

# *American Law & Economics Association Annual Meetings*

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*Year 2004*

*Paper 65*

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## The Life-profile Theory of Marriage, Cohabitation, and Same-sex Marriage

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\* Thank you Jane Binner, Jennifer Dnes, Irina Kalnaya and Elizabeth Mytton for useful discussions of many of the ideas developed in this paper.

## **Introduction.**

This paper is an exploration of some of the limits to freedom in family law imposed by society in terms of the recent debate surrounding homosexuality and marriage. In particular, we consider the value of extending marriage rights to homosexuals, a very heated topic at present internationally. It is well known that states such as Connecticut and California have faced local attempts to declare as unconstitutional the ban on homosexual marriage, which is reinforced federally by the *Protection of Marriage Act 1996*. Recently, President Bush has suggested an amendment to the Constitution making it absolutely clear that marriage is a social status reserved for heterosexuals.

The question from an economic perspective is whether any useful purpose *could* be served by extending marriage rights to homosexuals. Note that the marriage *boundary* has moved on previous occasions in common-law jurisdictions, notably in relation to the remarriage of divorcees and in relation to consanguinity. It clearly differs between jurisdictions: Consider the difficulty internationally of recognizing polygamous marriages formed in Islamic jurisdictions.<sup>2</sup> The question of whether there is a case for a boundary movement, favoring homosexuals, must be related to an examination of the purpose of marriage more generally. We therefore begin by briefly describing the life-profile' theory of marriage (Cohen 1987, 2002), considering whether this might apply to homosexuals. We also report the results of a modest survey targeted at identifying asymmetric relationship-specific investments made by homosexuals.

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<sup>2</sup> The boundaries of all areas of law move over time: Consider the movement in tort law over professional negligence, or psychiatric injury of onlookers at accidents; or the history of consideration in contract law.

## Cohabitation and the Law

Homosexual cohabitation is a special case of heterosexual cohabitation, or even non-sexual cohabitation. Traditionally, the rights of cohabitants are governed by contract principles, following cases like *Marvin*,<sup>3</sup> although there is currently renewed interest in taking a status view of marriage (Ellman 2001). A status view appears to underlie recent arguments in favor of extending the obligations of marriage to forms of cohabitation that approximate marriage, the key feature of which would be introducing the practices of a divorce court in settling up over property rather than allowing property rights to stand where they have arisen by work, inheritance, purchase, resulting and implicit trusts, or proprietary estoppel. The nature of the debate may be seen in the proposals covering marital and (heterosexual) non-marital relationship breakdown contained in the American Law Institute's recent *Principles of the Law of Family Dissolution*,<sup>4</sup> which would effectively treat cohabitation as a form of marriage.

The debate also surfaced recently in England in a Law Commission discussion paper that ultimately noted the difficulties of moving away from a traditional property-rights approach towards the sharing of homes outside of marriage (Law Commission 2002). The Commission began by addressing a case that many see as representing considerable injustice to cohabitants in long *marriage-like* relationships: The hard case,

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<sup>3</sup> *Marvin v. Marvin*, 122 Cal. Rptr. 555 (App. 1981) (cohabiting parties upon separation have the obligations towards each other that they previously agreed upon). See also *Marone v. Marone*, 429 N.Y.S. 2d 592 (1980) (requiring express oral or written agreements) and *Posik v. Posik*, 695 So.2d 759 (Fla. 1997) (applying *Marvin* to same-sex couples). A more recent case with *Marvin* characteristics and additional issues concerning business ownership is *Maglica v. Maglica*, 78 Cal. Repr. 2d 101 (App. 1998).

<sup>4</sup> American Law Institute, *Principles of the Law of Family Dissolution, Final Draft* (2001). The *Principles* (e.g., section 5 on former spouses, and section 6 on cohabitees) emphasize several status-linked ideas. Cohabitation is to be assessed according to the extent to which it approximated marriage, ancillary relief follows a formulaic approach, and there is a strong presumption of equal property division (described by Ellman (2000) - the Chief Reporter - as appropriately viewed as an irrebuttable presumption in most cases).

