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Elizabeth S. Scott
Elizabeth.Scott@chicagounbound.edu

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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, 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 was the setting in which most children were raised. Today, when about 40 percent 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 heterosexual or gay couples.

1 University Professor and Class of 1962 Professor of Law, University of Virginia. For comments on an early draft, I am grateful to Maxine Eichner, Robert Ferguson, Bill Sage, Bob Scott and Rip Verkerke. Thanks also to participants in conferences and presentations of the paper at Hofstra Law School, The University of Chicago Legal Forum Symposium (Oct 2003), Columbia Law School, and the University of Virginia Law School. I received excellent research assistance from Jessica Smith and Scott Horton.


2 Sociologists have described a social trend in which sex, cohabitation, childbearing, and childrearing increasingly take place outside of marriage. See William G. Axinn and Arland Thornton, The Transformation in the Meaning of Marriage, in Linda J. Waite, ed, The Ties That Bind: Perspectives on Marriage and Cohabitation 148-50 (Walter de Gruyter 2000). 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 UC-1, Unmarried Couple Households, by presence of Children: 1960-
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, it is quite appropriate to ask whether the special legal status of marriage can be justified any longer.

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 out-moded institution that increasingly is not the preferred family form.

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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, inevitable and derivative dependency. The latter is the dependency of caretakers (particularly mothers) who can not be self sufficient economically because of their caretaking role. See Martha Albertson Fineman, The Neutered Mother, the Sexual Family, and other Twentieth Century Tragedies 161-66 (Routledge 1995); Martha Albertson Fineman, Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency, 8 Am J Gender Soc Pol & L 13, 20-22 (2000).

Martha Albertson Fineman, Contract and Care, 76 Chi Kent L Rev 1403 (2001). 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 Marion Young, Reflections on Families in the Age of Murphy Brown: On Gender, Justice, and Sexuality, in Nancy J. Hirschmann & Christine Di Stefano, eds, Revisioning the Political: Feminist Reconstructions of Traditional Concepts in Western Political Theory 267-68 (Westview 1996); Stephanie Coontz, The Way We Never Were: Families and the Nostalgia Trap (BasicBooks 1992); Judith Stacey, In the Name of the Family:
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 be subject to the same legal treatment. In this vein, the American Law Institute ("A.L.I.") proposes that courts should impose the financial rights and obligations of marriage on cohabiting parties when their relationships end.

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. These advocates make apocalyptic claims about the negative impact of the decline of marriage on social welfare. Many reject the legitimacy of alternative family forms and aim to restore traditional marriage; they can be charged fairly with seeking to impose a moralistic vision of the good life on the rest of society. 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.\footnote{At the heart of the pro-marriage movement are fundamentalist Christians who advocate a return to traditional marriage on religious and moral grounds. See, for example, Jerry Falwell, \textit{Listen America} 121-64 (Doubleday 1980). Covenant 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, Alan J. Hawkins, et al, \textit{Attitudes about Covenant Marriage and Divorce: Policy Implications from a Three-State Comparison}, 51 Family Relations 166 (2002). Many feminists have opposed covenant marriage. See Katha Pollitt, \textit{Is Divorce Getting a Bum Rap?}, Time 82 (Sept 25, 2000); Katha Pollitt, \textit{Can this Marriage be Saved?}, The Nation 9 (Feb 17, 1997); Barbara Ehrenreich, \textit{In Defense of Splitting Up: The Growing Anti-Divorce Movement is Blind to the Costs of Bad Marriages}, Time 80 (Apr 8, 1996).}

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.\footnote{See note 27 and accompanying text. 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. \textit{Goodridge v Department of Health}, 798 NE 2d 941 (Mass 2003). Subsequently, the Massachusetts legislature proposed an amendment to the state constitution prohibiting same-sex marriage, but allowing civil unions. However, until such an amendment is ratified, \textit{Goodridge} stands and issuance of marriage licenses to same-sex couples commenced in spring 2004. In response to \textit{Goodridge} and 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, \textit{Same Sex Marriage: The President; Bush Backs Ban in Constitution on Gay Marriage}, New York Times A1 (Feb 24, 2003).} 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.\footnote{Some advocates for the rights of gay and lesbian persons challenge this policy goal. See Polikoff, 79 Va L Rev at 1549-50 (cited in note 4).}

On first inspection, those who challenge the favored legal status of marriage would seem to have the better argument. 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 Article, I offer a modest defense of the privileged legal status of formal marriage (as I will define this union) and of neutrality toward informal intimate unions. My claim is that the special 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, the government can delegate to the family some of society's collective responsibility for dependency.\(^{14}\) Retaining the privileged legal status of marriage in a contemporary setting can (and should) constitute 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 partners.\(^{15}\) Default rules that reflect the implicit understandings of most couples in these unions will mitigate the harsh inequity that results today when courts de-

\(^{14}\) I assume that society has this collective responsibility. Libertarians and some social conservatives might disagree with this claim.

cide 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.

