was present at the death of her fiancé.¹¹⁴ This "bystander" liability is narrower than liability for the loss of consortium, since the claimant must witness the injury in question.¹¹⁵ By contrast, a spouse who sues for loss of consortium is presumed to have suffered injury simply by virtue of the fact that her marital partner has been injured or killed, regardless of whether she was present at the event.¹¹⁶ Viewed from the legal fiction of foreseeability, it is reasonably foreseeable that a defendant who injures someone who is with a companion will also cause emotional distress to that companion, particularly given the growing ranks of cohabiting partners. It is far more foreseeable, however, that someone who injures an unaccompanied person will also inflict injury on an absent spouse than on an absent unmarried partner.

III. DOMESTIC PARTNER REGISTRATION

I have suggested with respect to some benefits that the difficulty and unpredictability of case-by-case identification of eligible domestic partners is one factor that militates against extension of spousal benefits to cohabitators. One way to avoid this problem would be to permit unmarried couples to register as domestic partners if they wished to be treated comparably to spouses for certain purposes. Some jurisdictions make certain public benefits available to couples who register.¹¹⁷ Others furnish registration only as a step that may qualify partners for some private benefits, such as coverage under private employer health insurance policies.¹¹⁸

114 *Dunphy v. Gregor*, 642 A.2d 372, 380 (N.J. 1994).

115 *See id.*

116 *See Gonen, supra* note 13, at 341.

117 *Id.*

118 *See id.*

Treating registration as a device simply to obtain rights and benefits, without any corresponding responsibilities, is at odds with the idea that domestic partners warrant some degree of special treatment, because they are committed to one another. Furthermore, it seems likely that at least some persons would register who would not deserve such favorable treatment, since registering would have no disadvantages, because it triggers no obligations.

One way to address this concern would be to provide that domestic partners who register would receive some, but not all, of the benefits of marriage and would be subject to some, but not all, of the responsibilities that spouses assume. Couples who desire a more limited commitment than marriage would be able to take advantage of this alternative. Registration would reflect a more explicit willingness to assume the status of cohabitor, in contrast to courts' current tendency to infer such an agreement from the conduct of the parties.¹¹⁹ One might argue that this system would take account of couples' varying degrees of commitment and would provide a more predictable legal regime governing intimate relationships than we now have. Rather than maintaining a dichotomy between married and unmarried couples, law would offer a menu of choices that gives partners greater choice over the terms of their relationships.

There are, however, at least a couple of concerns about this arrangement. First, it would effectively revive explicit contract as the basis for the rights and duties of cohabitators. While registration does not carry some of the negative connotations that contract does in the context of intimate relationships, partners who register nonetheless would be entering into an agreement that provided for enforceable rights and duties with respect to one another and third parties. Yet, as the ALI has observed, even as courts formally invoke the doctrine of contract, in substance they tend to rely on general equitable principles in adjudicating claims between unmarried partners.¹²⁰ Such flexibility is valuable in light of the fact that not all forms of vulnerability and reliance can be explicitly anticipated in advance. Responsibilities and expectations can arise from interdependence, not simply from voluntary agreement, and will vary according to the course of a relationship whose trajectory necessarily will be uncertain. If domestic partners must register in order to enjoy any rights or obligations, many deserving individuals will be left without recourse. If some claims will be recognized even in the absence of registration, then a

119 See *supra* text accompanying notes 52–71.

120 See ALI PRINCIPLES (Tentative Draft 2000), *supra* note 1, § 6.03 cmt. b.

registration scheme will provide little more predictability than currently exists.

A second concern is more subtle, but not necessarily less important. Would law still be recognizing and encouraging commitment if partners could calibrate in advance the specific benefits they expect to enjoy and the particular burdens they are willing to accept? In what sense would it be meaningful to speak of commitment that involves, for instance, willingness to be responsible for emergency medical expenses of one's partner, but unwillingness to share property equitably if the relationship ends? Commitment, in other words, may be a binary concept, at least when intimate relationships are involved. One may speak of the absence or presence of commitment, but one does so less easily of commitment with respect to some aspects of the relationship but not others. Marriage has such cultural resonance because it is seen as involving an open-ended pledge to share the uncertainties of life "for better or for worse," rather than a qualified promise to bear some risks but not others.

To be sure, few if any partners can live up to this ideal. The exigencies of daily life and the frailties of human beings inevitably constrain our ability to realize it. Acknowledging that these practical obstacles will almost certainly arise, however, is different from specifying at the outset that there are limits on the commitment that one is willing to make. Marriage may be valuable as a "regulative ideal," an aspiration that shapes purposive activity, even if that activity never fully fulfills the aspiration that animates it.¹²¹ Will marriage continue to serve this function if it is one option among many on a menu of legally recognized intimate relationships?

IV. SAME-SEX COUPLES

As I noted at the outset, my discussion of the legal treatment of unmarried couples is based on the premise that marriage should be extended to same-sex couples. In the absence of this step, laws treating same-sex domestic partners similarly to spouses may be a reasonable way to acknowledge both that gays and lesbians may be involved in committed relationships and that there is some resistance to making marriage available to them. It is worth noting, however, that the goal of preserving the distinctiveness of marriage and avoiding blurring its differences with unmarried intimate relationships may in fact be served by permitting same-sex couples to marry if they choose.

