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Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step In The Right Direction

Nancy D. Polikoff*

The most contested issue in contemporary family policy in the United States is whether married couples should receive resources, support, and legal recognition denied to other family forms.¹ The American Law Institute ("ALI") stepped into this cultural divide with the publication of its Principles of the Law of Family Dissolution ("Principles").² The culmination of twelve years of study, the Principles articulate a set of rules designed to achieve fairness when a family dissolves. At more than 1,100 pages, the Principles address, in painstaking detail, the allocation of custodial and decisionmaking responsibility for children, the payment of child support, the division of property, and the transfer of funds as compensatory spousal payments.³ The provisions concerning custody and child support assume a virtually indifferent stance towards the marital status of the child's parents.⁴ This, of course, mirrors current law. The Principles diverge

¹ Professor of Law, American University Washington College of Law. I am deeply grateful to my three research assistants, Amy Stewart, WCL 2004, Laura Astrada, WCL 2005, and Kelly Barrett, WCL 2005, for agreeing to help me follow my tangents wherever they took me, even at a moment's notice.

² For a paradigmatic face-off between these two perspectives, compare the Institute for American Values, available online at <http://www.americanvalues.org> (visited Apr 9, 2004), and the Institute for Marriage and Public Policy, available online at <http://www.marriagedebate.com> (visited Apr 9, 2004), with the Council on Contemporary Families, available online at <http://www.contemporaryfamilies.org> (visited Apr 9, 2004), and the Alternatives to Marriage Project, available online at <http://www.unmarried.org> (visited Apr 9, 2004).


⁴ See ALI Principles § 2.01 comment a at 92. (cited in note 2) (explaining that while the rules of this chapter were written primarily to address disputes over children arising during divorce proceedings, the same disputes arise between parents who were never married and therefore these rules apply to them as well); id § 3.01 comment b at 410 (stating that "[u]nder these Principles, a parent's support obligation to a child does not vary according to the parents' legal or social relationship").
from current law in most states, however, by extending to separating couples who meet the definition of "domestic partners" the same economic consequences applicable to divorcing spouses.\(^5\)

This is an important step in the right direction of making marriage matter less, an endeavor I have elsewhere called "ending marriage as we know it."\(^6\) It is also a step that has provoked substantial criticism. Part I of this Article describes the ALI's definition of domestic partners. I largely applaud the criteria established in the Principles, especially the availability of the designation of domestic partners to non-conjugal couples. Parts II and III address the primary categories of criticism leveled against the ALI approach. Part II considers the stance that marriage is a relationship superior to other relationships that should thereby enjoy a privileged status in the law. Adherents to this position diverge on one critical point—whether to allow same-sex couples to marry. Most, however, object to the parity between marriage and domestic partnership in the Principles. Ideologically, I disagree with those who would elevate marriage to a status above other relationships. I hold this view regardless of whether same-sex couples can marry.

Part III addresses criticism based upon a reluctance to ascribe to a couple a status they have not chosen for themselves. Such criticism rejects the status-based approach of the ALI, claiming that it violates autonomy, freedom of choice, and contract principles. I refute this objection by debunking the notion that a couple that marries embraces distinct economic consequences. Because couples do not have accurate knowledge of the economic significance of marrying, it is false logic to oppose adjusting the economic status of domestic partners on the theory that the partners have avoided marriage to avoid specific economic ramifications.

In Part III, I also compare American developments in this area with those in Canada, where little difference exists in the legal treatment of spouses and cohabiting same-sex and opposite-sex couples. In the United States, critics of ascription by and large also value marriage above other relationships. In Canada, criticism of ascription comes without such ideological baggage. In a regime with little social or legal discrimination based upon a couple's marital status, it might make sense to settle disputes

\(^{5}\) Consider id § 6 at 907-44 (describing the Principles of domestic partnership and their relation to legal marriage).

between unmarried partners under a legal framework slightly different from that established by the ALI.

I. QUALIFYING AS A DOMESTIC PARTNER

The ALI Principles of the Law of Family Dissolution define as domestic partners two individuals who are “not married to one another, who for a significant period of time share a primary residence and a life together as a couple.” When two people have a common child and have “maintained a common household” for a specific length of time, called the “cohabitation parenting period,” they are domestic partners. This is an irrebuttable designation.

Any other determination of domestic partnership rests upon presumptions. Thus, a domestic partnership for those without a child is presumed when a couple “maintain[s] a common household” for a specific length of time called the “cohabitation period.” This period is longer for childless couples than it is for couples with a common child. The presumption does not apply if the two people are related by blood or adoption.

The Principles list thirteen factors that can rebut the presumption created by the length of cohabitation. These same thirteen factors can prove the existence of a domestic partnership if the length of time, with or without a child, has been too short to trigger the presumption, or if the two persons are related by blood or adoption.

The thirteen factors are illustrative of “all the circumstances” that would determine whether the two persons “share a

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7 ALI Principles § 6.03(1) at 916 (cited in note 2).
8 The Principles do not establish the length of time, but instead specify that the duration should be set in a “rule of statewide application.” Id § 6.03(2) at 916. In the commentary to this section, the ALI uses the period of two years. Id § 6.03 comment d at 921. The couple “maintains a common household” when they live “only with each other and family members,” or when they “act jointly, rather than as individuals, with respect to management of the household” if they live with others. Id § 6.03(4) at 916-17.
9 “When parties have lived together in a common household for a specified uniform period of time with a child of both of them, they are domestic partners.... When parties are not the co-parents of a child, but have shared a common household for a specified period of time, they are presumed to be domestic partners.” ALI Principles Ch 1, Overview of Ch 6 at 35 (emphasis added).
10 Again, the Principles do not establish the required length of time. Id § 6.03(3) at 916. The commentary uses three years and calls this a “reasonable choice.” Id § 6.03 comment d at 921.
11 Id § 6.03(3) at 916.
12 ALI Principles § 6.03(7) at 917-18 (cited in note 2).
13 Id § 6.03(6) at 917.
life together as a couple."\textsuperscript{14} They include written and oral statements and promises made to one another about the relationship;\textsuperscript{15} representations made to third parties about the relationship, as well as the couple's reputation in the community as a couple;\textsuperscript{16} commingling of finances;\textsuperscript{17} economic interdependence, or dependence of one person on the other;\textsuperscript{18} assumption by the parties of specialized or collaborative roles;\textsuperscript{19} changes in the life of either or both engendered by the relationship;\textsuperscript{20} naming of each other as financial beneficiaries and naming each other in documents, such as wills;\textsuperscript{21} participation in a commitment ceremony or partnership registration;\textsuperscript{22} joint caretaking of a child;\textsuperscript{23} and the parties' "emotional or physical intimacy."\textsuperscript{24}