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, underscored by a comparison with informal unions, justify the legal privileging of marriage. Part III discusses the enforcement of obligations in cohabitation unions and argues 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 a 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 otherwise would bear in caring for children and for adults who cannot provide for basic needs due to illness, disability, or advanced age.

The government recognizes the useful role of families through direct and indirect subsidies, programs that support particular family functions, and policies that benefit families (or particular types of families). Even in an earlier era when law-

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16 The law privileges families, particularly (but not exclusively) families based on marriage. For example, parents get federal income tax deductions and childcare 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 take leave from work when a family member is ill. Family members qualify for Social Security survivor benefits, government health insurance, and pensions. Zoning ordinances favor families over other groups. See Moore v City of East Cleveland, 431 US 494, 496 (1977); City of Ladue v Horn, 720 SW2d 745, 747 (Mo App 1986); David D. Haddock and Daniel D. Polsby, Family as a Rational Classification, 74 Wash U L Q 15 (1996). Family members also have a special status under rent control regulations. See Braschi v Stahl Association, 543 NE2d 49 (NY 1989). See discussion of marital benefits in notes 86-89.
makers insisted that families occupied a private sphere and that the government bore no responsibility for dependency, the legal regime strongly supported traditional marriage and harshly sanctioned other family forms. This stance can be 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, opponents reject marriage as obsolete; they describe it as a once-dominant union that has been (or is being) supplanted by other family forms. Second, critics argue that marriage cannot escape its history as a patriarchal institution that oppressed women who married and harshly discriminated against those who did not—especially unmarried mothers.

The first critique maintains that the utility of marriage has declined too much for it to retain a privileged legal status. Even if marriage once functioned usefully to meet society’s dependency needs, this is no longer true because of the dramatic social changes of the second half of the twentieth century. Law should adapt to these changes by protecting all relationships that serve family functions and by abandoning its elevation of the status of formal marriage.

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17 Frances Olsen, Constitutional Law: Feminist Critiques of the Public/Private Distinction, 10 Const Commentary 319, 324-25 (1993); Fineman, The Neutered Mother at 79-87 (cited in note 3).
20 Arguments for legal recognition of functional families have focused on relationships outside the traditional legal categories, including adult couples in informal unions and de facto parent-child relationships. See, for example, Martha Minow, Redefining Families: Who’s In and Who’s Out?, 62 Colo L Rev 268 (1991); Katherine T. 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 (1988); Joseph Goldstein, Anna Freud and Albert Solnit, Beyond the Best Interests of the Child (Free Press 1973) (arguing that the law should protect the relationships between children and their psycho-
These social developments and their implications for the status of marriage warrant a bit more attention. First, feminist commentators point to divorce rates of 40 percent 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. 21 Divorce is associated with many psychological and economic costs to children, 22 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 even the needs 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 parents. 23 Fineman and others point to these demographic trends as evidence that the importance of marriage as a context for childrearing has declined. Given that the special legal status of the family and its claim to government support rest largely on its childrearing 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. 24 In light of these developments, lawmakers increasingly are urged to extend marital privileges to unmarried couples on the ground that these relationships fulfill family func-

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21 Divorce rates reached a peak of near 50 percent in the early 1980s. Since then, they have declined and stabilized at about 40 percent. See Hawkins, 51 Family Relations at 166 (cited in note 11).

22 See research described in Robert Emery, Marriage, Divorce, and Children’s Adjustment 33-53 (Sage 2d ed 1999); Paul Amato and Alan Booth, A Generation at Risk 195-207 (Harvard 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 or doméstive violence generally. See generally research described in Elizabeth S. Scott, Divorce, Custody, and the Culture Wars, 9 Va J Soc Pol & L 95 (2001).

23 See note 2; See also Arlene Skolnick, Family Values: The Sequel, Am Prospect 83 (May-June 1997); Sara S. MacLanahan, The Consequences of Single Motherhood, 18 Am Prospect 48 (Summer 1994). For the most comprehensive study and analysis of single parent families, see Irwin Garfinkel and Sara S. McLanahan, Single Mothers and Their Children (Urban Institute 1986); Sara S. MacLanahan and Gary Sandefur, Growing Up with a Single Parent: What Hurts, What Helps (Harvard 1994).

tions and deserve the legal benefits and privileges that mostly have been limited to married couples.

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. In this country, 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. Other reform proponents contend that the financial obligations of marriage should be extended to long-term cohabitants in order to provide protection for financially vulnerable partners. The A.L.I. recently proposed

25 See Minow, 62 Colo L Rev at 268 (cited in note 20); Braschi, 543 NE2d at 49 (applying a 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, and Scott, Family Law (cited in note 2).


