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Marriage, Cohabitation and Collective Responsibility for Dependency

Elizabeth S. Scott*

Marriage has fallen on hard times. Although most Americans say that a lasting marriage is an important part of their life plans,¹ the institution no longer enjoys its former exclusive status as the core family form. This is so largely because social norms that regulate family life and women's social roles have changed. A century (or even a couple of generations) ago, marriage was a stable economic and social union that for the most part lasted for the joint lives of the spouses; it was the only option for a socially sanctioned intimate relationship and the setting in which most children were raised. Today, when about 40% of marriages end in divorce, marriage is a less stable relationship than it once was. It is also less popular; many couples choose to live in informal unions instead of marriage and many children are raised by unmarried mothers, other family members, or by unmarried straight and gay couples.²

*University Professor and Class of 1962 Professor of Law. For comments on an early draft, I am grateful to Robert Ferguson, Bill Sage, Rip Verkerke, and Bob Scott. Thanks also to participants in conferences and presentations of the paper at Hofstra Law School, the University of Chicago Law School (the Legal Forum symposium), Columbia Law School, and the University of Virginia School of Law. I received excellent research assistance from Jessica Smith and Scott Horton.

¹A Gallop survey in 2001 found that 87% of 20-29 year olds thought they would marry. National Marriage Project, *The State of our Unions: The Social Health of Marriage in America 2001*. In another survey, 80% of high school girls reported that having a good marriage is extremely important to them. National Marriage Project, *The State of our Unions: The Social Health of Marriage in America 1999*.

² Approximately 40% of adults live in non-marital family units, Axinn & Thornton, in Waite, *The Tie That Binds* (1996). Between 1980 and 2002, the total number of cohabiting heterosexual couples in the United States more than tripled, from 1,589,000 to 4,898,000. U.S. Census Bureau, Table HH-1. Households by Type:1960-Present, June 12, 2003 (available at: <http://www.census.gov/population/www/socdem2002/hh-fam/tabHH1.csv>). [During that time the number of marriages increased from 49,112,000 to 56,747,000.] The 2000 Census also reported almost 600,000 same sex couples. Approximately 1.35 million children were born to unmarried women in 2000, up more than 15% from 1990. According to one study, 40% of births to unmarried mothers between 1990-94 were to cohabiting couples. Larry Bumpass & Hsien-Hen Liu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 *POPULATION STUDIES*. 29 (2000) An comprehensive demographic summary of changes in family form

These changes pose a challenge to foundational policies of family law. Formal marriage is a privileged legal status that receives substantial government protection and benefits, and is also defined by many legally enforceable rights and obligations between the spouses. In a world in which marriage no longer functions as well as it once did to provide care for children and to serve other family dependency needs,³ it is quite appropriate to ask whether the special legal status of marriage can any longer be justified.

This issue has been the focus of a heated debate in academic and policy circles. On one front, many feminists claim that marriage, the source of women's subordination, is an outmoded institution that increasingly is not the preferred family form.⁴ Martha Fineman, a leading marriage critic, argues that the privileged legal status of marriage should be abolished in favor of a family form more deserving of legal protection—the caretaker-dependent dyad. Other critics contend that, in an era in which family arrangements are understood to be a matter of private choice, cohabitation unions and marriage should

can be found in IRA ELLMAN, PAUL KURTZ & ELIZABETH SCOTT, *FAMILY LAW: CASES, TEXT, PROBLEMS* 3rd Ed. (1997). For a description of these trends that concludes that they are worldwide, see Judith Bruce, et. al., *Families in Focus* (1995).

³ Individuals have dependency needs at various stages of life, most notably childhood and old age. Illness and unemployment also create dependency. Martha Fineman has identified two categories of dependency, direct and derivative dependency. The latter is the dependency of caretakers (particularly mothers) who can not be self sufficient economically because of their caretaking role. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 228-30(1995); Fineman, *Cracking the Foundational Myths: Independence, Autonomy and Self-Sufficiency*, 8 AM. U. J. GENDER, SOC. POL. & L. 13 (2000).

⁴M. Fineman, *Contract and Care*, Chi.-Kent L.Rev. Other critics of the privileged status of the nuclear family based on marriage include Nancy Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 Va. L. Rev. 1535 (1993); Iris Young, *Reflections on Families in the Age of Murphy Brown*, in N. Hirshmann & C. Di Stefano (eds. *Revisioning the Political: Feminist Reconstructions of Traditional Concepts in Western Political Theory* 251 (1996); Stephanie Coontz, *The Way we Never Were: American Families and the Nostalgia Trap* Judith Stacey, *In the Name of the Family* (199_); *Good Riddance to Families: A Response to David Popenoe*, 55 J. Mar. & Family, 545 (1993)(stable marriage depends on inequality).

be subject to the same legal treatment.⁵ In this vein, the American Law Institute proposes that courts should impose the financial rights and obligations of marriage on cohabiting parties when their relationships end.⁶

On the other side of the debate are highly visible defenders of marriage, many of whom are social and political conservatives with a religious or moral agenda.⁷ These advocates make apocalyptic claims about the negative impact of the decline of marriage on social welfare.⁸ Many reject the legitimacy of alternative family forms and aim to restore traditional marriage; they can fairly be charged with seeking to impose a moralistic vision of the good life on the rest of society.⁹ In the policy arena, a “marriage movement,” populated mostly by religious and social conservatives, has dominated the recent legislative initiatives to promote covenant marriage and revive fault-based divorce.¹⁰

⁵This is part of a larger debate over the appropriate legal response to functional families generally. See *infra* note .

⁶ American Law Institute, *Principles of the Law of Family Dissolution*, [hereinafter *A.L.I. Principles*] Ch. 6, Domestic Partnerships. The *A.L.I. Principles* only deal with inter se disputes and not with government benefits.

⁷Patrick Buchanan, *Right from the Beginning*(1988); Caroline Graglia, *The Housewife as Pariah*, 18 *Harv. J. L. & Pub. Pol.* 509, 511-12 (1995); Blankenhorn, *marriage movement.org*. Also among those who argue for the benefits of marriage are sociologists such as Steven Nock, Paul Amato and Norval Glenn, whose claims are based on substantial empirical evidence. STEVEN NOCK, *MARRIAGE IN MEN’S LIVES ; A Comparison of Marriages and Cohabiting Relationships* 16 *J. FAM. ISSUES* 53 (1995)[hereinafter *Marriages and Cohabiting Relationships*]; Paul Amato “Good Enough Marriages” *Va. J. Soc. Pol. & L.* (2001); Linda Waite, *Does Marriage Matter?* 32 *Demography* 483 (1995); N. Glenn, *Is the Current Concern about American Marriage Warranted?* *Va. J. Soc. Pol. & L.* (2001).

⁸Some academic observers have joined in expressions of concern about family decline. D. Popenoe, *American Family Decline, 1960-1990: A Review and Appraisal*, 55 *J. Marriage & Family* 527 (Aug. 1993).

⁹ Charles Murray, “The Coming White Underclass” *Wall Street Journal*, Oct. 29, 1993 at 14 (“[I]llegitimacy is the single most important social problem of our time...”); Barbara Whitehead, “Dan Quale was Right” *Atlantic* (1993). At the heart of the pro-marriage movement are fundamentalist Christians who advocate a return to traditional marriage on religious and moral grounds. Jerry Falwell, *Listen America*..

¹⁰Covenant marriage statutes, which allow couples entering marriage to opt out of no-fault divorce standards, have been enacted in three states. For a discussion of the marriage movement and a study of attitudes toward covenant marriage, see *generally* Hawkens, et. al, *Attitudes about Covenant Marriage and Divorce: Policy Implications of a Three State Study*, 51 *Family Relations* 166 (2002). Many feminists have opposed covenant

Adding a layer of complexity to the debate is a third interest group with the distinctive agenda of extending the privileges of marriage to same-sex couples.¹¹ This group does not challenge the privileged status of marriage, but rather argues that, as long as the special status continues, same-sex couples should have the right to enjoy the tangible benefits that marriage confers as well as its symbolic social importance.¹²

On first inspection, those who oppose perpetuating the favored legal status of marriage would seem to have the better arguments. They sensibly acknowledge that the legal regulation of family relationships must respond to changing social values and behavior. Moreover, the feminist contention that marriage historically has been the source of women's subordination is hard to refute, and the concern that the privileged status of marriage harms other families must be taken seriously. If legal marriage simply rewards couples who adapt their behavior to a socially conservative norm, then the argument that fairness, tolerance and social welfare would be promoted if marriage were "de-privileged" has considerable force.

In this essay, I offer a modest defense of the privileged legal status of formal marriage (as I will define this union) and legal neutrality toward informal intimate unions. My claim is that the special

marriage. See Barbara Ehrenreich, *In Defense of Splitting Up: The Growing Anti-Divorce Movement is Blind to the Costs of Bad Marriages* Time, April 8, 1996, 80; Katha Pollitt, *Can this Marriage be Saved?* The Nation, Feb. 17, 1997, at 9; *Is Divorce Getting a Bad Rap?* Time, Sept. 25, 2000 at 82.

¹¹See generally text and accompanying notes 23 to 25. This issue has received a great deal of attention recently, triggered in part by the decision of the Massachusetts Supreme Court that the state must afford same sex couples the right to marry. *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 3003). The Massachusetts legislature moved pass an amendment to the state constitution prohibiting same sex marriage, but allowing civil unions. In response to *Goodridge*, and to the issuance of marriage licenses to same sex couples in San Francisco, President Bush announced support for a constitutional amendment prohibiting same-sex marriages. See Elizabeth Bumiller, *Same Sex Marriage: The President; Bush Backs Ban in Constitution on Gay Marriage*, New York Times, Feb. 24, 2004, at A1. See t.a.n. _ to _ infra.

¹²Some advocates for the rights of gay and lesbian persons challenge this policy goal. See Polikoff, supra note _.

treatment of marriage can be justified, even if one has no nostalgic fondness for traditional family roles and rejects the moral superiority of marriage over other family forms. Through marriage, government can delegate to the family some of society's collective responsibility for dependency.¹³ Retaining its privileged legal status in a contemporary setting can (and should) be part of a comprehensive policy of family support that acknowledges the pluralism of modern families.

In my framework, the government is justified in channeling intimate relationships into marriage because formal unions function as a useful means of providing care in a family setting. The availability of legal marriage allows couples to declare their commitment and choose a formal status with a package of clearly defined and enforceable legal rights, privileges, and obligations that embody that commitment. Even in an era of high divorce rates, marriage represents a relatively stable family form, partly because of its formal status and partly because it is regulated by a powerful set of social norms that reinforce commitment. Moreover, within a properly structured legal framework, even marriages that end in divorce can serve quite effectively to provide a measure of financial security for dependent family members. Informal unions, in contrast, are a less reliable family form because the behavioral expectations and financial obligations between the parties are uncertain and legal enforcement is difficult.

Government privileging of marriage and neutrality toward informal unions does not mean that financial understandings between parties in cohabitation relationships should be unenforceable. To the contrary, I argue that contract theory supports a default rule framework that presumes that property acquired during long term cohabitation unions is shared and that support is available to dependent

¹³I assume that society has this collective responsibility. Libertarians and some social conservatives might disagree with this claim.

partners.¹⁴ Default rules which reflect the implicit understandings of most couples in these unions will mitigate the harsh inequity that results today when courts decide that parties' understandings are too ambiguous for contractual enforcement. This autonomy-based framework is superior to the approach of the A.L.I. Principles, under which an unchosen status is imposed on unmarried couples.