*Burns*,<sup>5</sup> in which, because of the emphasis on private property rights, a vulnerable claimant received no share of a family's assets on dissolution. Traditionally, the emphasis on private property rights, outside of marriage where a divorce court can subsequently reallocate assets, has affected all cohabitants regardless of sexuality. The position has been mitigated in recent years by changes in the rules of organizations such as pension schemes and housing associations, and the domestic partnership laws introduced in many jurisdictions. The recent changes do support *private* ordering, but do not apply divorce-court rules to dissolution, and do not typically include cohabitants among protected persons under rules of inheritance.<sup>6</sup>

Note that heterosexuals are not forced to cohabit. Libertarian arguments can be made in favor of protecting the freedom to avoid marriage commitments (Dnes 2002). This view would claim that *Burns, femme*, should have known better: People do not just "end up places." Among the homosexuals, matters must be viewed differently because they are forced to cohabit; although consider the possibility of privately ordering living arrangements and dissolution obligations to approximate marriage.<sup>7</sup>

### **Life Profiles: 'She Gave Him Her Best Years'**

Lloyd Cohen (1987; 2002) has made a powerful argument that to avoid encouraging opportunistic divorce the equivalent of expectations damages should be awarded to the fault-free party in a divorce. Cohen was particularly concerned with the fate of women leaving traditional marriages, for which modern 'no-fault' divorce law gives poor support. His argument was based on a life-profile theory of marriage,

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<sup>5</sup>*Burns v. Burns* [1984] Ch.317; [1984] F.L.R. 216 C.A. (An unmarried mother was not entitled to a share of her cohabitant's property in the absence of agreements to the contrary).

<sup>6</sup> The long-term partner of the late Nigel Hawthorne (*The Madness of King George; Yes Minister*) complained recently on BBC Radio that he had not only to cope with grief when the actor died, but also found difficulties in remaining housed owing to his tenuous position under inheritance laws.

characterized by an asymmetry over the timing of 'investments' made by the man and woman. The woman invests in child raising and home building early on and expects, under a regime of fault-based divorce, to remain with her husband enjoying the family income and home over the long term. He is freed of domestic responsibilities to build up a career that will yield high earnings later on in the life cycle. Cohen observed that males more readily remarry in middle age than can women: the life profiles show an asymmetry between the sexes. The life-profile theory broadly implies that marriage may be a mechanism for protecting specific investments over time in the face of opportunism.

Marriages based on asymmetric investment patterns are subject to possible 'post-contract opportunism', particularly after the introduction of no-fault divorce, which does not tie alimony and property division to fault. It is now possible for the man to tire of an older wife and scoot off to a new relationship without maintaining the promised life style, providing courts do not require the payment of expectations-based settlements. Divorce settlements based on meeting the *needs* of an ex-wife, as in American 'equitable distribution' states, may make divorce 'too cheap' and lead to such opportunism (Dnes 1998) which is observed empirically.<sup>8</sup> Note also that a needs-based settlement culture, common in equitable-distribution common-law jurisdictions such as England or Virginia, could also make divorce too cheap from a female perspective. The wife might tire of marriage and may know that, in a moderate-asset setting, 'needs' could lead to her keeping a high proportion of the assets: Particularly as a parent with custody of minor

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<sup>7</sup> Apparently some homosexuals have been forming partnerships under company law as a method of regulating the asset side of their relationships.

<sup>8</sup> The modern trend to introduce reliance (opportunity cost) or restitution (returning the value of domestic contributions) will also under compensate, as I explain in an earlier paper (Dnes 1998). Think of the low opportunity cost of a waitress who marries a millionaire, or the low market value of hosting and domestic management compared with a promised wealthy lifestyle.

children. Casual empiricism suggests that the male variety of opportunism is more prevalent.

The legal regime affecting settlement can allow marriages to end even when, in terms of economics, they have been showing a surplus. This inefficiency follows if one party can hold enough of the surplus under the legal rules to put that amount beyond bargaining. Such indivisibilities explain why the Coase theorem may not apply to bargaining in the shadow of the divorce court to rearrange individual benefits and prevent divorce occurring when there is a positive overall benefit from the marriage. The disruption of Coasian bargaining by divorce law changes is anyway implied by empirical results showing a significant and permanent shift in divorce rates following the introduction of no-fault divorce laws (Biner and Dnes, 2001).<sup>9</sup>

Opportunistic divorce could not happen in a (contract) regime based on expectations damages and fault-based divorce, with fault interpreted as breach of contract. Possibly, the parties will agree to divorce because the change will increase the welfare of one while the other has his or her welfare at least maintained. Alternatively, one party will force a divorce but will be required to maintain the value of promises made to the other party, and would only do so in anticipation of being better off as a result. This reflection has caused Alan Parkman (2002) to argue in favor of what amounts to a specific performance requirement in marriage, i.e., the move to a regime allowing divorce but only by consent.