For the most part, the ALI does a good job of capturing the characteristics of relationships that should trigger property division and spousal support rules applicable to the dissolution of marriages. The Principles identify "emotional or physical intimacy" and make this only one factor that determines whether the parties share a life together as a couple.\textsuperscript{25} A sexual relationship, therefore, is not a prerequisite for domestic partnership. The Principles do not presume a domestic partnership between family members related by blood or adoption because two such persons are less likely to live together as a "couple." Nonetheless, two such family members might lead the kind of entwined lives contemplated by the ALI, and, when they do, the marital dissolution principles properly apply.\textsuperscript{26}

When a sexual relationship exists between the couple, the exclusivity of that relationship figures nowhere in the Principles' criteria. This is appropriate. Critics have commented that a court requiring monogamy to recognize a couple's legal status\textsuperscript{27} im-

\begin{footnotesize}
\textsuperscript{14} Id § 6.03(7) at 917.
\textsuperscript{15} Id § 6.03(7)(a) at 917.
\textsuperscript{16} ALI Principles § 6.03(7)(i) at 918 (cited in note 2).
\textsuperscript{17} Id § 6.03(7)(b) at 917.
\textsuperscript{18} Id § 6.03(7)(c) at 917.
\textsuperscript{19} Id § 6.03(7)(d) at 917.
\textsuperscript{20} ALI Principles § 6.03(7)(e) at 917 (cited in note 2).
\textsuperscript{21} Id § 6.03(7)(f) at 917.
\textsuperscript{22} Id § 6.03(7)(g) at 918.
\textsuperscript{23} Id § 6.03(7)(h) at 918.
\textsuperscript{24} ALI Principles § 6.03(7)(i) at 917 (cited in note 2).
\textsuperscript{25} Id (emphasis added).
\textsuperscript{26} Id § 6.03 comment d at 920-21.
\textsuperscript{27} See Braschi v Stahl Associates, 543 NE2d 49, 54-55 (1989) (suggesting that monogamy, among other factors, should be considered when determining whether a same-
\end{footnotesize}
poses a value that married couples are free to reject. Although married couples also can reject the intermingling of finances that the Principles consider, this element, as one factor of thirteen, is unlikely to torpedo an appropriate determination of the existence of a domestic partnership.

Of some concern is the absolute requirement that the couple live together. Married couples, of course, can live separately. The commentary explains the reason for this requirement as follows: “The purpose is to exclude casual and occasional relationships, as well as extramarital relationships conducted by married persons who continue to reside with a spouse.” The Principles also require that the couple’s residence serve as the “primary abode” of both parties. Although domestic partners will usually share a common primary residence, in some instances the thirteen criteria listed in this section would point towards the presence of a domestic partnership even in the absence of a common primary residence.

The Principles could achieve their purpose by requiring a shared primary residence for a presumption of domestic partnership, rather than making it an absolute requirement. No “casual and occasional” relationship could meet the standard established by the thirteen criteria. A difficulty would remain, however, in identifying the date upon which the partnership began for purposes of determining domestic-partnership property available for division. The Principles focus on the date on which the partners begin living together to facilitate this determination. In the absence of such a concrete marker, assessment of the relevant time period would be more subjective. The Principles could account for this by again placing the burden of establishing which property is the property of the domestic partnership on the person seeking a determination of domestic partnership when the couple did not share a primary residence.

Under the ALI, once a domestic partnership is established, dissolution of that relationship takes place under a regime al-

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28 Mary Ann Case, Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights, 79 Va L Rev 1643, 1665 (1993) (noting that “[a] marriage certificate now allows heterosexual couples to have an open marriage . . . without having their commitment or the legal benefits that follow from it challenged”).
29 ALI Principles § 6.03 comment c at 919 (cited in note 2).
30 Id.
31 Id § 6.04(2)(a) at 938.
most identical to that which governs divorce, including presumptively equal division of property and the availability of compensatory payments.\textsuperscript{32} As with married couples, those who wish to arrange the economic consequences of their relationship under other principles may opt out through contract.\textsuperscript{33}

II. DEBATING WHETHER MARRIAGE SHOULD BE VALUED ABOVE OTHER RELATIONSHIPS

A. The Ideological Critics

Ideological opposition to the Principles’ Domestic Partners chapter has surfaced in both scholarly and popular publications. Ideological opponents see the legal recognition of a nonmarital relationship as an attack on marriage. “[The ALI] want[s] marriage to mean nothing,” says Representative Marilyn Musgrave, Congressional sponsor of the Federal Marriage Amendment.\textsuperscript{34} John Leo, writing in \textit{U.S. News and World Report}, blasts the “drastic notion” in the ALI Principles that “marriage is just one arrangement among many.”\textsuperscript{35} Brigham Young law professor Lynn Wardle says the Principles “reflect an ideological bias against family relations based on marriage”\textsuperscript{36} and a continuation of “the war on the traditional family and traditional sexual morality that has been waged over three decades.”\textsuperscript{37} As Bush Administration welfare policy advisor Ron Haskins expressed it most succinctly, “[c]ohabitation is a plague and we should do what we can do [sic] discourage it.”\textsuperscript{38}

According to this point of view, law and social policy should promote marriage. Recognizing an option other than marriage dilutes and downgrades marriage.\textsuperscript{39} Extending the benefits of

\textsuperscript{32} The ALI replaces alimony, and its murky theoretical underpinnings in contemporary life, with the concept of equitable allocation of financial loss incurred by a party as a result of that party’s membership in a marital unit. Consider id § 5.