A road map may be helpful. Part I begins with a description of the case against marriage and a preliminary response to the critics. In Part II, I argue that marriage functions relatively well as a family form that can satisfy dependency needs, both because of its stability and because obligations between the parties are specified *ex ante* with some certainty. These advantages, which are underscored by a comparison with informal unions, justify the legal privileging of marriage. I then turn in Part III to the enforcement of obligations in cohabitation unions and argue for a default rule framework that presumes marriage-like understandings about property and support in long term unions.

I. Is Marriage an Obsolete Institution?

A. The Challenge

No one contests that families should have a protected legal status— at least not in the debate that I am entering. As law students recognize on the first day of class in Family Law, the special status of families in law is readily justified because family members provide care and support to one another, reducing the burden that society would otherwise bear in caring for children and for adults who are unable to provide for basic needs due to illness, disability or advanced age.

The government recognizes the useful role of families through direct and indirect subsidies,

¹⁴For a discussion of default rules regulating divorce generated in a hypothetical bargain framework, see Elizabeth Scott & Robert Scott, *Marriage as Relational Contract*, 84 VA. L. REV.1225 (1998). A similar model can be applied to the cohabitation context.

programs that support particular family functions, and policies that benefit families (or particular types of families).¹⁵ Even in an earlier era when law makers insisted that families occupied a private sphere and that government bore no responsibility for dependency, the legal regime strongly supported traditional marriage and harshly sanctioned other family forms.¹⁶ This stance can be fairly criticized for excluding from legal protection some relationships that fulfilled the social function of families, but the fact that marriage was privileged on this basis in itself is unsurprising. Contemporary critics of marriage do not aim to deprive family of its privileged status; their goal is simply to shift or extend legal support and privilege to other family forms.

Thus, the contested issue is whether marriage, a particular family form that once had monopoly status, deserves continued deference, in an era in which other groups fulfill the function of family care. Two kinds of challenges are raised. First, marriage is rejected as obsolete; it is described as a union that once was dominant but that has been (or is being) supplanted by other family forms. Second, critics argue that marriage can not escape its history as a patriarchal institution that oppressed women who married and harshly discriminated against those who did not—especially unmarried mothers.¹⁷

¹⁵The law privileges families, particularly (but not exclusively) marriage. For example, parents get federal income tax deductions and child care credits for children and married couples can file a single tax return, which often offers tax advantages. Estate and gift tax law benefits family members; family status determines ranking under intestate succession laws. Parents can get government subsidies under federal TANF laws and the Family Leave Act allows spouses and parents to get leave from work when a family member is ill. Family members qualify for Social Security survivor benefits; government health insurance and pensions, etc. Zoning ordinances favors families over other groups. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Belle Terre v. Borass*, 416 U.S. 1 (1973); *Horn v. City of Ladue (Mo.S. Ct.) Haddock & Polsby, Family as a Rational Classification*, 74 Wash. U. L. Q. 15 (1996). Family members have a special status under rent control regulations See *Braschi v. Stahl Assoc.*, 543 N.E. 2d 49 (N.Y. 1989). See discussion of marital benefits, *infra* note _.

¹⁶Frances Olson, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 *Constitutionary Commentary* 319 (1993) MARTHA FINEMAN, *THE NEUTERED MOTHER*, *supra* note_

¹⁷Fineman, *Shaking the Foundations*, *supra* note _; Shanley, *Unwed Fathers' Rights, Adoption and Sex Equality: Gender Neutrality and the Perpetuation of Patriarchy*, *Col. L. Rev.* 60 (1995).

The first critique holds that the utility of marriage as a viable family form has declined too much for it to retain a privileged legal status. Even if marriage once functioned as a useful mechanism to meet society's dependency needs, this is not longer true, because of the dramatic social changes of the second half of the 20th century.¹⁸ Law should adapt to these changes by protecting all relationships that serve family functions and it should abandon the policy of elevating the status of formal marriage.¹⁹

These social developments and their implications for the status of marriage warrant a bit more attention. First, feminist commentators point to divorce rates of forty per cent or more as evidence that contemporary marriage no longer functions as a reliable setting for childrearing or for the satisfaction of other family dependency needs.²⁰ Divorce is associated with many psychological and economic costs to children,²¹ and spouses who dissolve their marriage will not be available to care for each other in old age. In short, marriage is so unstable, critics contend, that it is not serving the needs even of married couples and their children. Moreover, increasing numbers of children are reared outside of marriage, usually by their mothers, sometimes in extended families or in families that include fathers or de facto

¹⁸Fineman Contract and Care, *supra* note_; Coontz, *supra* note _; Stacey, *Brave New Families: Stories of Domestic Upheaval in the Late 20th Century* (1990).

¹⁹ Arguments for legal recognition of functional families have focused generally on relationships outside the traditional legal categories. These include both adult couples in informal unions and de facto parent-child relationships. Martha Minow, *Redefining Families: Who's In and Who's Out?* 62 *Colo. L. Rev.* 268 (1991); Katherine Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed*, 70 *Va. L. Rev.* 879 (1984); Joseph Goldstein, Anna Freud and Albert Solnit, *Beyond the Best Interest of the Child* (1973) (arguing that the law should protect the relationships between children and their psychological parents).

²⁰Divorce rates reached a peak of near 50% in the early 1980s. Since then, they have declined and stabilized at about 40%. See Hawken, et. al., *supra*, note_.

²¹ See research described in ROBERT EMERY, *MARRIAGE, DIVORCE AND CHILDREN'S ADJUSTMENT* (1999); Paul Amato and Alan Booth, *A Generation at Risk* (1997). Most research on the impact of divorce on children indicates that children are worse off after divorce unless divorce allows them to escape high levels of interparental conflict. See generally, research described in Elizabeth Scott, *Divorce, Custody and the Culture Wars*, 9 *Va. J. Soc. Pol. & L.* 95 (2001).

parents.²² Fineman and others point to these demographic trends as evidence that the importance of marriage as a context for child rearing has declined. Given that the special legal status of the family and its claim to government support rest largely on its child rearing function, marriage, on this view, no longer deserves the privilege that it has received traditionally.

Other critics challenge the sharp legal distinction between marriage and cohabitation on both utilitarian and fairness grounds. The number of couples who live together in informal unions has increased steadily over the past half century and mainstream society today is morally neutral toward this form of intimate association. In light of these developments, law makers increasingly are urged to extend marital privileges to unmarried couples on the ground that these relationships fulfill family functions and deserve the legal benefits and privileges that mostly have been limited to married couples.²³

These demographic and social trends have led to several law reform initiatives in recent years. Canada has led the way in extending marital rights and benefits to parties in same-sex and opposite-sex informal unions, and other Commonwealth and European countries have followed.²⁴ In this country,

²²See note 2, supra. Arlene Skolnick, *Family Values: The Sequel*, Am. Prospect, May-June 1997, at 83; Sara MacLanahan, *The Consequences of Single Motherhood*, Am. Prospect, Summer 1994 at 48. For the most comprehensive study and analysis of single parent families, see Irwin Garfinkel & Sara McLanahan, SINGLE MOTHERS AND THEIR CHILDREN; Sara MacLanahan & Gary Sandefur, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS.

²³See Minow, supra note __; *Braschi v. Stahl Assoc.*, 543 N.E. 2d 49 (N.Y. 1989)(applying functional family definition to same-sex partner of decedent tenant under New York rent control law). Courts have also recognized claims by de facto parents to continued relationships with children with whom they have lived in a functional family. See discussion in Ellman, Kurtz, & Scott, supra note __at__.

²⁴ Beginning in the 1970s, some Canadian provinces provided for financial support when informal unions dissolve. Ont. Fam. L. Reform Act of 1986 Sect. 29 & 30 RSO 1990, c F.3, s29 and s 30 (cohabitants of three years are “spouses” for purposes of spousal support); Fam. Rel. Act. Of Brit. Columbia RSBC 1996 as amended 10\1\98] ch. 128 Sect. 1 (same and opposite sex cohabitants living in “marriage-like” relationship for two years are spouses under spousal support statute). The Canadian Supreme Court recently held that government benefits extended to married couples could not be withheld from same sex couples under the Canadian Charter of Rights. *M v. H*.2 S.C.R. 3 (1999).

advocates for same-sex couples have argued with some success that the exclusion of this group from the benefits that accompany marital status violates the fundamental principle of equal treatment under law— and is bad policy as well.²⁵ Other reform proponents contend that the financial obligations of marriage should be extended to long term cohabitants to provide protection for financially vulnerable partners.²⁶ The American Law Institute recently proposed the legal recognition of a domestic partnership status that can give rise to marriage-like financial rights and obligations between partners in cohabitation unions with no affirmative act by the parties, and, indeed, without their consent.²⁷ These developments suggest that the line between marriage and informal unions has become blurred and that law makers are coming to believe that sharp legal distinctions are no longer warranted.

Some feminists offer a second critique, opposing marriage as a patriarchal institution that is the source of women's subordination and dependency. This challenge is familiar enough that it need not be

In New Zealand, financial support and property division claims are recognized when unions of three years duration dissolve. New Zealand Marital Property Act (2001). See also discussion of domestic partnership statutes in Denmark, (Danish Registered Partnership Act); Sweden, and France in A. L.I. Principles, Chapter 6, comment b.

²⁵Nan Hunter, *Marriage, Law and Gender: A Feminist Inquiry*, 1 *Law & Sexuality* 9 (1991); WILLIAM ESKRIDGE, *THE CASE FOR SAME SEX MARRIAGE* (1996); David Chambers, *The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 *Mich. L. Rev.* 447 (1996); Michael Wald, *Same Sex Marriage: A Family Policy Perspective*, 9 *Va. Soc. Pol. & Law* (2001). Three states, Vermont, California and Massachusetts, have extended the privileges, protections and obligations of marriage to same sex couples. *Baker v. State*, 744 A2d 864 (Vt. 1999); Vt. Stat. Ann. Tit. 15 §§1201-1207 (2002); Cal. Fam. Code §§ 297 (West Supp. 2004); *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (2003). In Vermont, the legislature enacted a civil union statute, rather than extending marriage to same sex couples. The Massachusetts court found civil unions not to be an adequate substitute for marriage, leading the legislature to consider enacting a state constitutional amendment prohibiting same sex marriage. At about the same time, President Bush announced support for an amendment to the federal constitution prohibiting same sex marriage. See note 11.

²⁶Grace Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 *U.C.L.A. L. Rev.* 1125 (1981); See discussion in Ellman, Kurtz, & Scott, *supra* note __ at __ to __.