If opportunistic divorce is known to be possible under a legal regime, it could destabilize marriage more generally: a spouse might avoid marriage if worried about opportunistic divorce later on. The avoidance could take the form of delaying marriage to make a career investment that would act as self-insurance.

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<sup>9</sup> Bargaining may also be defeated by the presence of more naturally occurring indivisibilities such as children (Zelder 1993). The argument that divorce rates may not change following legal reform because of bargaining adjustments is associated with Peters (1986).

## Cohabitation and the Life Profile Model

The move away from marriage and towards cohabitation represents a significant shift in social behaviour during the post-war period. The trends for the 1960-2000 period are similar across many European countries and North America.<sup>10</sup> On average, first marriages fell from approximately 70 per 1000 to 30 per 1000 of the male population. The age at which first marriages occur has typically risen, with both men and women waiting an extra three years. Births outside of marriage have increased from 5 per cent to 35 per cent of all births. In addition, the proportion of cohabiting women between the ages of 20 and 50 has trebled.

A puzzling aspect of the substitution is that cohabitation is against the interests of many women. Marriage is potentially a rather good mechanism for supporting long-term family investments, even taking a very approximate view of the fit of the life-profile model, and without marriage women might predict vulnerability to opportunistic behaviour (there might also be some men in such a position). It seems unlikely that changes in women's economic activity and in techniques of child rearing have reached a point where the sexes no longer show *any* asymmetric interdependence over life profiles. Therefore, one would expect a man's willingness to offer marriage to remain a very important signal for young women, giving a 'separating equilibrium' distinguishing committed from uncommitted life partners.<sup>11</sup>

Cohabitation has not generally been subjected to the same kind of settling up regime as marriage in the event of dissolution. Up to now there has been no equity-based

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<sup>10</sup> See Kiernan (2002) and Brinig and Nock (2004).

<sup>11</sup> There is a female equivalent: if divorce law did not support at-fault wives, their signal would be of willingness to bear dissolution costs if uncommitted in the long run.



intervention by a family court with powers to reallocate assets between partners or to create maintenance obligations. Cohabiting parties must rely largely on natural 'hostages' that emerge in the relationship to limit the kind of opportunism described above. Such hostages may be provided by the presence of children, with whom a parent may wish to maintain easy contact. Also, the search costs of finding a new partner, or any social stigma that might be attached to living alone, may act to hold people together over a long period of time. In the case of marriage, the hostages will typically be bolstered by legal obligations between the ex-spouses to pay child and possibly spousal maintenance and to divide marital property according to statute and case law.

Note that recent moves towards treating cohabitation as marriage have led to child-support legislation imposing an obligation on all absent parents, regardless of marital status, to pay child support. Nonetheless, it is clear that it would be rational to choose to cohabit, if the parties actually wished to avoid, or perhaps in some jurisdictions just to lessen, the legal obligations towards each other in the event of termination. One can conclude from research findings that, to the extent that people think they are 'trying out' partners (Lewis 1999) they are indeed *avoiding* marriage at that stage in their lives.

Quite apart from the imposition of status-neutral child support obligations, there have been more general moves towards public-policy authorities treating cohabitation as if it were de facto marriage. At the beginning of this paper, we mentioned the ALI proposals that effectively give marital status to anything looking much like marriage, and the abortive attempt by the Law Commission in England to find rules for intervening in the established property rights (in the home) of parting cohabitants.<sup>12</sup> Even though the Law Commission failed to recommend changes, this was not because it eschewed

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<sup>12</sup> Property rights may have changed during the relationship, if for example one partner promised a share in the house and the other relied on that promise, or one partner spent money on the other's property. This

intervention by the state in unmarried cohabitation, but rather because all the investigated ways of equitably redistributing property seemed to generate as many problems as were apparently solved. The Commission spent some time considering whether it should be possible to balance off contributions to home life (perhaps A's paying food bills) against payments for the home (B as legal owner pays the mortgage). It noted that people often have received accommodation benefits that would need to be deducted from any capital value claimed and that courts might wish to treat the impact of work done and payments made differently depending on who made the contributions and the reasons behind their efforts (Law Commission 2002, 56). There certainly are problems in getting a scheme to work. What should we do if rents were high for the period during which a deduction is calculated and capital values have since fallen: Would A then owe B money?