\textsuperscript{33} ALI Principles § 7.02 at 954 (cited in note 2).


Marriage to unmarried couples promotes cohabitation and weakens the institution of marriage, which is contrary to the best interests of society.\textsuperscript{40} Marriage is uniquely suited to advance the goals of childrearing and protecting women, and therefore, the disincentive to marriage in the ALI Principles is a mistake.\textsuperscript{41} Citing empirical data, ideological opponents assert that cohabitants invest less in each other than do married couples and focus on the short term rather than the long term.\textsuperscript{42} Cohabitation is less stable than marriage, they assert.\textsuperscript{43} The law, therefore, should encourage marriage, not cohabitation.\textsuperscript{44}

Most ideological opponents of the ALI Domestic Partners Chapter want to limit the status of marriage to only heterosexual couples. To these critics, the ALI Principles are a mistake because they validate gay and lesbian relationships\textsuperscript{45} and move society closer to allowing same-sex marriage.\textsuperscript{46}

Some opposition to the recognition of domestic partnerships, however, comes from gay rights supporters. These commentators want marriage to retain its elevated status in the law and want same-sex couples to be able to marry.\textsuperscript{47} Although such opposition
to the recognition of domestic partnerships is an ideological position, it is not grounded in the superiority of opposite-sex marriage, either on moral grounds or as the only desirable unit in which to raise children. Rather, it is grounded in the view that only marriage expresses the ultimate commitment of the two partners to one another and that it is good for both the couple and society that this commitment be encouraged, rewarded, and reinforced. Adherents of this perspective are more nuanced in their response to the ALI Domestic Partners chapter.

For example, Professor Elizabeth Scott, who supports same-sex marriage, argues:

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. Thus, under a well structured marital regime, government benefits and protections serve as quid pro quo for the couple's agreement to alleviate society's dependency burden.

Scott's defense of marriage is thus considerably more modest—a word she herself uses—than that of the ideological defenders who oppose same-sex marriage. Therefore, it is not surprising that, although she opposes the ALI Domestic Partners Chapter, she does not wish to leave separating unmarried couples in their current legal morass of ill-suited contract and property remedies.
Professor Milton Regan has articulated his support for the privileged position of marriage through numerous books and articles over many years, and he also supports same-sex marriage.\(^{52}\) "[L]aw need not be agnostic among types of intimate relationships," he writes.\(^{53}\) The law should promote marriage because marriage expresses the importance of intimate commitment and such commitment is necessary for individual stability and unity of self over time.\(^{54}\) "For intimate commitment to be constitutive of identity . . . requires that it be seen as something that derives its value from a source outside of the self's choice to engage in it."\(^{55}\) The legal institution of marriage provides that source of validation.

Professor Regan resists the option of domestic partner registration that would confer some, but not all, of the benefits and obligations of marriage. Rather, he suspects that commitment is a binary concept, either present or absent, and that the law would not encourage commitment if it implied that partners could pick and choose among levels of responsibility towards one another.\(^{56}\)

Professor Regan acknowledges that some of the impetus for recognition of domestic partners stems from a desire to recognize committed same-sex relationships.\(^{57}\) Marriage would be the preferable approach because it would serve "the goal of preserving the distinctiveness of marriage and avoiding blurring its differences with unmarried intimate relationships."\(^{58}\) He also postu-
lates that the pressure for domestic partner recognition would abate if gay men and lesbians could marry.\(^5\)

Professor Regan’s viewpoint leads him to evaluate separately each dimension of the legal treatment of unmarried couples. In general, he favors recognition when doing so reinforces “an ethic of care and commitment.”\(^6\) Thus, with respect to claims between partners whose relationships involve financial and emotional interdependence, he believes that the ALI gets it right because “individuals may have responsibilities of care toward one another that arise not simply from consent but by virtue of a shared life, whatever legal form it takes.”\(^6\)

B. Responding to the Ideological Critics

There are two distinct responses to the ideological opponents of the ALI Principles. Since such opponents argue that marriage is a more valuable relationship than domestic partnership, one can respond by disagreeing with that assertion. This is the approach that I take. Alternatively, one can meet the objections of the ideological opponents by agreeing that marriage presents a more desirable relationship, but also arguing that the implementation of the Domestic Partners chapter merely recognizes the reality of people’s lives and does not diminish the importance of marriage. The ALI itself, as well as the main drafters of the Principles, have adopted this approach when defending their work against ideological attacks. Because family law has a history of adapting to changing families, most notably in the recognition currently provided to children born out of wedlock, this

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\(^6\) Regan, 76 Notre Dame L Rev at 1464 (cited in note 48). Elizabeth Scott makes this assertion more forcefully:

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 same-sex relationships are clearly moved by the unfairness of the discriminatory exclusion that these couples face. 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.


\(^6\) Regan, 76 Notre Dame L Rev at 1450 (cited in note 48).

\(^6\) Id at 1451.
approach has a respectable pedigree. First I will describe such approach, and then I will differentiate my approach from it.

1. **Defending the ALI Domestic Partner Principles as a practical response to changing family demographics.**

The comment section of the Domestic Partners chapter succinctly states: "Although society's interests in the orderly administration of justice and the stability of families are best served when the formalities of marriage are observed, a rapidly increasing percentage of Americans form domestic relationships without such formalities."62 The main drafters of the Principles, Ira Ellman and Grace Ganz Blumberg, have said repeatedly that the ALI intended to adapt family law to meet the changes in the family—to make the law take account of social changes.63 "The more frequent such relationships become, the more the law should be concerned."64

Professors Ellman and Blumberg note that it does not hurt married people to have the law recognize relationships between unmarried people.65 "[The ALI] does not oppose marriage," says Professor Blumberg.66 In fact, the Principles note that the extension of the law to govern the dissolution of domestic partnerships could promote marriage by removing the preservation of economic autonomy from the list of reasons why someone might choose not to marry.67 Thus, the drafters support the domestic partner provisions as extending equity and justice to those who actually live in nonmarital partnerships without defending the positive good of such relationships.