²⁷ A. L.I. Principles, Ch. 6.

repeated here.²⁸ Feminists also point to exogenous harms of traditional marriage. Because powerful moral and religious norms historically dictated that marriage was the only acceptable venue for intimacy and reproduction, unmarried mothers and their children were subject to harsh social condemnation and excluded from the legal protections that accompanied marriage.²⁹ These attitudes persist in the public hostility and punitive policies toward unmarried mothers who are unable to support their families.³⁰

Given this history, some feminist critics find it difficult to consider seriously whether a case can be made for retaining the special legal status of what they believe is a corrupt and illegitimate institution. Although it might be conceded that social and legal changes have improved things to some extent, contemporary marriage, on the view of many feminists, continues to be contaminated by its patriarchal history.³¹ Moreover, less has changed than it might seem; wives are still burdened with responsibility for dependency without compensation for the useful work they do, and are thereby subject to discriminatory treatment.³² When marriages end in divorce, women and children are likely to suffer financial hardship under current alimony and child support laws. Beyond this, women who have invested in traditional roles often are ill-equipped to succeed in the employment sphere. In short, marriage is a bad deal for women and its decline as a family form is welcome.

B. A Preliminary Response

²⁸Many feminists welcome the decline of marriage and invoke the “obsolescence” critique in support of an ideological argument against marriage. See Fineman, *Contract and Care*, supra note _.

²⁹ Mary Shanley, supra note _; Martha Fineman, *the Neutered Mother* at _; Judith Stacey, *In the Name of the Family*, at _; Stephanie Coontz, *The Way We Never Were*, supra note _ at);

³⁰Judith Stacey, *id.* At _; Dorothy Roberts, *Motherhood and Crime*, *Iowa L. Rev.*; Fineman, *id.* at _

³¹Stacey, *Good Riddance to Families*, supra note _ at _; Polikoff, supra note _.

³²Arlie Hochschild, *The Second Shift*; Martha Fineman, *Shaking the Foundations*, supra note _; Amy Wax, *Bargaining in the Shadow of the Market: Is there a Future for Egalitarian Marriage?* 84 *Va. L. Rev.*509 (1998).

These critiques challenge the legitimacy and utility of contemporary recognition of marriage as a privileged legal status and suggest that American law lags beyond that of other Western countries in responding to social change. As to the functional critique, there is little question that marriage no longer represents the exclusive family form, and thus it no longer serves individual and societal dependency needs in the way that it once did. However, the fact that many persons today live in families not based on marriage, or that marriage itself is a less stable union it once was, should not obscure the reality that marriage continues to serve family care functions quite well for many people.³³ Although many marriages end in divorce, a majority do not, and, as I will demonstrate, even those that do provide financial and relationship benefits for dependent family members that derive from the formal legal status.³⁴ Thus, despite the demographic trend toward diverse family forms, it is plausible to assume that social and individual welfare is promoted by the continued availability of legal marriage as one component of a pluralistic family support policy. Such a strategy does not stigmatize any family form; it simply utilizes one that works quite well to provide for the care and support needs of many people.³⁵

The ideological critique of marriage is harder to answer, at least in a way that would satisfy its adherents. No consensus is likely to emerge on whether the cultural and social meaning of marriage today is indelibly tainted by its problematic history and gendered structure. I tend to be an optimist on this issue and to believe that contemporary marriage, although far from an egalitarian ideal, has already

³³As the census figures in note 2, *supra*, indicate, marriage is far from obsolete. In 2000, almost 57,000,000 couples lived in family units based on marriage, an increase of 15% since 1990. Moreover, most young persons see marriage as part of their future. See note 1, *supra*.

³⁴See *t.a.n.* _ to _ *infra*.

³⁵ Indeed, the robust pluralism that characterizes contemporary families has served to dilute the stigma traditionally attached to non-traditional families. The reason Dan Quayle harangued Murphy Brown is that the popular show presented unmarried motherhood in a positive light. See note _ *supra*.

changed considerably in a relatively short period. Law reform can reinforce this trend and mitigate the costs to women of gendered marital roles.³⁶ Of course, those who reject this view will be unmoved by arguments about the social utility of this institution.

II. The Case for Marriage

The model of marriage that I advocate has much in common with the contemporary version – but with some important differences. It is a status available to individuals who want to formally undertake a long-term commitment to another person of the same or opposite sex, to live together in an intimate and exclusive family union – a union dissolvable only through formal legal action. The exchange of marriage vows represents each party’s implicit agreement to be bound by a regime of informal social norms underscoring their commitment to the relationship and by a set of legal rights and obligations affirming that the union is one of economic sharing and mutual care. These obligations include the duty to care for one another and for any children who become part of the family, to share property and income acquired during the union, and to provide support to dependent family members should the union dissolve. Couples who undertake this formal commitment to one another become eligible to receive an array of government benefits and privileges, recognizing that their relationship of mutual care and support benefits society as well as themselves.

I will argue that government can and should maintain and support a family form of this type, and

³⁶Academics and law reformers have focused on how the legal regime could better protect dependent family members after divorce, particularly where one spouse has assumed a homemaker role. Scott & Scott, *Marriage as Relational Contract*, Jana Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 *Geo. L. J.* 2423 (1994); Ellman, *A Theory of Alimony*, *Cal. L. Rev.* (1989); Katherine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 *NW. U. L. Rev.* 1 (1996). Ellman’s approach to alimony as compensatory payment to homemaker spouses has been adopted by A.L.I. *Principles*, Ch. 5, *Compensatory Spousal Payments*.

that doing so is one means by which the state can protect vulnerable members of society and respond to the dependency needs that all individuals have over the course of a lifetime. Marriage is also a suitable mechanism through which the state can facilitate the pursuit of personal happiness by individual members of society, by respecting privacy and choice in the realm of family life. The policy I envision encourages couples in intimate relationships to choose marriage over informal unions, but, it is also respectful of those who choose unions defined by a shallower commitment.

A. The Importance of Non-Discrimination

Making marriage available to both opposite-sex and same-sex couples is important for several reasons. First, existing marriage law discriminates against lesbian and gay couples on moral and religious grounds that cannot be justified in contemporary society.³⁷ Legal marriage is a status that carries many government benefits.³⁸ If lesbian and gay individuals seek to declare their commitment to one another and their readiness to undertake family obligations by entering formal unions, then law makers can legitimately withhold marital status from same sex couples only if they can be distinguished in some relevant way from heterosexual couples with the same goals.³⁹ If the special legal status of

³⁷See note _ describing literature advocating legal recognition of same-sex marriage on constitutional or policy grounds, and legislation extending marital rights to same sex unions in Vermont and California. The argument is gaining recognition in courts also. The Supreme Judicial Court of Massachusetts recently held that withholding marriage from gay couples failed to meet rational basis review. *Goodridge v. Dep't of Public Health*, 798 N.E. 2d 941 (Mass. 2003). Some supporters argue that the constitutional claim has gained strength in the aftermath of *Lawrence v. Texas*, 123 S. Ct. 2472 (2003). However, the continued political hostility to same sex marriage is evident in the passage of the federal Defense of Marriage Act. 28 U.S.C. 1738C (2000). This statute provides that states need not recognize (or give full faith and credit to) same-sex marriages formalized in other states. Some scholars argue that the prohibition of same sex marriage is justified. See Lynn Wardle, *A Critical Analysis of the Constitutional Claims for Same Sex Marriage*, 1996 B.Y.U. L. Rev. 1.

³⁸The court in *Goodridge* provides a comprehensive description of the government benefits and privileges that married couples enjoy in Massachusetts. 798 N.E. 2d 941, _.

³⁹Most opponents of same sex marriage invoke religious or moral claims about the inherently heterosexual nature of marriage, or challenge same sex marriage as harmful to children. See Lynn Wardle, *supra* note _.

marriage is justified on the ground that the recognition of formal legal unions promotes caretaking and facilitates individual pursuit of happiness, these goals are satisfied through recognition of same-sex as well as opposite-sex unions.

The argument that states can not withhold the benefits of marriage from same sex couples has begun to take hold, as evidenced by recent judicial and legislative developments in several states.⁴⁰

⁴⁰ See note __.

However, same sex marriage continues to be the subject of much political controversy, similar to that surrounding mixed-race marriage in the 1950s and 1960s. In part in response to the recent legal reforms, amendments to state and federal constitutions prohibiting same sex marriage have been proposed.⁴¹ Nonetheless, it seems inevitable that equality-based arguments will ultimately prevail and that same sex marriage will eventually gain acceptance— in much the same way as mixed-race marriages have become accepted in mainstream society.

A second reason to extend marriage to gay couples is that an inclusive stance would function effectively to distance contemporary legal marriage from its historic origins, and signal that the modern status is a union that is not grounded in hierarchical gender roles.⁴² This innovation would clarify that marriage enjoys a special legal status because of its tangible and intangible social benefits and not because of its moral superiority as a family form that preserves traditional roles.⁴³ This legal reform, of course, would not interfere with the ability of religious or social groups to maintain the traditional form of marriage.

Today, the most compelling arguments against privileging marriage over non-marital unions are made on behalf of same-sex couples. Courts extending rights based on family status to partners in

⁴¹See note _ above.

⁴²Some advocates for same-sex marriage have made this argument. See Nan Hunter, *supra* note _ (“What is most unsettling to the status quo about the legalization of lesbian and gay marriage is its potential to expose...the historical construction of gender at the heart of marriage. [T]he impact of lesbian and gay marriage ...will dismantle the legal structure of gender in every marriage.”). But see Nancy Polikoff, *supra* note _, (arguing that gay and lesbian advocacy of marriage is unlikely to transform gendered marriage and threatens to distort gay and lesbian values and goals.) See also Polikoff, *supra* note 42.

⁴³ The enactment to the Defense of Marriage Act by Congress followed intense advocacy by groups who saw same sex marriage as a moral and social threat. 28 U.S.C. 1738C (2000). .

same-sex relationships are clearly moved by the unfairness of the discriminatory exclusion that these couples face.⁴⁴ If same sex couples are allowed to marry, the argument becomes a narrower (and much weaker) claim on behalf of parties in informal unions who have the option to marry but choose not to do so.

A fair question is whether a non-discrimination policy toward marriage should result in legal recognition and privileging of relationships other than conjugal dyads. Many commentators have argued that non-conjugal family groups should be accorded the privileged legal status of marriage.⁴⁵ In part, the argument simply advocates parity between functional families and marriage, a position that I challenge in this essay. However, a more difficult question is whether a regime of formal registration should be extended to other family groups. For example, two sisters or a group of three or more close friends who function as a family might wish to undertake a formal legal commitment to one another that involves the responsibilities conventionally associated with marriage. My tentative response is that these relationships should not be accorded the privileges of marriage— at least not yet. I will argue that an important contributor to the stability of marriage as a family form lies in reinforcement of mutual commitment provided by the social norms surrounding this particular relationship. Currently, non-

⁴⁴See, e.g. *Braschi v. Stahl Associates*, *supra* note __, in which the New York Court of Appeals determined that the gay life partner of a tenant in a New York rent control apartment was a “family” member for purposes of protection under the rent control statute. The court described Braschi and the decedent as “two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence,” that was not “given formal recognition by the law.” It then concluded that the statutory meaning of “family” should not be rigidly restricted to those “who have formalized their relationship by obtaining...a marriage license...”