From a life-profile perspective, if there were evidence that women were making early investments in family life in the expectation of lifetime support (a traditional model) and that men were taking advantage of them by imposing cohabitation rather than marriage, there would be the basis for a claim of exploitation. Policy might then reasonably seek to outlaw cohabitation by turning it effectively into marriage. Such reasoning might cause marriage-like obligations to be enforced when cohabitation came to approximate marriage (e.g. after children have been born within the union, or after a period of time during which one party has been economically dependent). However such a claim of opportunistic or exploitative cohabitation is not supported by the evidence (Lewis 1999) which appears to suggest a run up to marriage rather than a perception of common-law marriage,<sup>13</sup> and at best one could claim that some women and men may be misinformed about the likely outcome of cohabitation and the life-profile problem. In that

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kind of trust and estoppel based considerations apply to the range of proprietary interests, including property in marriage, property shared by cohabiting relatives, or by cohabiting same-sex partners.

case there might be a case for providing information and education but hardly one for banning a consensual practice. The key issue here is that parties are free to avoid cohabitation as they could choose marriage.

### **Same-sex Cohabitation.**

Jurisdictions in Canada and America (such as Hawaii and Vermont) and - outside of the common-law world - others like Denmark and Belgium, have instigated 'domestic partnership' contracts carrying many of the obligations of marriage. There have also been recent moves, particularly in California, Connecticut and New York, to legitimize homosexual marriage, as mentioned at the beginning of this article. Much pressure to recognize same-sex unions within the EU has come from the incorporation into national law of Articles 12 (the right to marry) and 8 (respect for privacy and family life) of the European Convention on Human Rights. However, the Netherlands is the only jurisdiction so far to have fully extended marriage to same-sex couples, within a system characterized by a formidable array of legal models for marriage and cohabitation.

The issues of property rights connected to same-sex unions are substantially the same as those in heterosexual unions, with the difference that heterosexuals have traditionally had a choice over whether to marry, whereas homosexuals have had no choice but to cohabit. The growth of a debate over extending marriage or domestic partnerships serves to cast some of the property-rights issues affecting traditional marriage partners into sharp relief. There is a related question whether extending marriage rights to homosexuals (or, for that matter, transsexuals) would serve any function.

The thrust of the life-profile theory of marriage is that the enforcement of long-term support promises protects specific investments by the economically vulnerable

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<sup>13</sup> Common law marriage (i.e. an informal claim by a couple to be married) is recognized in some American

spouse thereby creating confidence that commitment is genuine. Marriage enables a man and woman to plan their lives and to avoid turning a sexual asymmetry into the basis for exploitation of the weaker party. On this reasoning it would make sense to extend the status of marriage to homosexual partners if there were evidence of the same life-profile issues that affect heterosexuals. Given the same-sex nature of the relationships it does not seem likely that such asymmetries would arise and at first sight it would seem that the life-profile approach does not support same-sex marriage. It would appear that the Hawaiian approach of enabling domestic partnership registration, really as a basis for defining pension and similar rights, could meet the functional needs of homosexual cohabitants.

In the recent interesting case of *Wayling v. Jones*<sup>14</sup> a homosexual cohabitant worked for many years in the expectation of eventually inheriting the hotel he helped to develop. In many ways, the case mirrors the canonical heterosexual life-profile case of the young woman investing in a home and family on the understanding of sharing the fruits of her husband's career development. There are differences however in that the expectation of inheritance was dealt with adequately in *Wayling* by the application of normal proprietary estoppel principles, i.e. by applying equity principles that would affect all persons married or otherwise. Care must be taken: just because it seems likely that the specific investments (sunk costs) made in same-sex unions will be quantifiable and will tend to register on the standard land law concerning trusts and estoppel, it does not mean that we can rule out the life-profile asymmetry that is of such concern in considering heterosexual marriage. There may be some, even just a very small number, of homosexual cohabitants who can produce the same life-profile issues affecting heterosexuals.