121 See generally DOROTHY EMMET, *THE ROLE OF THE UNREALISABLE: A STUDY IN REGULATIVE IDEALS* (1994) (defending reliance on regulative ideals as a valuable form of moral standard).

First, some of the impetus for the enactment of domestic partner legislation has been a desire to provide at least a measure of legal recognition for committed same-sex relationships.¹²² Some provisions that extend benefits to both same-sex and opposite-sex domestic partners may well reflect the fear that failure to include the latter group may prompt a legal challenge. If marriage were available to gays and lesbians, some, although not all, of the pressure for domestic partner legislation might abate. All intimate couples who wished to make a significant commitment to one another would be able to marry. States could then reasonably assume that unmarried couples generally represented those partners who did not wish to make such a commitment. While it would be appropriate to provide some legal benefits to such couples in accordance with the analytical framework that I have suggested, there might be less insistence on fully comparable treatment of married and unmarried couples.

A second benefit is admittedly more speculative, but perhaps more important. Despite elimination of most of the formal legal provisions reinforcing traditional spousal gender roles, marriage as a cultural symbol undeniably is still associated with the adoption of these roles. Surely there are some couples who are deeply committed to one another who nonetheless are wary of marrying, because they see it as entry into a patriarchal institution kept alive by social expectations. If same-sex couples were able to marry, however, there would be a body of spouses for whom gender could not serve as the basis for a division of labor. Marriage, in other words, would no longer be an exclusively gendered relationship, thereby confounding traditional expectations that rest on this feature.¹²³ This severance could well change the cultural meaning of marriage, investing it with a more egalitarian ethos. Such a development would remove what may be an important obstacle to marriage by committed partners, thereby making even more justified legal distinctions between married and unmarried couples.

CONCLUSION

I have argued that society is justified in treating marriage as a legally privileged intimate relationship, thereby preserving a distinc-

¹²² In Vermont, of course, legislation is a response to the state supreme court's requirement that the state find some way to make available to same-sex couples the marital benefits that are provided to those who marry. See *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999).

¹²³ See Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 *LAW & SEXUALITY* 9, 18-19 (1991).

tion between married and unmarried couples. Due regard for practical realities, however, supports treating marriage and cohabitation similarly in certain circumstances. In general, these are when an individual is rendered vulnerable by virtue of her reliance on a nonmarital relationship or wishes to express his or her commitment by assuming responsibilities to a partner or child. If more couples cohabit, we can expect more cases in which the law recognizes these interests. This itself could begin to blur the perception that there is a meaningful difference between marriage and cohabitation. If marriage involves fewer exclusive benefits, its burdens may seem more pronounced. Might this make marriage appear even less desirable than cohabitation?

One response is that, in many cases, recognizing the claim of one domestic partner also involves imposing a duty on the other. This is true, for instance, with respect to financial awards at the time an unmarried couple separates. In addition, certain rights represent the assumption of an obligation, such as the right to make medical or other decisions on behalf of an incapacitated partner. To the extent that rights and responsibilities are paired, the perceived distinctive burdens of marriage may seem less.

Nonetheless, a second response is that it is precisely the greater obligations involved in marriage that give it a special status as the pre-eminent expression of intimate commitment. A willingness to assume burdens and responsibilities that could easily be avoided can signal a special depth of commitment. The acceptance of limits on individual freedom, when an alternative exists that offers many benefits without such restrictions, could make marriage an even more powerful cultural symbol. What is unclear is whether this will come at the cost of fewer marriages. Will marriage become a more potent, but less chosen, social arrangement?

Perhaps. To try to prevent this by resolutely refusing to provide any legal benefits to cohabitators, however, seems misguided. First, it would result in hardship in many cases. Furthermore, it is by no means certain that this would discourage cohabitation and encourage marriage. The dramatic increase in cohabitation in recent decades has come during a period in which legal benefits have been made available haltingly and inconsistently. The social practice of cohabitation seems to have placed increasing pressure on the law, rather than law prompting changes in behavior.

This suggests that preserving the legal distinctiveness of marriage may have an ambiguous impact. On the one hand, couples may be only vaguely familiar with the legal rights and duties that accompany marriage when they make decisions about their relationships. This

suggests that different legal treatment of marriage and cohabitation may have little effect on the choices of intimate partners. At the same time, marriage remains the most significant symbol of commitment to a shared intimate life between adults. As a cultural icon, it may be more powerful than ever. Eliminating all or most legal distinctions between it and cohabitation could begin to erode that symbolic role—even though the ability to describe precisely how this might happen is maddeningly elusive.

Marriage and cohabitation ultimately should evoke considerable humility for those attempting to trace the intricate connections among law, culture, and behavior. This is an area in which grand pronouncements and categorical approaches are less useful than awareness of the limits of rationality and appreciation of “the crooked timber of humanity.”¹²⁴ Perhaps more than any other dimension of life, intimate relationships remind us that what we care about most may be hardest to attain by design. Yet, the very importance of those relationships makes it seem unthinkable not to try. In the end, we are left with the paradox that Karl Llewellyn described so well: “Law means so pitifully little to life. Life is so terrifyingly dependent on the law.”¹²⁵

124 See generally ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS* (1991) (suggesting in various essays that there is no single human way of life superior to all others).

125 Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 *YALE L.J.* 704, 751 (1931).