⁴⁵The Law Commission of Canada issued a report in 2001 advocating legal recognition and privileging of a broad range of close personal adult relationships. *Beyond Conjuality: Recognizing and Supporting Close Adult Personal Relationships*, available at http://collection.nlc-bnc.ca/100/200/301/cec-cdc/beyond_conjuality-e/pdf/37152-e.pdf. Nancy Polikoff opposes same-sex marriage and argues that American law should follow the example of this report and offer legal support to all relationships that serve family functions. Nancy Polikoff, *Ending Marriage as We Know It: Reconsidering the Goal of Same Sex Marriage in Light of Canada’s Beyond Conjuality Report*, Hofstra L. Rev. (2004).

conjugal affiliations would not benefit from this source of stability— although, this may change in the future. Moreover, the transaction costs involved in defining and enforcing mutual responsibilities in unions involving more than two adults would be formidable. Although many relationships between and among adults may fulfill family functions, my inclination is to limit the privileged status of “marriage” to conjugal dyads.

B. Marriage as a Commitment Contract

Legal marriage functions quite well as a family form in providing care and support to members for at least two reasons. First, marriages tend to be more stable relationships than are informal affiliations, in part because the formal status is grounded in and reinforces commitment. In the aggregate, marriages last longer and produce greater happiness and less conflict than cohabitation unions.⁴⁶ Because of its greater stability, marriage is likely to function more reliably as a family form that provides care to vulnerable individuals. Second, formal marriage is a relationship that embodies clearly defined expectations, including financial and emotional understandings about mutual responsibility, support and sharing. These expectations are incorporated in the legal rights and obligations that constitute the marriage contract and regulate its dissolution.⁴⁷ Although contemporary

⁴⁶This statement is supported by a substantial body of quantitative research comparing marriages with informal unions on several dimensions, including duration, parties’ health, income, relationship satisfaction, domestic violence, etc. See research summarized in Linda Waite, *Does Marriage Matter?* Supra note __; Judith Seltzer, *Families Formed Outside of Marriage*, supra note __; Steven Nock, *Marriages and Cohabiting Relationships*, supra note __; Linda Waite, *A Comparison of Marriage and Cohabitation*; MARRIAGE IN MEN’S LIVES; Norval Glenn, supra note __. An important issue in evaluating this research is whether marriage itself accounts for the differences that are observed or other factors, such as differences in individuals who choose different types of unions.

⁴⁷Robert Scott and I have argued that the legal default rules regulating marriage and divorce constitute (many of) the terms of the marriage contract, and that optimal rules can be designed (and existing rules evaluated) within a hypothetical bargain framework. Scott & Scott, *Marriage as Relational Contracts*, supra note __.

marriage and divorce law falls short in this regard,⁴⁸ marriage, properly structured, can provide substantial financial protection to dependent spouses and other family members.

1. Marriage as a Stable Family Form

a. Formal Commitment and Stability of Marriage

In part, marriage is more stable than are informal unions because of self-selection. Individuals who want a committed relationship of mutual care search for partners with similar goals for intimacy. The availability of marriage, a status with a well established social and legal meaning, allows them to coordinate: Each party's choice to marry signals to the partner and to the community that he\she is what Eric Posner calls a "good type" – a responsible person ready to undertake a long term commitment to an exclusive intimate affiliation.⁴⁹ The marital vows also represent explicit and implicit promises by each spouse to accept a set of responsibilities that will assure that the other's dependency needs are met. Through marriage, each party binds herself and each can rely on the other's good intentions.⁵⁰ Those who are unwilling to undertake such a commitment do not choose to marry.

Beyond its function as an effective sorting and matching mechanism (separating committers from non-committers and matching committers), the institutional dimensions of marriage operate to reinforce commitment. First, the ceremonial traditions surrounding the entry into marriage– wedding and engagement rings, announcements, bachelor parties, and formal weddings– underscore the seriousness of the commitment that the change in status represents. More importantly, marriage is an institution has

⁴⁸Id at _.

⁴⁹Eric Posner, Family Law and Social Norms, in *The Fall and Rise of Freedom of Contract*, (ed. F.H. Buckley (1999)); Also on the signaling function of marriage, see Trebilcock, *Marriage as a Signal*, in *The Fall and Rise of Freedom of Contract*, (ed. F.H. Buckley (1999)); Bishop, *Is He Married? Marriage as Information*, 34 U. Toronto L. J. 245 (1984). .

⁵⁰Scott, *Rational Decisionmaking about Marriage and Divorce*, Va. L. Rev. 1990; Posner, id. at _

a clear social meaning and is regulated by a complex set of social norms that promote cooperation between spouses— norms such as fidelity, loyalty, trust, reciprocity and sharing.⁵¹ These norms express the unique importance of the marriage relationship. They are embodied in well-understood community expectations about appropriate marital behavior that are internalized by individuals entering marriage. To be sure, some norms that have traditionally regulated marriage reinforced hierarchical gender roles -- which is one reason that feminists understandably are wary of marriage.⁵² However, many marital norms (loyalty, fidelity, trust) create behavioral expectations for both husband and wife that underscore their mutual commitment to the relationship.

The social norms and conventions surrounding marriage influence spousal behavior in a variety of ways that reinforce the stability of the relationship.⁵³ For example, the wedding ceremony and accompanying traditions can be understood as a public announcement of an important change in status. The ceremony usually includes the couple's exchange of vows and declaration of commitment before friends and family. Symbolically, at least, this represents an expression of each spouse's willingness to be held accountable, not only by the other spouse but also by the broader community, for faithful performance of marital duties. Marital status also signals the community that the spouses are not available for other intimate relationships, and thus discourages outsiders interested in intimacy from

⁵¹I have argued that the traditions and social norms regulating marriage serve to promote cooperation and to reinforce the stability of the relationship. See Elizabeth Scott, *Social Norms and the Legal Regulation of Marriage*, 86 Va. L. Rev. 1901 (2000).

⁵²Gender norms define expectations about the marital (and other) behavior of husbands and wives in ways that reinforce traditional gender roles. For example, traditional gender norms encourage husbands to be wage earners and wives to be primary caretakers). See Scott, *Social Norms*, supra note _.

⁵³*Id.* at _.

approaching married persons.⁵⁴ In general, the fidelity norm is quite robust; the spouse contemplating adultery will anticipate costs associated with guilt and community disapproval.⁵⁵ Finally, the normative framework of marriage generally encourages cooperation between spouses and deters exit from the relationship.⁵⁶ To be sure, enforcement of marital norms has weakened considerably in the last generation or two, and thus their power should not be exaggerated. Nonetheless, the informal regime that regulates formal marriage serves to reinforce commitment in a relationship that is almost universally recognized to signify a uniquely important affective bond.

The formality of marital status, together with the requirement of legal action for both entry into marriage and divorce, clarifies the meaning of the commitment the couple are making and underscores its seriousness. Legal scholars have long recognized that formal requirements serve these functions. Lon Fuller famously described legal formalities as serving three functions in contract law: an evidentiary function of clarifying the terms and meaning of the contract; a cautionary function of encouraging deliberation by the parties in executing the agreement; and a channeling function of providing a simple external test of an intention by the parties to undertake a particular set of legally enforceable obligations.⁵⁷ These functions are evident in the legal formalities associated with marriage. Although

⁵⁴See Bishop, *supra* note _.

⁵⁵Contemporary survey evidence indicates a high level of disapproval of adultery. In one poll, 77% of respondents found extramarital sex to be “always wrong.” Nock, *Marriage in Men’s Lives*. Today, of course, in most communities, sanctions for adultery are milder than in earlier times. Nonetheless, at a minimum, the spouse who violates this norm can anticipate gossip and awkwardness in relations with friends and neighbors, not to mention (in most cases) severe disruption of the marriage relationship.

⁵⁶Robert Axelrod has described the way in which reciprocal cooperative interactions can result in a stable equilibrium. Robert Axelrod, *The Evolution of Cooperation* 30-33 (1984)(describing patterns of cooperation in iterated games). For an application of Axelrod’s model to marital interactions, see Scott, *Social Norms*, *supra* note _

⁵⁷Lon Fuller, *Consideration and Form*, 41 *Colum. L. Rev.* 799 (1941)

wedding ceremonies vary a great deal depending on the couple's religious traditions, wealth and preferences, all couples must "register" their marriage with civil authorities as a legal change in status. The formality of the occasion encourages deliberation and solemnity— an acknowledgment that the decision represents an important commitment and the undertaking of legal obligations between the spouses. Finally, the nature and extent of these obligations are defined by the formal legal status.

The package of substantive legal obligations that goes with the formal status of marriage serves independently to promote stability in the relationship. The mutual duty of financial support and physical care,⁵⁸ the presumption that marital property and income will be shared, and the duty to share a portion of each spouse's estate automatically attach upon marriage. These obligations sharply distinguish this relationship from other affective bonds; and the willingness to conform to the law's expectations is a good measure of each party's intentions for an enduring union. Although spouses are freer than they were a generation ago to contract out of marital obligations, few in fact do so.⁵⁹ The goals and personal expectations of most individuals entering marriage align with the legal obligations that they undertake in deciding on this formal status.⁶⁰

The stability of marriage should not be exaggerated, of course, in an era in which a large percentage of marriages end in divorce. Nonetheless, the factors that I describe serve to stabilize marriages as relatively durable and harmonious affiliations— at least in comparison with informal

⁵⁸Under the necessities doctrine, spouses are liable to third parties who provide "necessaries" to the other spouse— including medical care, shelter, etc. *North Carolina Baptist Hospitals v. Harris*, 354 S.E.2d 471 (N.C. 1987).

⁵⁹ Usually premarital agreements are executed to protect the inheritance of children of an earlier marriage from a spousal claim or to protect one spouse's wealth and/or income from the other. See I. Ellman, P. Kurtz, & E. Scott, at 801.

⁶⁰ Most individuals entering marriage view it as a lifelong commitment. Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 *Law & Hum. Behav.* 439 (1993).

unions.⁶¹ In entering marriage, most couples expect to be together for a long time in a relationship in which they provide mutual care and support to one another (and to children who join the family). The normative and legal framework, by structuring marriage as a solemn affirmative decision to undertake serious mutual obligations and to conform to a prescribed set of behavioral expectations, enhances their prospects of achieving their goal.

b. Comparing Cohabitation to Marriage

A significant body of research demonstrates that, in general, marriages are more stable than are cohabitation relationships. Marriages tend to last considerably longer than do informal unions; most cohabiting couples either marry or break off the relationship within a few years.⁶² Cohabiting individuals also express lower levels of commitment to their relationships than do spouses, and they are less likely to be in accord with one another on this dimension.⁶³ Research also indicates that cohabiting partners are more likely than married persons to engage in acts of sexual infidelity⁶⁴ and domestic violence,⁶⁵ and that spouses generally express greater happiness with their relationships.⁶⁶ Finally,

⁶¹See discussion in Section b, *infra*.

⁶²Judith Seltzer, *supra* note _ at 1249; Steven Nock, *Marriages and Cohabiting Relationships*; LINDA WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE*; ; Bumpass & Liu, *supra* note _ (only 10% of couples continue to live together in informal unions for 5 years); Willis & Michael, *supra* note 2. Moreover, those who cohabit and then marry have less stable marriages than couples who do not cohabit, probably because of selection effects. Nock, *Marriage and Cohabiting Relationships*, *supra* note _ at _o at _.

⁶³Nock, *Marriages and Cohabiting Relationships*, *supra* note _ at _

⁶⁴*Id.* at _. They are also less satisfied with the sexual relationship with their partner. See Waite and Gallagher, *supra* note _ at 82-83.