The logic and coherence of this position derive significant support from a different issue in family law: equal legal status for children born to married couples and those born to unmarried women. No one seriously disputes that legal principle today, although its implementation, beginning in the 1960s, toppled centuries of traditions and values.68 Nonetheless, supporters of the

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62 ALI Principles § 6.02 comment a at 914 (cited in note 2).
63 See, for example, Pear, Legal Group Urges States to Update Their Family Law, NY Times at A1 (cited in note 36).
64 ALI Principles Ch 1, Overview of Ch 6 at 33 (cited in note 2).
65 Edelhart, Unmarrieds at Risk, Indianapolis Star at E1 (cited in note 41).
66 Id.
67 ALI Principles § 6.02 comment b at 916 (cited in note 2).
68 See Uniform Parentage Act, Prefatory Note, 9B ULA 378 (1973) ("When work on this Act began, the notion of substantive legal equality of children regardless of the mar-
mainstream position of treating all children as legitimate do not thereby embrace the positive good of out-of-wedlock childbearing. Rather, they accept the reality of contemporary life and articulate the principles of equality, equity, and justice that underlie our current statutory and legal regime. The ALI can proudly stand behind analogous reasoning.

Some would dismiss this analogy. They would argue that children bear no responsibility (or guilt) for their out-of-wedlock birth and so should not suffer disadvantages because of it. Such advocates might argue that, on the other hand, unmarried couples should face the consequences of choosing a disfavored family form. This reasoning ignores the ideology that supported the harsh distinction between “legitimate” and “illegitimate” children for centuries, indeed millennia.
The principle that the sins of the fathers should be visited upon their children has ancient roots in Judeo-Christian tradition. The Ten Commandments instruct that those who do not worship the one God will incur consequences that will be visited upon their grandchildren and great-grandchildren. The common law rule that a child born out of wedlock was filius nullius, the child of no one, condemned children for the sin of their parents. The notion that such children are innocent and concomitantly entitled to protection under the law supplants centuries of tradition in favor of a better principle—one that reflects modern values of equality and justice.

Furthermore, the law recognizes the rights of parents of children born out of wedlock, the very people whose "sins" led to the centuries of distinction. On the very day that the Supreme Court found it unconstitutional to deny children born out of wedlock the right to recover for the wrongful death of their mother, it also found it unconstitutional to deny the mother of an out-of-wedlock child the right to recover for her child's wrongful death. The mother's "immorality" did not bar her claim. Similarly, courts have permitted fathers to inherit from their out-of-wedlock children and to recover in the event of their out-of-wedlock child's wrongful death. Although the Supreme Court has upheld some distinctions in this area, it has declined to do so on grounds related to promotion of the traditional family or sexual morality.

It seems accurate then to link relatively recent changes in the legal status of out-of-wedlock children and their parents with the ALI's proposed changes to the legal status of unmarried cou-
ple. Both are responses to social and demographic changes in family composition. Neither necessarily applauds those changes.

2. *Defending the ALI Domestic Partner Principles as an expression of the positive good of such relationships.*

Unlike Professors Ellman and Blumberg, I am happy to defend the Principles as an expression of the positive good of non-marital relationships. For reasons I have articulated elsewhere, I support the abolition of marriage as a legal category; its religious or cultural status could continue for those who so choose. I do not believe that marriage is an inherently more valuable relationship than others, including non-conjugal relationships characterized by care and/or interdependence. Without the prospect of the elimination of legal marriage in sight, however, I support removing the “special rights” conferred on marriage. Rather, when relationships are relevant to the purpose of a law, I support the inclusion within the law of all relationships that achieve the law’s purpose.

The most important objective of laws governing the financial consequences of divorce is the just resolution of the economic claims of parties. There would be no need for distinctive divorce rules if traditional property and contract principles could justly carry out this objective. Such principles fail, however, when the


81 If forced to identify society’s most important relationship, I would agree with Martha Fineman that the relationship between an inevitable dependent, most commonly a child, and the person who cares for that dependent, most commonly a mother, is the bedrock relationship without which society could not continue. Martha Albertson Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* (Routledge 1995). To privilege a relationship between two adults based on their sexual affiliation to one another misses the point.


83 The Director’s Foreword to the ALI Principles notes that their work “attempts to treat wives, husbands, and children fairly when the family dissolves.” ALI Principles Director’s Foreword at xv (cited in note 2). The Principles list as the most important objective of the Domestic Partners chapter the “just resolution of the economic claims of parties who qualify as . . . domestic partners.” §6.02 comment b at 915.
dispute grows out of lives intertwined in the shared endeavor of an intimate family relationship. To achieve the objective of such laws, all relationships sharing characteristics that make contract and property remedies insufficient must be addressed by other distinctive rules. The ALI's definition of who qualifies for this status has mostly gotten it right.84

I am also willing to acknowledge that legal recognition of nonmarital relationships expresses acceptance of such relationships, and that this is a good thing. Thus, I agree with Professor Gary Spitko, who makes the analogous point in his analysis of the extension of intestacy law to include same-sex couples.85 Professor Spitko notes that the exclusion of same-sex couples from the rules of intestate succession in Article II of the Uniform Probate Code serves a powerful expressive function—a silence he deems "deafening in its devaluation of gay relationships."86 Drafters revising Article II to include same-sex couples could profess to base their revision on the reality of such relationships and could disclaim an intent to promote such relationships.87 Professor Spitko believes, however, that "inclusion would indicate that gay and lesbian relationships merit positive attention and would be a powerful symbol that society accepts such relationships."88

Professor Spitko points out that the Uniform Probate Code is a "model code" studied by scholars and legislators, and students who will be future scholars and legislators.89 In a similar vein, the ALI Principles are, as their subtitle reflects, "recommendations." They are the American Law Institute offering "advice" to

84 See Part I.
86 Id at 1103.
87 Id at 1101.
88 Id at 1100. Spitko also writes:

It is a truism that the law teaches as it governs. The law has great potential to teach and reinforce the values that ground it or appear to ground it. Those who experience the law operating on them personally and those who observe the law operating on others are likely to learn whom the law respects, ignores, privileges, and disadvantages. In this way, intestacy law not only reflects society's familial norms but also helps to shape and maintain them. Thus, succession law reform has great potential to change the way our society views gay men and lesbians and, indeed, how gay men and lesbians view themselves.