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states such as Montana.

Extending the choice of whether to marry or cohabit does not force homosexuals into same-sex marriage. It does give a party to a relationship the opportunity to insist on marriage to protect sunk investment if in that party's estimation the protection of marriage laws is needed. Thus if two women live together and one develops a career while the other builds the home, the possibility of a divorce settlement if the relationship were later dissolved would provide a credible signal of long term commitment to the economically more vulnerable woman. Indeed, with adoption of children or the use of artificial insemination it is possible to imagine the duplication of most of the characteristics of a traditional marriage. Making marriage available is like using a property rule (Ayres and Goldbart, 2003) to deal with nuisance - we do not know in advance whether a party will need the legal entitlement to make certain costs register with other parties but in the right circumstances the entitlement will support an efficient bargaining solution.<sup>15</sup>

### **Life Profiles: Some Preliminary Results.**

We now report on a preliminary survey of a sample of 100 homosexual couples to ascertain whether their life profiles showed anything like the same asymmetric pattern as the one suggested for traditional marriage among heterosexuals.<sup>16</sup> Generally, the results support a substantially egalitarian, rather than asymmetric, pattern of inputs to cohabitation – with little childrearing or partner-support activities occurring. The results are summarized in the table.

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<sup>14</sup> (1993) 69 P.&C.R. 179; [1995] 2 F.L.R. 1029.

<sup>15</sup> A property rule refers to an approach such as enjoining a nuisance that effectively gives the victim a property right in stopping the nuisance, forcing the tortfeasor to obtain permission for the nuisance if it is to continue (probably by paying compensation for losses).

*Table: Homosexual Cohabitants and Life Profiles (% Reported or Agreeing)*

	Partner Stays Home	Income Disparity >20%	Children Own	Adopted	Career Impediment
No	95	80	7	2	90
Yes	5	20	93	98	10

(Sample: N=100; male = 82; female = 18)

There is little evidence in the table for similarity between homosexual cohabitation and the traditional model of marital asymmetric dependency that gives a functional reason for marriage. Very few cohabitants appear to give up their careers to invest in home making, and there is almost no adoption of children. Where there are children, they tend to have come from a cohabitant's former heterosexual relationship. Income equality is dominantly recorded and few cohabitants thought their relationship an impediment to career progress. One would expect a heterosexual cohabitant to deviate from a traditional norm these days, but not to such a marked extent.

The fact that very few homosexual cohabitants fit a pattern needing marriage does not mean that homosexual marriage can be instantly dismissed. That just a few people might suffer a form of exploitation does not make it desirable, from the perspective of either welfare economics or ethics, to ignore the problem. However, if these preliminary results carry over to a larger sample, they would suggest examining alternatives to marriage as mechanisms for protecting vulnerable cohabitants, particularly if homosexual marriage carried major externalities for the wider population. The externalities do seem to be present, given the vociferous opposition to which President Bush has given voice.



<sup>16</sup> The sample was constructed by a snowball technique. Initial contacts being made through a gay and Lesbian association based on the south coast of England.

## Conclusions

Marriage is potentially useful in all cohabitation settings where asymmetry in life-profiles can be detected, but as an option for the parties to choose for themselves. The range of cohabitation settings is quite extensive and includes same-sex cohabitation. Public policy moves to turn heterosexual cohabitation into marriage need to be treated with extreme caution, whereas the extension of the possibility of marriage to same-sex couples might be welfare enhancing for the small numbers for whom it may be relevant. Broadly, life-profile theory implies sustaining a choice between informed cohabitation and marriage.

However, if homosexual marriage creates a great deal of discomfort among the wider population, the small number of likely victims of opportunistic behavior within the community of homosexual cohabitants would suggest examining alternatives to marriage. Perhaps homosexual couples who adopt children, or who otherwise recognizably disadvantage one of the cohabitants, could be required to write dissolution agreements covering the support of weaker party in the event of dissolution. Alternatively, divorce-court jurisdiction could be extended to cohabitants who are unable to marry and show the asymmetry that seems to indicate a need for ex-post regulation.

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