⁶⁵Linda Waite, *Trends in Men's and Women's Well-Being in Marriage*, in L. Waite, (ed.), *The Tie That Binds*, 368 at 379-83. Waite found that engaged cohabiting couples had domestic violence rates comparable to married couples (a probability of 3.6% over the coming year). The probability for cohabiting couples with no plans to marry was 7.6%. *Id.* at 381-82.

⁶⁶Bumpass, Sweet & Cherlin, *supra* note _; Waite *id.*

spouses are more likely to share assets and income and to co-mingle their finances.

The earlier discussion suggests why, in the aggregate, cohabitation unions are less stable than marriage. As with marriage, self-selection plays a role. To state the obvious, cohabitation may appeal to some couples because it is *not* marriage. Cohabitation relationships may be casual affiliations entered into for limited purposes without serious consideration of commitment-- or they may be trial unions that allow the couple to determine whether they want to commit to one another.⁶⁷ Some cohabiting couples, to be sure, may share a long term commitment, but decline to marry for principled or practical reasons.⁶⁸ Alternatively, a cohabitation union that begins casually or tentatively may evolve over time into a stable union that is like marriage in many regards. For the most part, however, informal unions can be distinguished from marriage by the parties' intentions and goals for the relationship.

Another difference between cohabitation and marriage (and source of instability for cohabitation) is that informal unions are "underinstitutionalized."⁶⁹ In contrast to marriage, no well defined social norms encourage cohabiting parties to act toward one another in ways that reinforce the relationship. In part, this is because the expectations and understandings of the parties in these unions vary. While couples entering marriage are provided with an established template of behavioral patterns that most will follow, no such template guides cohabiting couples, even those who are inclined toward commitment. Moreover, the cohabiting couple's family, friends and community may lack clear

⁶⁷See Seltzer, *supra* note __, explaining that a high % of cohabiting couples marry within a year or two.

⁶⁸For example, marriage might result in loss of Social security benefits, pension rights, or spousal support from an earlier marriage. Some individuals and couples reject marriage for ideological reasons, and some are wary due to earlier marital failures. See Carol Smart, *Stories of Family Life: Cohabitation, Marriage, and Social Change*, 17 *Can J. Fam. L.* 20 (2000).

⁶⁹Nock, *Marriage and Cohabiting Relationships*, *supra* note __.

expectations about cohabiting behavior. Thus, the norms that regulate informal unions are tentative and uncertain at best, in contrast to the informal regime of expectations and enforcement that reinforces cooperative behavior in marriage.⁷⁰

If marriage is a more stable family form than are informal unions, then in this regard, at least, it is superior as a setting for satisfying family dependency needs. Couples in stable intimate partnerships are better able to generate financial and emotional resources that are necessary for the care of children and other dependent family members over an extended period of time. They also are more likely to be available to provide care to one another in old age and in times of illness. The value of family stability is important in other ways. It is well established that secure relationships with parents contribute in critical ways to healthy child development and that family dissolution imposes financial and psychological costs on children. Other than in situations of domestic violence, intense inter-parental conflict, or other maltreatment, children's development usually is enhanced if their parents' relationship endures.⁷¹ In general, adequate fulfillment of family dependency needs requires ongoing involvement and investment over time— which is more likely to happen in marriage than in informal unions.

2. Marital Obligations and the Satisfaction of Dependency Needs

a. Financial Obligations in Marriage and Divorce

Marriage is a useful family form not only because it tends to be more stable than other unions,

⁷⁰Id. At __. See also Julie Brines & Kara Joyner, *The Ties That Bind: Principles of Cohesion in Cohabitation and Marriage*, 60 *Am. Soc. Rev.* 333 (1999). These authors describe costs and benefits of the absence of a system of social norms regulating informal unions. Cohabiting couples are freer to experiment and develop relationships that are tailored to their individual needs. However, the partners may have less incentive to jointly invest in the relationship and they lack guidelines for “how partners might conduct themselves once they set up a household.” Id at 350-51.

⁷¹Robert Emery, *supra* note __. See Studies described in Scott, *Pluralism, Parental Preference and Child Custody*, *Cal. L. Rev.*

but also because the formal undertaking of legal rights and obligations that accompanies marriage can function to provide financial security to families members. When they exchange marital vows, individuals agree that they will take upon themselves a substantial measure of responsibility for each other's needs, and the needs of children who may join their family (and possibly other family members as well). The agreement to assume these obligations and the satisfactory performance of marital duties relieve society of that much of the burden of dependency. Thus, it is fair to say that responsibility for dependency in marriage is not simply relegated to the private realm of the family by the government, as some feminists have argued. Rather, through marriage, the individual spouses represent to society as well as to each other a willingness to assume a substantial portion of the burden of family care and support.

Contemporary legal regulation of marriage and divorce creates a set of rights and duties between spouses that offer greater financial security to family members in marriage than other families enjoy. To be sure, the marital duty to provide financial support to dependant spouses and children is seldom legally enforced in intact families. Nonetheless, the obligation is well understood and, for the most part, legal enforcement is unnecessary.⁷² Family members living together usually tend to identify individual and collective interests— and it is hard *not* to share a standard of living. A combination of strong social norms and affective bonds usually is sufficient to encourage spouses and parents to provide adequate care and support to dependent family members. The refusal to provide adequately for family members' needs despite the ability to do so is likely to be met with disapproval from friends,

⁷²McGuire v. McGuire, 59 N.W.2d 336 (Neb. 1953) (holding that legal obligation of spousal support is not enforceable in intact marriage). There are good reasons not to enforce financial obligations in intact marriages. See Scott & Scott, Marriage as Relational Contract at _.

neighbors, and community members.⁷³

The formal legal status becomes even more important as a source of protection to dependent family members if the marriage ends in divorce. The default rules that regulate support and property distribution on divorce can best be understood as the dissolution terms of the marriage contract.⁷⁴ The exchange of marital vows represents agreement to be bound by the legal obligations embodied in these rules (and offers the assurance that the other spouse is also bound). Property and support rules can prescribe with relative certainty the claims held by dependent spouses to property and (together with minor children) to financial support when marriage ends. The quality of financial protection received by vulnerable spouses and children on divorce depends on the extent and certainty of obligations under divorce doctrine, of course, and contemporary law is far from optimal in this regard. Criticism of current law, however, should not lose sight of the fact that the legal framework regulating divorce can (and to an extent, does) serve as an effective mechanism to define financial obligations on the basis of marital roles when marriage ends.

b. Meeting Family Dependency Needs in Cohabitation Unions

1. Expectations and Enforcement Informal unions function far less effectively to assure that

⁷³Scott, Social Norms, supra. note __; Scott & Scott, Marriage as Relational Contract. An extreme example of this behavior is the recent New Jersey case in which adoptive parents were accused of starving four of their seven children, and seemingly took good care of the others. Iver Peterson, In Home That Looked Loving, 4 Boys Suffering was Unseen, NY Times, 10\28\03 at A1. Public outrage at the alleged conduct was intense, although the story, as it unfolded, suggested complexities not known at the outset (including the possibility that the children suffered from medical\ psychological conditions that contributed to their condition. Leslie Kaufman, and Richard Lezin Jones, Amid Images of Love and Starvation, A More Nuanced Picture Emerges, N.Y. Times, Nov. 3, 2003, at 31. Nonetheless, the parents face criminal charges for their conduct.

⁷⁴Scott & Scott, Marriage as Relational Contract, supra note __ at __. Marriage also has more subtle protective effects that protect family members after dissolution. Divorced non-custodial parents comply with child support payment orders at a much higher rate than their unmarried counterparts, and are more likely to maintain relationship with their children. .

the dependency needs of vulnerable family members will be met. In comparison with marriage, cohabitation relationships are not regulated by clearly defined norms that prescribe behavioral expectations of financial support and sharing. More importantly, these unions lack a legal framework that prescribes and enforces financial obligations. Together with (and related to) variations in level of commitment, couples living together have varying expectations about financial interdependency. Many couples likely assume that property and income acquired while the couple live together are not shared--this preference may be a reason not to marry. Some may engage in income pooling but expect that property is separate, while others may assume that income and property are shared but that the support obligation ends when the relationship dissolves. Still other unmarried couples may view their mutual obligations to be indistinguishable from marriage. The expectations about the duty to provide financial support of a partner's child from an earlier union also likely vary considerably among cohabiting couples. Finally, the parties may not even have the *same* understanding or expectations about financial sharing, particularly upon dissolution. One may believe the union is marriage-like, while the other may prefer cohabitation over marriage as a means of enjoying the benefits of marriage while limiting financial obligations.

The freedom that we have today to live in informal unions expands our opportunities for arranging our intimate lives according to our preferences. From the perspective of society, however, cohabitation is less satisfactory than marriage as a family form. This is due to a reduced level of commitment and stability generally in informal unions, and also to the uncertainty that is generated by the lack of uniformity in the expectations and understandings about financial responsibility. Moreover, even in marriage-like unions, dependent partners confront a harsh reality when the relationship ends. Because cohabitation unions carry no prescribed legal obligations and because cohabiting couples usually do not

formalize their understandings contractually, ex post determination of the nature of the parties' expectations about financial sharing and support is difficult. As a result, legal enforcement of financial obligations is an uncertain business. Even in long-term cohabitation unions in which the relationship appears to be marriage-like, courts often fail to find sufficiently clear mutual understanding between the parties to support contractual enforcement.⁷⁵ Thus, in comparison to marriage with its set of relatively clear obligations, informal unions provide little financial security for vulnerable family members.

2. A.L.I. Domestic Partnership Status The A.L.I. Domestic Partnership Principles are designed to remedy this problem. A domestic partnership under the A.L.I. Principles differs considerably from the standard version of this status, which typically is available through registration and carries relatively limited government benefits.⁷⁶ The Principles, in contrast, offer a standard by which courts can evaluate financial disputes between intimate partners when informal unions dissolve: If the court determines ex post that the relationship was a domestic partnership, it is subject to the rules for property division and compensatory support payments that apply to marriage. [The Principles do not affect government benefits or create a privileged legal status.] Under the A.L.I. scheme, same- or opposite-sex couples who live together for a prescribed cohabitation period (2 or 3 years is suggested)

⁷⁵See e.g. *Friedman v. Friedman*, 24 Cal. Rptr. 892 (1994); *Morone v. Morone*, 429 N.Y.S.2d 592 (1992); *Tapley v. Tapley*, 449 A.2d 1218 (N.H. 1982). Some courts and legislatures have found that a written agreement between cohabiting parties is necessary for enforcement of financial obligations. *Posik v. Layton*, 695 So. 2d 759 (Fla. App. 1997); Minn. Stat. Sects 513.075; 513.076; Tex. Bus. & Com. Code Sect 26.01 (b)(3). Since few cohabiting couples execute written agreements, a writing requirement means that few claims will be recognized. Robbenolt & Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Therapeutic and Preventative Approach*, 41 Ariz. L. Rev. 417 (1999).