Spitko, 41 Ariz L Rev at 1100-01 (cited in note 85).
89 Id at 1105 (emphasis in original).
those seeking "fair" family law rules. By including unmarried opposite-sex and same-sex partners within its purview, the ALI acknowledges that such relationships fall within the circle of relationships deemed family. And when addressing the dissolution of such relationships, the ALI recommends that states not make them "a stranger to its laws."

III. CONSIDERING WHETHER TO ASCRIBE STATUS TO PARTIES WHO DO NOT MARRY

A. The Law Ascribes Status to Reflect Desired Norms

Others oppose the ALI Domestic Partners Chapter because they disagree with a rule ascribing status to those who do not choose it. These commentators assume that heterosexual conjugal couples who do not marry choose to forego the legal consequences of marriage, including those that would flow from the dissolution of their relationship. This argument against status imposition is attractive, given the premium we attach to personal autonomy in deciding matters of family life.

Professor Marsha Garrison postulates that marital obligations derive from consent and are thereby contractual in nature. She argues that, empirically, cohabitation does not pro-

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90 ALI Principles Director's Foreword at xvi (cited in note 2).
91 Romer v Evans, 517 US 620, 635-36 (1996) (finding in violation of the Equal Protection Clause an amendment to the Colorado Constitution prohibiting any governmental unit from enacting any law or policy protecting gay men and lesbians and deeming the amendment a classification that made "a class of persons a stranger to its laws").
93 At the 2003 North American Regional Conference of the International Society of Family Law, Professor Wardle offered a particularly tempting scenario. He postulated a low income mother who lives with the father of her child but does not marry him because she knows he is a financial risk—that he may turn out to be an economic liability rather than an economic asset—and who thinks she has a better chance at a good life for herself and her child if she is not encumbered by him. The prospect of a court awarding him financial compensation when she finally decides to get rid of him seems unjust in the face of her deliberate strategy to avoid financial entanglement. This would be troubling if there were any prospect under the ALI Principles that she would actually bear some financial responsibility for him, but she would not, regardless of whether she marries him. He could not obtain ongoing support payments from her because such payments are tied to economic loss that the person suffered through his or her investment in the family; the man in this example suffered no such loss. As for property division, in this economically marginal family scenario there would be no property to divide.
vide evidence of agreement to assume marital obligations. Under some of the circumstances identified by the ALI, she suggests, heterosexual couples do informally—rather than formally—consent to the assumption of marital obligations; these cases warrant reinvigoration of common law marriage more readily than ascription of status as defined by the ALI. For same-sex couples barred from marriage, she prefers either allowing them to marry or allowing formalization through other means, such as civil unions. Ascription, on the other hand, devalues marriage, a status entitled to privileged treatment because of its symbolic importance and its association with greater “health, wealth, happiness, and stability” than that of cohabitation.

Professor Garrison disputes the ALI’s concern that ascription of status is necessary to compensate for the disparate bargaining power between a dependant woman and her male partner who does not marry her. She questions as an empirical matter whether nonmarital cohabitation harms women and children. She speculates that the example of a woman who wants to marry and a man who does not no longer presents an accurate picture of cohabitation.

Similarly, Elizabeth Scott finds imposition of financial obligations on unchoosing parties paternalistic. She argues that a contractual framework is more compatible with liberal values: “Imposing a marriage-like status on cohabiting parties, as the ALI Principles do, excludes an intimate affiliation that some parties might choose. . . . Although an imposed status may sometimes beneficially deter exploitation of dependent partners, it sacrifices the freedom of individuals to order their intimate lives.”

95 Id.
98 Id.
99 Id.
100 Id.
101 Scott, 2004 U Chi Legal F at 262 (cited in note 49). Of course the ALI does permit the parties to avoid financial entanglement through contract. Consider ALI Principles §7 (cited in note 2) (providing rules for pre-marital, post-marital and separation agreements all of which would allow a couple to contract out of the substantive rules contained within the Principles).
Although Scott would modify the traditional contract approach to unmarried couples by presuming intent to assume marital obligations if they live together for more than five years, another opponent of the ALI’s ascription model, Professor David Westfall, adopts the pure contract approach. Deploring the status approach of the ALI, he hails the “powerful contemporary movement to recognize the parties’ freedom to contract about the terms of their relationship.” He would have limited the Principles to those facilitating enforcement of the agreements of nonmarital partners.

A fatal flaw exists in the reasoning that differentiates married and unmarried couples on the theory that the former agree, in the manner of a contract, to economic obligations towards one another. The flaw is the premise that those who marry or do not marry accurately understand the legally enforceable economic obligations that each will have towards the other. In our federal system, it is not possible for this proposition to be true.

State laws establishing obligations between spouses vary dramatically. In some states, but not all, spouses are liable to third parties for the provision of necessaries to the other spouse. I doubt that marrying couples in Maryland and Michigan know they are not liable to hospitals for each other’s medical bills, or that couples in New Jersey know they will indeed have to pay their future spouse’s medical bills if the spouse lacks sufficient funds. Couples who settle in California likely do not choose a community property regime, and couples who settle in New York likely do not choose common law property as their form of ownership. Moreover, spouses who move from California to New York are unlikely to know, let alone agree, that doing so changes their economic relationship.