⁷⁶Many domestic partnership laws are municipal ordinances designed to provide limited government benefits (health and life insurance for partners of government employees) for same-sex couples; In 2003, California enacted a comprehensive domestic partnership statute which extends to same-sex couples who register as domestic partners, the legal "rights, protections, benefits and responsibilities" that are granted to spouses. See note _ supra. Several European countries have adopted comprehensive "registered partnership" laws, which extend marital rights to same sex couples. See Ellman, Kurtz, & Scott, at 982-86.

are presumed to be domestic partners. If the status is contested, however, the determination of whether the union qualifies can involve a broad ranging inquiry into the nature of the relationship; for example, factors under the standard include whether the couple intermingled finances, maintained a “qualitatively distinct relationship,” shared emotional and physical intimacy, assumed specialized roles, and acknowledged their commitment to one another.⁷⁷

One aspect of the A.L.I. domestic partnership status deserve further attention. As I have mentioned, the status is imposed automatically at the end of the cohabitation period without the parties’ consent. Couples who don’t want to be subject to the property distribution and support obligations of marriage can opt out through express agreement— at least in theory.⁷⁸ However, the Principles limit couples’ ability to contract out of domestic partnership obligations by giving courts broad discretion to refuse to enforce these contracts when there is a substantial disparity between the financial distribution under the agreement and the outcome prescribed by the Principles.⁷⁹ Thus, at least implicitly, the Principles take the normative position that cohabiting couples should not be free to choose lasting unions of limited interdependency and commitment.

Putting aside its illiberal character for now, the A.L.I. domestic partnership status promises to

⁷⁷Principles, Ch. 6 Sect. 6.03. Couples who have a child are presumed to be domestic partners if they live together.

⁷⁸Chapter 7 of the Principles regulates agreements between parties that opt out of the obligations established under the Principles.

⁷⁹The Commentary in Chapter 7 of the Principles emphasizes that contracts dealing with the consequences of family dissolution can not be enforced under standard contract doctrine that applies to commercial contracts because married individuals are subject to cognitive limitations in their capacity to anticipate dissolution and also because of the differences between intimate and commercial relationships. See Commentary Sect. 7.02. Section 7.05 provides that agreement terms should not be enforced that would “work a substantial injustice.” This may be found after a fixed number of years (as set by a rule of statewide application) where there is a substantial disparity between the outcome under the agreement and the outcome under prevailing legal principles.

provides greater financial protection to dependent parties in informal unions than is currently available. It will mitigate real hardship and unfairness by enforcing expectations in long-term marriage-like unions and by discouraging exploitation by parties with greater financial sophistication and resources. However, the mechanism by which these beneficial ends are accomplished is costly, intrusive, and fraught with uncertainty. In contrast to couples who choose formal marriage, parties in informal unions will not know until after the relationship ends whether it qualifies as a domestic partnership. This uncertainty makes domestic partnerships rather unreliable as a means of fulfilling family dependency needs.

The substantial cost and limited utility of the A.L.I. domestic partnership derives from its structure as an ex post designation of family status. First, from the perspective of judicial economy, the new status promises to generate a flood of litigation by hopeful claimants. Given the indeterminacy of the standard, the pay-off for successful claimants, and the relatively modest duration of the proposed cohabitation period, it seems likely that many marginal claims will arise when informal unions dissolve. Moreover, under the complex and indeterminate standard for demonstrating domestic partnership status, expensive and intrusive inquiries often will be necessary to discern whether the relationship qualifies as a domestic partnership. (What evidence will be offered of the parties' emotional and physical intimacy?) As is always true with ex post inquiries, the parties are likely to offer conflicting accounts of their relationship and courts must try to sort out the truth.

This is not to say that courts should reject property and support claims by dependent partners in long term cohabitation unions. Valid claims should be recognized: Enforcing the expectations of the parties in marriage-like unions and preventing exploitation are important goals that support legal enforcement, despite the messiness of the process. I will shortly turn to an alternative framework that is

based on contract default rules, an approach that is more solidly grounded in conventional doctrine and in familiar liberal principles than is the A.L.I. approach. However, it is important to be clear that ex post determinations of family obligations in informal unions offer only limited protection to dependent family members— whether under the A.L.I. Domestic Partnership Principles or through a regime of contract default rules. This is because the nature of the parties’ commitment to one another and the contours of their legal obligations are ascertained only when the relationship ends. The partner who chooses to undertake a specialized family role that leaves her financially vulnerable can hope that she will be provided with support and a share of property should the relationship end, but that will happen only if a court concludes that the criteria for domestic partnership or contractual obligation have been met.

The advantages of marriage as a formal commitment undertaken ex ante by the parties become more apparent when compared to cohabitation or to domestic partnership status as envisioned by the A.L.I. Parties in informal unions can establish financial claims, but it is a cumbersome and uncertain business. The A.L.I. approach invites litigation about the status itself and only when that is settled can dependant family members have any measure of security. Substantial benefits follow if couples in functional family unions formalize their relationships; at that point, the terms of their commitment and the extent of mutual financial obligations are clear and need not be determined through ex post inquiry. Thus, society quite sensibly might prefer that couples in long-term intimate unions choose marriage over cohabitation.

D. A Functional Justification for Marital Privilege

The upshot of my analysis is that law makers should (continue to) treat formal marriage as “special,” not because it is morally superior to other family affiliations, but as a means of encouraging

couples in or contemplating committed unions to formalize their relationships and of rewarding them for doing so. Couples who are ready to undertake commitment will be more likely to marry if marriage offers some advantages over cohabitation. Marital privilege also serves as compensation for the willingness of couples to undertake the obligations of marriage and to abide by its sharing and responsibility norms.⁸⁰ Thus, under a well structured marital regime, government benefits and protections serve as a *quid pro quo* for the couple's agreement to alleviate society's dependency burden.

A package of modest but tangible government benefits and privileges serves these purposes. Special treatment of married couples in the domains of income and estate tax, military and government pensions, family leave, health and life insurance, and social security benefits are familiar under the current regime. Other dimensions of marital privilege such as inheritance rights and guardianship designation give each spouse a special status in relation to the other, acknowledging the presumed preferences of married persons.⁸¹

Calibrating the level of marital privilege –how special the legal status of marriage should be–is a tricky business, and it is unclear whether the current package of benefits is optimal. The level of privilege should be sufficient to encourage couples to formalize their unions, but not so excessive that the social cost of maintaining a special status exceeds the benefits. In general, as compared to other family forms, marriage would seem to be a relatively cost- effective means to satisfy dependency needs.

⁸⁰“Marital privilege” (ie what distinguishes marriage as a special legal status) is conventionally interpreted to include government benefits, privileges, rights and duties, and also the rights and obligations between the parties.

⁸¹ The default designation of spouses as presumed guardians for one another and as surrogate decisionmakers under medical consent statutes assign roles that are presumed to reflect the preferences of most spouses. Inheritance rights similarly embody presumed preferences, with the important qualification that spouses can not be disinherited.

Fulfillment of the marital support obligation by wage-earning spouses provides resources that are not reliably available to other families, who may require more in the way of direct government subsidies. In short, modest levels of government benefits would likely be money well spent if the desired effect of encouraging marriage is produced.⁸²

Legal privileging of marriage might also be challenged if it has the undesirable effect of contributing to social stratification by elevating marriage over other family types.⁸³ The privileged status of marriage has symbolic as well as functional importance, signaling society's approval of this family form. Although many conventions that define marriage as a status of social distinction are not legal in nature,⁸⁴ the legal privileging of marriage has contributed historically to the stigmatizing of other families. To some extent, this problem is mitigated if marriage is available to all couples, without discriminatory exclusions.⁸⁵ Moreover, families composed of unmarried parents and their children are also entitled to many of the legal benefits of marriage, and may be eligible for other government benefits needed to provide adequate support.⁸⁶ Nonetheless, this concern reinforces the

⁸²Of course, if the package of marriage benefits is too generous, some individuals or couples who lack commitment may be tempted to marry. Sham marriages offer little social benefit and excessive privilege undermines the signaling function of marriage between the parties. Spouses who marry opportunistically can not be counted on to fulfill their obligations of support and sharing, but fraud might be costly to detect—at least in intact marriages. Monitoring costs are high in intimate family relationships. Scott & Scott, *Parents as Fiduciaries*, supra note __. Moreover, dissolution can be costly and disruptive and post-divorce enforcement of obligations could be costly with this

⁸³See t.a.n, supra note __.

⁸⁴Non-legal symbols include engagement and wedding rings, announcements, name change, and fancy weddings. See Scott, *Social Norms at 1917-18*. Some of these are less prevalent than in earlier periods—name change and bans, for example.

⁸⁵ Advocates for access to marriage for same-sex couples have emphasized its symbolic importance. See William Eskridge, *The Case for Gay Marriage*, supra note __.

⁸⁶Benefits that are available to families that include children, regardless of whether parents are married include government employee health care benefits, family leave, and Social Security disability and survivor benefits.

admonition against excessive privilege. The social utility of marriage justifies a modest incentive- and compensation-based privilege; it does not justify stigmatizing distinctions.

One implication of this rationale for privileging marriage is that opting out of marital obligations through premarital agreements becomes more problematic than it is understood to be under current law.⁸⁷ If marriage (in part) is a contractual exchange between society and the couple, the availability of this privileged status should be contingent on the couple's readiness to assume the obligations of financial sharing and support. Other intimate relationships between adults properly belong in the domain of contract.

III. Enforcement of Obligations in Non-Marital Unions

The legitimate preference that lawmakers have for formal marriage with its set of clear obligations does not mean that *inter se* financial claims by parties in long-term informal unions should be rejected. Any other response would often result in harsh inequity;⁸⁸ sanctions for failure to choose

Single-parent families may also be eligible for direct financial subsidies that are not available to married couples, under programs such as TANF, etc. This is not to suggest that the package of benefits available to other families currently is adequate to satisfy family dependency needs.

⁸⁷ The trend has been toward more routine enforcement of premarital agreements, although recently there has been some retrenchment. The traditional approach was to monitor these agreements for both procedural and substantive fairness, and to set aside agreements that were unfair either at the time of execution or at the time of enforcement (typically when the parties divorce). The Uniform Premarital Agreement Act, adopted by 24 states, focuses on procedural fairness, applying an unconscionability standard to substantive review. Moreover, the UPAA directs courts to set aside agreements on the basis of fairness at the time of enforcement, only if enforcement of a support restriction will leave one spouse on public assistance. Many courts in jurisdictions that have adopted the U.P.A.A. have set aside agreements on the basis of unfairness at the time of enforcement, however, where the agreement results in a lopsided distribution. See discussion in ELLMAN, KURTZ & SCOTT, FAMILY LAW, supra note _ at 822-32. The recent A.L.I. Principles give courts considerable discretion to set aside premarital agreements on fairness grounds. See note _ supra.

⁸⁸This is well demonstrated by cases in which courts either refuse to recognize contractual understandings or fail to find a contract in a long-term marriage-like union. In *Hewitt v. Hewitt*, for example, the Illinois Supreme Court pointed to the abolition of common law marriage as evidence of a legislative policy against recognizing

marriage are not justified in a social environment that is morally neutral toward cohabitation.⁸⁹ Instead, courts should enforce, under ordinary contract principles, agreements between cohabiting parties dealing with property distribution and support.

Many courts have adopted this view in recent years and have been ready to enforce these contracts. If a couple has an express written agreement, enforcement is usually straightforward. Sometimes, even without a writing, substantial evidence exists of the couple's agreement that property acquired during the union would be shared or that one party would provide post-dissolution support.⁹⁰ Often, however, no express agreement can be proved and the claimant must seek to demonstrate that the parties had a contract implied in fact based on conduct.

Courts' responses to financial claims by cohabiting parties based on conduct rather than express promise have been mixed.⁹¹ In general, contracts implied in fact will be legally enforced if the

contractual claims in informal unions. The Hewitts had lived together for many years with their children and held themselves out as being married. 394 N.E.2d 1204 (Ill. 1979). See also *Morone v. Morone*, 429 N.Y.S.2d 592 (1980)(declining to recognize implied contracts; case involved property or support claim by woman in 25 year union in which couple held selves out as husband and wife); *Friedman v. Friedman*, 24 Cal. Rptr 892 (1994) (no sufficiently clear conduct to indicate implied contract for support in 25 year marriage-like union in which couple lived together with two children).

⁸⁹ In *Marvin v. Marvin*, the California Supreme Court pointed to changing social values as the basis of its decision that contracts between cohabiting parties should be enforced, and that the public policy justification for the traditional stance against enforcement was no longer valid. 134 Cal. Rptr. 815 (1976).

⁹⁰A New Jersey court found an express contract for support in the man's statement during the relationship that he would support the woman for the rest of her life if she would return to live with him. *Kozlowski v. Kozlowski*, 403 A.2d 902 (N.J. 1979). Other courts have recognized express oral contracts to share property. *Cook v. Cook*, 691 P2d 664 (Ariz. 1984); *Knauer v. Knauer*, 470 A2d 553 (Pa. Super. 1984). See also *Recigno v. Recigno*, A-2023-01T5 slip op. (N.J. Super. Ct. App. Div. 1\07\03)(recognizing joint venture and dividing assets between couple who held themselves out as husband and wife in a 26 year personal and business relationship).

⁹¹Although some courts have insisted that only express contracts between cohabitants will be enforced, others have been more open to implied contracts. Compare *Morone v. Morone*, 429 N.Y.S.2d 592 (1980); *Merrill v. Davis*, 673 P2d 1285 (N.M. 1983); *Tapley v. Tapley*, 449 A2d 1218 (N.H. 1982)(only express contracts enforced) with *Marvin v. Marvin*, 134 Cal. Rptr. 815 (1976); *Hay v. Hay*, 678 P2d 672 (Nev. 1984); *Watts v. Watts*, 405 N.W.2d 303 (Wis. 1987); *Goode v. Goode*, 396 S.E.2d 430 (W.Va. 1990); *Boland v. Catalano* (Colo. 521 A.2d 142 (Conn. 1987) (express and implied-in-fact contracts enforced).

conduct is promissory, that is, if it is sufficiently clear to demonstrate an understanding between the parties that an obligation exists. Courts have sometimes found sufficient evidence of promissory conduct to enforce implied agreements to share property acquired during the relationship— focusing on the duration and nature of the cohabiting relationship, the extent of financial intermingling, contributions by the claimant to income and property acquisition, and evidence of marriage-like sharing generally.⁹² Parties claiming post-dissolution support have been less successful, as court have declined to infer promissory conduct from the parties’ adoption of marital roles.⁹³

In general, although claimants have sometimes prevailed, enforcement of implied contracts by cohabitants is uncertain and costly. As I have suggested, the extent and nature of understandings about financial sharing and support varies in informal unions, and the ability of third parties (ie courts) to discern accurately the parties’ expectations on the basis of their conduct in this context is limited. Even where cohabitants have held themselves out as a married couple for many years, courts sometimes

⁹²One court found an agreement by the couple who cohabited for 23 years to hold property as if they were married, by looking at the “purpose, duration and stability of the relationship and the expectations of the parties.” *Hay v. Hay*, 678 P2d 672,674 (Nev. 1984). An Oregon appellate court suggested that the determination of whether the parties had an implicit agreement to share assets equally should be based inter alia on “how the parties held themselves out to the community, the nature of the cohabitation, [and] joint acts of a financial nature, if any...and the respective financial and non-financial contributions of each party.” *Wallender v. Wallender*, 870 P2d 232,234 (Or. App.1994). Under the facts, the court found that the parties, who cohabited for nine years after their marriage dissolved, intended to share a tract of land purchased in the defendant’s name, but improved and maintained by the plaintiff. However, the court found that the plaintiff did not intend to share other property. See also *Shuraleff v. Donnelly*, 817 P2d 764 (Or. App.1991)(intent to share assets found in couple’s discussions of saving and investing for retirement); *Glasco v. Glasco*, 410 N.E.2d 1325 (Ind. App. 1980) (intent found in situation and relation of parties); *Byrne v. Laura*, 60 Cal. Rptr. 3d 908 (Cal. App. 1997); *Goode v. Goode*, 396 S.E. 2d 430, 438 (W.Va. 1990); *Watts v. Watts*, 405 N.W. 2d 303,313 (Wisc. 1987). Courts also point to a course of conduct between the parties as evidence of an oral agreement. See *Cook v. Cook*, 691 P2d 664, 667 (Ariz. 1984) *Ann Estin* points out that the line between express oral agreements and agreements implied from conduct is murky, but can be quite important in jurisdictions that recognize the former but not the latter. *Ann Laquer Estin, Unmarried Partners and the Legacy of Marvin v. Marvin: Ordinary Cohabitation*, 76 Notre Dame L. Rev. 1381 (2001). For example, see *Morone v. Morone*, supra note

⁹³In *Friedman v. Friedman*, supra, for example, the parties agreed to share property accumulated during a relationship of more than 20 years, but the court declined to order support for Ms. Friedman, who was seriously disabled.

conclude that the parties' understandings are not sufficiently definite for contractual enforcement.⁹⁴ In some jurisdictions, the problem is exacerbated by the application of an implicit default rule that parties in intimate unions render personal services gratuitously without expecting compensation.⁹⁵ Moreover, the process of adjudicating these claims is costly and cumbersome, as parties present evidence of behavior over many years that was (or was not) implicit with promise. The unpredictability of outcomes discourages settlements. The upshot is that courts have struggled to achieve fair outcomes in response to these claims, but the results have been unsatisfactory from the perspective of protecting financially vulnerable parties.⁹⁶

Some commentators have responded to these difficulties by concluding that the contractual framework is unsuitable for this context because the parties' understandings are too ambiguous. The approach of the A.L.I. Domestic Partnership Principles is representative of this response.⁹⁷ Ira Ellman, Chief Reporter for the A.L.I. Principles, and a long-time skeptic about the use of contract as a mechanism for regulating financial obligations in intimate relationships generally, challenges the feasibility

⁹⁴Farnsworth, Contracts, Sect. 3.27 (discussing indefiniteness of contract terms as basis for non-enforcement). See Friedman, *supra*, at 898-99, finding insufficient evidence of clear intent to provide support.

⁹⁵A few courts describe such a "presumption" which often operates to defeat claims to share property and to post-dissolution support. *Morone v. Morone*, 50 N.Y.2d 481, 413 N.E.2d 1154 (N.Y. 1980)(declining to find an implied contract for support where couple lived together for 20 years and held themselves out as husband and wife). See also *Featherston v. Steinhoff*, 575 N.W.2d 6 (Mich. App. 1998)("services rendered during a meretricious relationship are presumably gratuitous."); *Tapley v. Taply*, 449 A2d 1218, 1220 (N.H. 1982).

⁹⁶Although many claims are unsuccessful, courts have employed a variety of theories to enforce financial obligations arising from parties' conduct in informal unions, including not only implied contract, but also constructive and resulting trust, quantum meruit and implied partnership. For an excellent analysis of the responses of courts to financial claims by cohabiting parties and description of the different theories employed, see Ann Estin, *supra* note _.

⁹⁷The comments to the ALI Domestic Partnership Principles, justify the adoption of a domestic partnership status on the ground that most couples have no contractual understanding. A.L.I. Principles, Ch. 6

of using a contract framework in this setting.⁹⁸ Ellman argues that unmarried couples do not think in contractual terms, and seldom have understandings about financial obligations upon dissolution that are sufficiently clear to be subject to legal enforcement as contract terms. Ellman's (and the A.L.I.'s) response is to substitute a non-consensual status as the mechanism to enforce financial obligations between intimate partners.

For reasons that I will address shortly, the A.L.I.'s abandonment of contract is undesirable. It is also unnecessary, in that contract law can provide efficient default rules to clarify the implied understandings about property and support obligations between parties in long-term intimate unions. The application of properly structured default rules can facilitate legal enforcement and simplify the judicial evaluation of these claims.

The simple premise of the default framework that I propose is that where a couple provide clear evidence through their conduct that their relationship is marriage-like, their agreement to assume marital obligations can be inferred— and legally enforced.⁹⁹ Where a couple lives together for many years, sharing a life and financial resources, and holding themselves out as husband and wife, it is a sound presumption that they intend to share the property acquired during the relationship. Further, a couple who assume traditional marital roles of wage earner and homemaker can be presumed to intend to provide the financially dependent partner with “insurance” in the form of support, should the

⁹⁸Ira Ellman, *Contract Thinking was Marvin's Fatal Flaw*, Notre Dame L. Rev (2002). See also Ira Ellman, *A Theory of Alimony*, Cal L. Rev. (1989)

⁹⁹ Some courts have implicitly adopted this approach. In *Recigno v. Recigno*, supra note __, the court, in recognizing joint venture and dividing the assets between a couple who lived together for 26 years, emphasized the extent to which the parties had conducted themselves as husband and wife in every aspect of their lives. The court stated that “the nature of the relationship was truly a joint venture of a personal and business nature ...it was the mutual intent of the parties to be partners.” A-2023-01T5 slip op. (N.J. Super. Ct. App. Div. 1\07\03).

relationship dissolve.¹⁰⁰ The default terms of the marriage contract represent mutual obligations that spouses incur whether or not they expressly agree; these obligations should also be incurred in marriage-like informal unions.

The challenge is to design clear criteria that separate marriage-like unions from those in which the parties are not married because they do not want marital commitment or obligations. The framework should be as simple as possible, in order to clarify obligations and promote certainty for both courts and parties. In my view, a cohabitation period of substantial duration is the best available proxy for commitment, and the only practical means to avoid intrusive and error-prone inquiry in the effort to distinguish marriage-like relationships from more typical informal unions that involve less financial interdependency.¹⁰¹ A period of five years or more, for example, supports a presumption that the relationship was marriage-like and discourages opportunistic and marginal claims. At that point, the party challenging the contractual obligation can fairly be required to demonstrate that the parties' intent was not to undertake marital obligations and that the union was of a different kind. A five year period will significantly limit the category of claimants, because most informal unions do not last this long.¹⁰² Thus, a presumption based on this duration promises to be a relatively accurate sorting mechanism for separating marriage-like from casual unions. To be sure, this means that some deserving parties will not get the benefit of the default rule. However, dependent partners in unions of extended duration present

¹⁰⁰ See Scott & Scott, *Marriage as Relational Contract*, supra note __, in which we argue that parties in a hypothetical bargain before marriage would agree to provide post-dissolution support as insurance against the risks of assuming a marital role that results in financial vulnerability.

¹⁰¹ Clearly, parties can enter a cohabitation union with marriage-like commitment, but duration is the only practical practical means by which 3rd parties can identify marriage-like unions ex post.