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104 Id at 1479.
106 See Condore v Prince George’s County, 425 A2d 1011 (Md 1981); North Ottawa Community Hospital v Kleif, 578 NW2d 267 (Mich 1998).
107 See Jersey Shore Medical Center-Fitkin Hospital v Estate of Baum, 417 A2d 1003 (NJ 1980).
108 See Cal Fam Code § 2581 (West 2004)
109 See NY Dom Rel Law § 236 (McKinney 2004).
Concerning expectations should they divorce, I doubt couples know that some states will divide their property equally, some will presume equal division, and others will follow an “equitable distribution principle” that may be far from equal. I doubt they know that sexual infidelity will bar alimony in North Carolina but not in New Jersey, or that in some states an adulterous husband will have his transgression used against him in assessing alimony or property division, whereas in others it will be irrelevant. I doubt they know that Delaware requires a showing of dependency before awarding alimony, while Florida does not. I doubt a wife who supports her husband through medical school in New York knows she will have a property claim to his resulting earning ability if they divorce, or that a wife in Indiana knows that, if she does the same, she cannot obtain even “reimbursement alimony” for her financial and nonfinancial contributions to his success. For that matter, consider how many people think that all states recognize common law marriage and

110 Compare Ariz Rev Stat § 25-318 (2003) (awarding each party an undivided one-half interest in the community property) with Ark Code Ann § 9-12-315 (Michie 2003) (presuming an equal division of property unless it would be inequitable given several listed factors) and 750 Ill Comp Stat § 5/503(d) (2003) (directing court to divide property in “just proportions”).


112 Compare Del Code Ann, Title 13, § 1512(c) (Supp 1990) (stating that alimony shall be determined “without regard to marital misconduct”) with NC Gen Stat § 50-16.3A(a) (cited in note 95) (including “[t]he marital misconduct of either of the spouses” as a factor for courts to consider when determining the amount of alimony).

113 Compare Del Code Ann, Title 13, § 1512(b)(1) (Supp 1990) with Fla Stat Ann § 61.08 (West 2003). Delaware is one of eight states that has adopted the alimony provisions of the Uniform Marriage and Divorce Act which prohibits alimony for any period of time unless the spouse seeking it “(1) lacks sufficient property to provide for his reasonable needs; and (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.” 9A ULA § 308(a) (West 1998).

114 Compare O'Brien v O'Brien, 489 NE2d 712 (NY 1985) (finding "an interest in a profession or professional career potential is marital property which may be represented by direct or indirect contributions of the non-title-holding spouse, including financial contributions and nonfinancial contributions made by caring for home and family") and Krigsman v Krigsman, 288 A2d 189 (NY App 2001) (awarding wife 50 percent of husband’s increased earning capacity because she supported him as he pursued his training as a pediatric gastroenterologist) with Yoon v Yoon, 711 NE2d 1265 (Ind 1999) (concluding that it was improper for trial court to consider enhanced earning capacity of husband’s medical practice as marital property) and In re Marriage of Roberts, 670 NE2d 72 (Ind App 1998) (refusing to treat advanced degree as marital property and ruling that there was no concept of “reimbursement alimony” under which she could be compensated for her financial and nonfinancial support of her husband while he went through school).
that cohabitation for a period of time means that they are married.\textsuperscript{115}

Justifying or criticizing law on the basis of people's assumptions about the legal consequences of their choices is not a fruitful pursuit. Couples who marry cannot be said, in any meaningful way, to have agreed with each other in the manner of a contract to specific economic obligations, including those that follow if the relationship ends. The wildly diverse policy determinations represented in the legal frameworks encompassing the economic consequences of marriage and divorce among the fifty states and the District of Columbia suggest that lawmakers, not the spouses, set the norms.\textsuperscript{116} Lawmakers extending the property and support frameworks that accompany divorce to domestic partners also express a norm. As with marriages, if the parties do not like the norm, they may contract around it.

B. Lessons About Ascription from Canada

In the United States, arguments against ascription of status through mechanisms like the ALI Domestic Partner Principles come from scholars who believe that marriage is more special, distinctive, and valuable than any other type of relationship. While some would recognize same-sex marriages and others would not—a huge distinction—all would encourage marriage. The development of the law in Canada offers the opportunity to consider arguments about ascription of status in a different ideological construct. Unmarried opposite-sex and same-sex couples in Canada have a legal status very close to that of married couples.\textsuperscript{117} In that climate, arguments about the benefits and burdens of ascription can be considered separately from the ideological arguments about the superiority of marriage.

\textsuperscript{115} Commentary in the Principles specifically notes: "Many Americans entertain the widespread, albeit erroneous, belief that the mere passage of time transforms cohabitation into common-law marriage." ALI Principles § 6.02 comment a at 914 (cited in note 2). See also Bowman, 75 Or L Rev at 711 (cited in note 96) (citing frequency of mistaken belief that cohabitation for a period of years results in common law marriage).

\textsuperscript{116} The law does not protect the expectations of those who marry. The advent of no-fault grounds for divorce changed the terms agreed to by those who married in an era when an "innocent" spouse could be assured that the promise of "till death do us part" was legally enforceable. The expectations of those who do not marry should not be valued any higher. Society can determine that the norm of equitable treatment of the financial consequences of relationship breakdown should trump any expectation that a chosen course of action would have, or not have, specific legal consequences.

\textsuperscript{117} Consider Nicholas Bala, \textit{Controversy Over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships}, 29 Queen's L J 41 (2003).
Ideological arguments so prevalent in the United States against legal recognition of nonmarital relationships have no resonance in Canada. Unmarried heterosexual couples who live together for anywhere between one and three years have legal rights and obligations closely tracking those of married couples. As in the United States, in Canada some aspects of family law are determined by provinces and some by the federal government, and so some regional differences arise. The first recognition of unmarried couples came in a British Columbia statute passed in 1972 extending spousal support rights; by way of contrast, the ALI proposal to extend compensatory payments to domestic partners would change the law of every American state. Numerous Canadian statutes followed in the 1980s and early 1990s, conferring private obligations and also recognizing unmarried couples in matters such as inheritance and taxation.