¹⁰² Only about 10% of cohabiting couples live in informal unions for 5 years or longer. Bumpass & Liu, supra note __ at 33. If the cohabiting couple have children together, it makes sense for the birth of the child to trigger the presumption. This is the A.L.I. approach.

the most compelling claims, and these parties will be protected.

The default rule framework represents a significant improvement over current law. Today, many claims fail, although it seems likely either that the parties had some agreement (but what, exactly?) or that one partner misled or exploited the other. Default rules clarify that the conduct of parties in long term unions will be deemed promissory unless clear evidence is offered that it is not. The framework functions effectively whether or not the parties have similar understandings of the terms of their commitment to one another. For most parties in relationships of long duration, the presumption that the union is marriage-like probably represents accurately the parties' explicit or implicit understanding about property sharing and support, and thus the framework simply functions as a standard majoritarian default. Where the default rule does not reflect both parties' expectations, it has a useful information-forcing function, putting the burden on the dissatisfied party to identify himself explicitly as a "non-committer."¹⁰³

Long-term informal unions present a context in which one contracting party may be motivated to withhold information about his intentions from the other for strategic purposes. In contrast to marriage, cohabitation provides no clear signal of commitment, and it may be difficult for individuals to discern whether their partners' intentions are the same as their own. Under the current regime, a primary wage earner who does not wish to undertake legal obligations to his homemaker partner can withhold this information, allowing her to assume that they will share property acquired during the time they are together and that he will provide support should the relationship end. Meanwhile, he is free to

¹⁰³ Majoritarian default rules, in general, have this information-forcing property as applied to parties who want to opt out. For discussion of default rules generally and their information-forcing properties, Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: an Economic Theory of Default Rules*, 99 Yale L. J. 88(1989); Robert Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. L. Stud. 597, 606-613 (1990);.

structure their financial arrangements in ways that undermine her future claims.¹⁰⁴ In this way, he reaps substantial benefits from the relationship, and then is protected by the implicit default rule against financial sharing between cohabiting partners.

The proposed framework presents the primary wage earner with two options: he can (perhaps grudgingly) accept the legal obligations that follow from the application of the default rule as the cost of being in a long term intimate union, or he can disclose to his dependent partner his intentions not to engage in financial sharing.¹⁰⁵ In the latter situation, she can make an informed choice about whether to end the union or to remain in a role that leaves her financially vulnerable.¹⁰⁶ In any event, the default rule allows the parties to act upon more complete information about the financial terms of their relationship, reducing misunderstanding and exploitation.

As compared with current doctrine, the default rule approach simplifies the judicial determination of financial obligations between cohabitants; it avoids an open-ended inquiry into the parties' expectations in every case. To be sure, as I have suggested, an ex post judicial determination is a more cumbersome and less effective means to protect dependent family members than is formal

¹⁰⁴He may do this by maintaining separate bank accounts and by acquiring real and personal property titled only in his name.

¹⁰⁵ Ayres and Gertner argue that penalty default rules can function to influence parties who strategically withhold information to disclose (so that they will not be bound by the default rule), leading to more efficient contracts. In the context of intimate unions, non-disclosure by the non-committer is likely more efficient at least from a social welfare perspective, in that it will result in a contract based on the default rule.

¹⁰⁶Alternatively, she can adapt her role in the relationship so that she is more financially self-sufficient. See Herma Kay *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. Cin. L. Rev. 1 (1987)(arguing that reducing the availability of alimony would reduce women's dependency and encourage financial self-sufficiency). In later work, Kay has written more positively about alimony and its benefits, particularly in long-term marriages. *Beyond No-Fault: New Directions in Divorce Reform*, in *DIVORCE REFORM AT THE CROSSROADS* (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

marriage, and fact finding will sometimes be complex.¹⁰⁷ Nonetheless, the framework provides a means to enforce the sometimes opaque financial understandings between cohabiting partners and does so by using familiar legal tools. The default framework offers far greater financial security than current law to vulnerable partners who otherwise may be exploited or misled-- or who may simply have a different understanding of the relationship than the primary wage earning partner.

Enforcing implied contracts between parties in informal unions does not mean that cohabitation would be transformed into a legally privileged status. Put differently, the default framework is not a revival of common law marriage, a doctrine under which qualifying informal unions are treated as marriage for all purposes.¹⁰⁸ Although common law marriage is recognized in a few states today, it has been abolished in many jurisdictions over the past century, in part because of the difficult evidentiary issues presented by ex post determination of family status. In contrast to parties in common law marriage, cohabitants who do not formally register their unions would not receive the government benefits and other protections of marriage. Thus, couples should still be motivated to formalize their commitment through marriage.

Outcomes under my proposed framework will often be quite similar to those obtained under the

¹⁰⁷ Carol Rose' famous distinction between "crystal" and "muddy" rules in property law is apt in this context. Carol Rose, *Crystals and Mud in Property Law*, 40 Stan. L. Rev. 577 (1988). Rose observes that human behavior cannot be compelled by "perfect specification of rights and obligations." Although clear rules defining property rights generally are to be preferred, Rose argues, they can sometimes function to allow the powerful to take advantage of the weak and gullible. When that happens, courts resort to "muddy" rules to achieve equitable solutions. In the realm of intimate unions, law makers legitimately might prefer all couples to choose marriage, a "crystal" category, but provide the protection of "muddy" default rules for unmarried parties who otherwise would be taken advantage of by their partners.

¹⁰⁸For example, common law spouses have been found to qualify for government death benefits and health and life insurance. See discussion in ELLMAN, KURTZ AND SCOTT at 64- 67. Ariela Dubler argues that common law marriage was a means to privatize dependency of women and children in the 19th century-- although she acknowledges that many of the claims were brought by women themselves (and not by the state). Ariela Dubler, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 Yale L. J. 1885 (1998). .

A.L.I.'s Domestic Partnership status, which also imposes marriage-like obligations on cohabitants. The contract-based default framework has some advantages, however over the A.L.I. approach. First, many critics have argued that the Principles will generate a flood of marginal claims because the proposed cohabitation period is brief and the standard is complex.¹⁰⁹ The five year time period that I propose will function more effectively to separate casual from committed unions and to reduce litigation.¹¹⁰

Another advantage of the proposed contract default framework is that it builds incrementally on conventional legal doctrine regulating cohabitation unions that has developed over the past generation. As mentioned above, some courts today apply a default rule that services provided by cohabiting parties are gratuitous. The proposed framework simply adopts a default rule that likely is more consonant with the expectations of couples in long term marriage-like unions. In contrast, the A.L.I.'s domestic partnership status represents an innovative, but somewhat radical legal reform that legislatures and common law courts are likely to view with some wariness.¹¹¹

Finally, and most fundamentally, a contractual framework is compatible with liberal values and thus has a normative appeal that the status-based approach adopted by the A.L.I. lacks. The

¹⁰⁹See Lynn Wardle, *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 B. Y. U. L. Rev. 1189; Lino Graglia, *Single Sex Marriage: The Role of Courts*, 2001 B. Y. U. L. Rev. 1013.

¹¹⁰ This deficiency in the A.L.I. proposal is of practical importance, but it can be easily remedied in any jurisdiction that adopts the Domestic Partnership Principles. The cohabitation period is to be established under a rule of statewide application.

¹¹¹ Although at least one state, Washington, has adopted status-based approach to cohabitation unions, the overwhelming majority have sought to resolve financial disputes between cohabiting parties within a contractual framework. See *Marriage of Lindsey*, 678 P2d 328 (Wash. 1984); *Connell v. Francisco*, 898 P2d 831 (Wash. 1995). Moreover, no state combines recognition of a cohabitation status, with judicial discretion to set aside agreements between cohabiting parties.

proposed default rules rest on realistic empirical assumptions about the intentions and expectations of many couples in informal unions, while at the same time offering protection to naive parties whose expectations may not be shared by their partners. The framework recognizes, however, that sometimes one party will reject financial sharing as a condition of continuing the relationship and his partner will choose to remain in the union. Parties are free to contract out of default rules. In contrast, *imposing* a marriage-like status on cohabiting parties, as the A.L.I. Principles do, excludes an option for intimate affiliation that some parties might choose. The A.L.I. approach assumes that financially vulnerable partners would always choose no relationship over a relationship without financial security; in fact, some may prefer a shared life without financial sharing.¹¹² Adults with full information should be free to make these choices. To be sure, sometimes the outcome under the default framework may result in inequity.¹¹³ However, the alternative of paternalistically imposing financial obligations on unchoosing (and even unwilling) parties after a certain period of cohabitation is even less satisfactory. Although an imposed status may sometimes beneficially deter exploitation of dependent partners, it sacrifices the freedom of individuals to order their intimate lives.

Not so long ago, both law and morality narrowly circumscribed the freedom of individuals to make choices about intimate affiliation; today, some people are nostalgic about a society in which marriage was the only acceptable intimate union. Most moderns, however, endorse the core liberal

¹¹²As noted above, although parties can opt out of the obligations of Domestic Partnership status through contract, courts are free to set aside contracts that depart from the distribution that parties would otherwise get. See note _ supra.

¹¹³For example, in *Carney v. Hansell*, a New Jersey court regretfully found that a cohabiting partner had no financial obligation to his partner of 16 years where he consistently made it clear during the relationship that he had no intention to support her when the relationship was over or to share property with her. Docket No. FM-03-585-02 (N.J. Super. Ct. Chanc. Div.8\27\03). On these facts, the outcome would be the same under the default framework). See also *Wallender v. Wallender*, 870 P2d. 232, 235-35 (Or. App. 1994)(property claim defeated where evidence showed that defendant clearly expressed his intent not to share particular property upon dissolution)..

principle that government should not interfere with the freedom of individuals to pursue their goals for personal happiness, absent some evidence that their choices will cause harm to others. Some couples may want to live together without commitment or obligation in long term relationships. As long as each partner voluntarily chooses this arrangement and is free to leave, paternalistic government restrictions that inhibit freedom in this private realm are hard to justify.

* * *

Although government interference with intimate relationships is problematic, government can play an active role in facilitating the attainment by individuals of their personally defined goals for happiness. The availability of the legal status of marriage to both same -sex and opposite-sex couples serves this end. Clear evidence supports that for many individuals, the opportunity to undertake a formal commitment to another person through marriage is an important part of their life plan, and that informal affiliation is not a satisfactory substitute.¹¹⁴ By holding out marriage as an option for intimate affiliation to all adults who believe that it will contribute to their happiness, government enhances the quality of life for many persons.

Conclusion

Although families have changed a great deal in the past generation, marriage continues to function usefully as a family form. This is so because it is a relatively stable union and because the process of formal registration provides a means to define financial rights and obligations between the parties with some certainty. Thus, the claim that this status is obsolete is premature, at best. Indeed, although predictably marriage will continue to evolve as an institution to accommodate changing social

¹¹⁴ Numerous surveys of young adults reveal that a high percentage plan to marry and believe that marriage will contribute to their personal happiness. See supra. note 1. Substantial evidence supports that many homosexual persons would marry if this option were available to them. Eskridge, *The Case for Same Sex Marriage*, 78-79.

values and practices, intimate unions grounded in formal legal commitment are likely to endure, because such unions function relatively effectively to satisfy society's dependency needs.