In 1995, the Supreme Court of Canada, in Miron v Trudel, found the exclusion of an unmarried partner from the definition of spouse for purposes of an automobile insurance policy unconstitutional. Central in the rhetoric of the Court's opinion is a belief in the equal value and dignity of nonmarital relationships. Finding discrimination based upon marital status a violation of the Canadian Charter of Rights and Freedoms, the Court stated that:

Discrimination on the basis of marital status touches the essential dignity and worth of the individual in the same way as other recognized grounds of discrimination violative of fundamental human rights norms. Specifically, it touches the individual's freedom to live life with the mate of one's choice in the fashion of one's choice. This is a mat-

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118 Id at 47.
120 Bala, 29 Queen's L J at 45-46.
121 Id at 47-59. Canadian commentators have expressed concern that the expansion of recognition of cohabiting couples is part of a trend of privatizing the responsibility for dependency and social and economic well-being once more firmly held by the state. See Mary Jane Mossman, Conversations about Families in Canadian Courts and Legislatures: Are there Lessons for the United States?, 32 Hofstra L Rev 171; Boyd and Young, 1 Seattle J for Soc Just at 757 (cited in note 119).
123 Id.
124 Id at 420.
ter of defining importance to individuals. . . . Discrimination on the basis of marital status may be seen as akin to discrimination on the ground of religion, to the extent that it finds its roots and expression in moral disapproval of all sexual unions except those sanctioned by the church and state.\textsuperscript{125}

Miron led to both federal and provincial legislation in a wide variety of areas, bringing partners cohabiting for a specified period of time within the definition of "spouse."\textsuperscript{126} In 1999, the Supreme Court of Canada found unconstitutional an Ontario statute extending spousal support benefits to unmarried heterosexual partners but not to same-sex partners.\textsuperscript{127} In that case, the Court relied in part on its earlier recognition in \textit{Egan v Canada}\textsuperscript{128} that discrimination on the basis of sexual orientation violated the Charter.\textsuperscript{129} In 2000, the Canadian Parliament amended sixty-eight federal laws to recognize as "common law partners" both same-sex and opposite-sex couples who cohabit for at least a year.\textsuperscript{130}

This legal landscape affected the comprehensive analysis of the law of personal adult relationships completed by the Law Commission of Canada in 2001.\textsuperscript{131} With the status of unmarried opposite-sex and same-sex couples virtually identical to that accorded to married couples, the Commission could consider more broadly the legal treatment of close personal relationships among adults. The Commission’s report, \textit{Beyond Conjugalit y}, argues that the state should not automatically prefer conjugal over nonconjugal relationships.\textsuperscript{132} Rather, every law that references a relationship should be examined to identify its purpose and to include within its scope all relationships relevant to achieving that purpose.\textsuperscript{133} The report takes for granted the equal value of married and unmarried, opposite-sex and same-sex, couples.

In such a legal and social climate, there is no need to support ascription upon relationship breakdown as a first step towards

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\textsuperscript{125} Id.
\textsuperscript{126} Bala, 29 Queen's L J at 48-59 (cited in note 117).
\textsuperscript{127} \textit{M v H}, [1999] 2 SCR 3 (Can).
\textsuperscript{129} \textit{M v H}, [1999] 2 SCR at 3.
\textsuperscript{130} Bala, 29 Queen's L J at 56 (cited in note 117).
\textsuperscript{131} Law Commission of Canada, \textit{Beyond Conjugalit y} (cited in note 82).
\textsuperscript{132} Id.
\textsuperscript{133} Id.
legal recognition of the value of nonmarital relationships; such recognition is firmly in place. In sharp contrast to the United States, third parties, including the government, recognize the rights of same-sex and opposite-sex couples for a variety of critical rights and benefits. Thus opposition in Canada to ascription for purposes of resolving claims the two parties have against each other when they separate (inter se claims) does not mask an ideological agenda of promoting marriage above all other relationships. In fact, governmental recommendations to limit the reach of ascription simultaneously urge enactment of registration schemes available to a wide range of relationships.

The Law Commission of Canada, in Beyond Conjugality, recommends extending marriage to same-sex couples and developing schemes that would allow those in both conjugal and non-conjugal relationships to register their relationships and thus receive legal recognition. Availability of marriage and registration promotes the principles of voluntariness and autonomy. Registration reduces the need of the government to examine the details of a relationship in order to determine its legal significance. The Commission specifically advocates making registration available to two people even if they do not live together.

In this context, the Law Commission of Canada is cautious about ascription, calling it a "blunt policy tool . . . that infringes upon the value of autonomy." Nonetheless, it does not recommend its elimination. Specifically, it notes that ascription should be used to prevent the risks of exploitation inherent in a model that would allow an unmarried partner to prevail in an economic dispute only in the presence of a contract.

A report from British Columbia proposing model legislation to govern inter se claims expressed a similar position in greater detail. The British Columbia Law Institute's Report on Recogni-

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134 Id at 130-31.
135 Law Commission of Canada, Beyond Conjugality at 117-22 (cited in note 82).
136 Id at 117-18.
137 Id at 116-20.
138 Id at 118-20.
139 Law Commission of Canada, Beyond Conjugality at 116 (cited in note 82).
140 It also seems clear that registration schemes could not completely replace the ascription model that has taken root in Canadian law. Id at 118.
141 Id.
ition of Spousal and Family Status included among its guiding principles both voluntariness and protecting the vulnerable.\textsuperscript{143} "Under a principle of voluntariness, the law should not impose rights and obligations on people who live together unless either (a) they (expressly or tacitly) accept those obligations, or (b) another policy . . . is applicable and . . . should be accorded greater weight than the principle of voluntariness."\textsuperscript{144} The subsequent principle to which this section refers is protecting the vulnerable, articulated as follows:

People in a marriage or in a relationship that resembles marriage may suffer economic prejudice when the relationship ends. They are also in need of protection. Not recognizing these relationships and not offering the same legal protections that the community has agreed are necessary in more traditional family units may allow one party to take unfair advantage of another. It is in these cases that the principle of voluntariness must sometimes yield to the principle of protecting the vulnerable.\textsuperscript{145}

In implementing these principles, the report proposes that those who have not married or registered their partnership but who have lived together for more than two years be deemed to be in "marriage-like relationships."\textsuperscript{146} Upon dissolution, they could request ongoing support under the same principles as married couples.\textsuperscript{147} For family assets, however, if the relationship lasted less than ten years, such persons would have no automatic right to equal share upon separation.\textsuperscript{148} Rather, they could request a share of assets based upon "protective legal principles that prevent one person from unjustly benefiting at the expense of another."\textsuperscript{149} A share of separate property could be awarded "on revised constructive trust principles or to compensate for economic prejudice suffered by reason on the relationship."\textsuperscript{150}

\begin{footnotes}
\item[143] Id at 6.
\item[144] Id.
\item[145] Id at 13.
\item[146] BCLI Report at 12 (cited in note 142).
\item[147] Id at 13.
\item[148] See id at 12-13.
\item[149] Id at 13. If the relationship lasted more than ten years, it would be treated as a marriage for property division purposes.
\item[150] BCLI Report at 13 (cited in note 142).
\end{footnotes}
A recent decision of the Supreme Court of Canada accepted a limit on ascription but failed to recognize the principled approach of the British Columbia Law Institute. Although some provinces extend to dissolving unmarried couples the presumptively equal property division applicable to divorce, Nova Scotia had not done so, and in *Nova Scotia v Walsh*¹⁵¹ the Supreme Court of Canada refused to find this distinction unconstitutional.¹⁵² The opinion denying a presumptively equal share of the man's property to the woman with whom he had lived for ten years and raised two children relied on "freedom of choice" arguments, refusing to ascribe spousal status to a couple that did not choose it.¹⁵³ "People who marry," the Court wrote, "can be said to freely accept mutual rights and obligations. A decision not to marry should be respected because it also stems from a conscious choice of the parties."¹⁵⁴ The Court's leap from the consent required to marry to the consent to be bound by specific property division laws, and the concomitant logic that the choice not to marry indicates the choice not to be bound by those rules, is unconvincing.

The Court noted that the law of constructive trust is still available to nonmarital partners.¹⁵⁵ I would highlight one other important element also noted by the Court: the possibility of obtaining a support order upon the dissolution of the relationship.¹⁵⁶ No American jurisdiction currently allows such orders absent a contract between the parties.¹⁵⁷ Nonetheless, in dissent, Justice L'Heureux-Dube blasted the majority for distinguishing the already settled right to spousal support from the requested right to property division.¹⁵⁸ Using the Court's framework for determining whether a law violates the Canadian Charter, she wrote:

¹⁵¹ [*2002*] 102 CRR2d 1 (Can).
¹⁵² See id at 1.
¹⁵³ Id.
¹⁵⁴ Id at 67.
¹⁵⁵ *Walsh, [2002]* 102 CRR2d at 70-71.
¹⁵⁶ Id at 71.
¹⁵⁷ The Reporter's Notes state that a few American jurisdictions have stretched contract principles to find an agreement for one party to provide post-relationship support to the other, but most have not. The Reporter refers to Canadian and Australian law when noting that "other closely related legal systems include nonmarital cohabitants within their definition of 'spouse' for purposes of spousal-support obligations." ALI Principles § 6.06 Reporter's Notes at 943 (cited in note 2).
¹⁵⁸ *Walsh, [2002]* 102 CRR2d at 5-7.
Extending the benefit of the equal presumption solely to married cohabitants constitutes a serious attack upon the dignity of the claimant and all heterosexual cohabitants. It sends the message that, although the need for a simple means of dividing the assets on dissolution exists, only certain people are entitled to the benefit because of a status wholly unrelated to that need. In short, it demeans the dignity of an equal to treat him or her with less respect than his or her functional equals.¹⁵⁹

Because the Court in *Walsh* failed to recognize that division of property should be available to compensate for economic damage incurred by one partner for the benefit of the other and their children, it failed to do justice the way the British Columbia Law Institute proposal would.

**Conclusion**

Under current Canadian law, in most respects third parties and the state must treat married couples and couples who cohabit for specific periods of time identically. Regarding *inter se* claims, upon dissolution of either type of relationship, the party economically disadvantaged by the termination can petition for spousal support. Provinces may, but need not, extend the presumption of equal division of property to unmarried couples.

In the United States, the federal government extends none of the economic benefits of marriage to nonmarital couples.¹⁶⁰ A few states and a substantial number of local governments and private businesses extend benefits to those who register as domestic partners.¹⁶¹ Nonmarital partners are rarely recognized

¹⁵⁹ Id at 131.

¹⁶⁰ In one very limited instance, federal law provides a benefit that can go to a nonmarital partner. The Mychal Judge Police and Fire Chaplains Public Safety Officer's Benefits Act, 42 USCS § 3796 (2003), provides for payment of a federal death benefit when a public safety officer dies in the line of duty. In the absence of a spouse or child, the payment goes to whomever the decedent named as his or her life insurance beneficiary. See id. When this named person is a same-sex or opposite-sex partner, that person will receive the benefit.

¹⁶¹ California offers the most expansive domestic partnership statute, extending to registered domestic partners "the same rights, protections and benefits and . . . responsibilities, obligations, and duties under law as are granted to and imposed on spouses." Cal Fam Code § 297.5 (West 2004). Vermont law extends the rights and obligations of marriage to same-sex couples who enter civil unions. See 15 VT Stat Ann, Title 15 Ch 23 (West 2004). Hawaii's Reciprocal Beneficiary Statute offers couples who are legally prohibited from marrying a small number of the rights and obligations conferred through marriage. Haw Rev Stat § 572C1-7 (2004). New Jersey is the most recent state to extend
under common law principles determining, for example, who is entitled to recover for wrongful death or loss of consortium.\textsuperscript{162} When a nonmarital couple separates, no state provides a mechanism to order one party to pay ongoing support to each other, and only one state permits property division under the rules applicable to divorcing spouses.\textsuperscript{163}

Decades ago, Canada began its journey towards accepting relationships outside of marriage as family. That journey has culminated in today's widespread acceptance of the principle that the decision to marry should matter little in distributing rights and responsibilities, both between partners and between the couple and the state. Once the United States has moved the same distance as Canada, it may be appropriate to reconsider whether ascription for purposes of property division should be limited to circumstances necessary to account for vulnerability and avoid exploitation. Until then, the ALI Principles push the United States in the right direction by making marriage matter less.

\textsuperscript{162} See, for example, \textit{Raum v Restaurant Associates Inc}, 675 NYS2d 343 (NY App 1998). A notable exception is New Mexico. See \textit{Lozoya v Sanchez}, 66 P3d 948 (NM 2003).