27 Nan Hunter, Marriage, Law, and Gender: A Feminist Inquiry, 1 Law & Sexuality: Rev Lesbian & Gay Legal Issues 9, 14-19 (1991); William N. Eskridge, Jr., The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment (Free Press 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 S. Wald, Same-Sex Couple Marriage: A Family Policy Perspective, 9 Va Soc Pol & Law 291 (2001). Three states, Vermont, California, and Massachusetts, have extended the privileges, protections, and obligations of marriage to same-sex couples. See Baker v State, 744 A2d 864, 911-12 (Vt 1999); Vermont Civil Union Statute, 15 Vt Stat Ann, 1201 et seq (2000); California Domestic Partnership Law, CA Fam Code, Div 2.5, §§ 297-297.5 (2000); Goodridge v Department of Public Health, 798 NE2d 941 (Mass 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 the same time, President Bush announced support for an amendment to the federal Constitution prohibiting same-sex marriage. See note 12.

28 See Grace Blumberg, Cohabitation Without Marriage: A Different Perspective, 28
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. These developments suggest that the line between marriage and informal unions has become blurred and that lawmakers 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 repeated here. 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. These attitudes persist in the public hostility and punitive policies toward unmarried mothers who cannot support their families. Given this history, some academic 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 the situation to some extent, contemporary marriage, on the view of many feminists, continues to be contaminated by its patriarchal history. 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. When marriages end in divorce, women and children


29 A.L.I. Principles, Ch. 6 (cited in note 7).

30 Many feminists welcome the decline of marriage and invoke the "obsolescence critique" in support of an ideological argument against marriage. See Fineman, 76 Chi Kent L Rev at 1403 (cited in note 4).

31 See Shanley, 95 Colum L Rev at 60 (cited in note 18); Martha Fineman, The Neutered Mother, 79-87 (cited in note 3); Fineman, 8 Am U J Gender Soc Pol & L at 13 (cited in note 3); Stacey, In the Name of the Family (cited in note 4); Coontz, The Way We Never Were, (cited in note 4).

32 See Stacey, In the Name of the Family (cited in note 4); Dorothy Roberts, Motherhood and Crime, 79 Iowa L Rev 95 (1993); Fineman, 8 Am U J Gender Soc Pol & L at 13 (cited in note 3).


34 Arlie Russell Hochschild, The Second Shift (Avon 1997); Martha Fineman, Crack-
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, its critics view marriage as a bad deal for women and welcome its decline as a family form.

B. A Preliminary Response

These critiques challenge the legitimacy and utility of contemporary recognition of marriage as a privileged legal status and suggest that American law lags behind 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 the fact that marriage itself is a less stable union than it once was, should not obscure the reality that marriage continues to serve family care functions quite well for many people. Although many marriages end in divorce, a majority do not, and, as I will demonstrate, even broken marriages provide financial and relationship benefits for dependent family members that derive from the formal legal status. 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.

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, already has changed considerably in a relatively short period. Law reform can reinforce this trend and mitigate the costs to women of gendered marital roles.\(^3\) Of course, those who reject this view will be unmoved by arguments about the social utility of marriage.

II. THE CASE FOR MARRIAGE

The model of marriage that I advocate has much in common with the contemporary version, but it has 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 a 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 duties 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 argue that government can and should maintain and support a family form of this type, and 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

\(^{38}\) Academics 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 and Scott, 84 Va L Rev 1225 (cited in note 15); Jana B. Singer, Divorce Reform and Gender Justice, 67 N C L Rev 1103, 1113-21 (1988-89); Ira Mark Ellman, A Theory of Alimony, 77 Cal L Rev 1, 71 (1989); Katharine Silbaugh, Turning Labor into Love: Housework and the Law, 91 NW U L Rev 1 (1996-1997). Ellman’s approach to alimony as compensatory payment to homemaker spouses has been adopted by the A.L.I. Principles, Ch. 5, Compensatory Spousal Payments, § 5.05 (cited in note 7).
happiness by individual members of society, by respecting privacy and choice in the realm of family life. The policy that 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 more shallow 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. Legal marriage is a status that carries many government benefits. 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 lawmakers legitimately can withhold marital status from same-sex couples only if these couples can be distinguished in some relevant way from heterosexual couples with the same goals. If the special legal status of 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.

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 not grounded in hierarchical gender

39 See note 27 (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 Department of Public Health, 798 NE2d 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 response to Goodridge and to the support by President Bush of a constitutional amendment prohibiting same-sex marriage. See also Defense of Marriage Act. 28 USC § 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 BYU L Rev 1.

40 The court in Goodridge provides a comprehensive description of the government benefits and privileges that married couples enjoy in Massachusetts. See Goodridge, 798 NE2d at 941.

41 Most 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, for example, Wardle, 1996 BYU L Rev at 1 (cited in note 39).
roles. 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 gender roles. 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 nonmarital 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, but choose not to marry.

The argument that states cannot withhold the benefits of marriage from same-sex couples has begun to take hold, as demonstrated by recent judicial and legislative developments in several states. 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. Nonetheless, it seems inevitable that equality-based arguments will ultimately prevail, and that same-sex marriage will

42 Some advocates for same-sex marriage have made this argument. See Hunter, 1 Law & Sexuality: Rev Lesbian & Gay Legal Issues at 18-19 (cited in note 27) (“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 be to dismantle the legal structure of gender in every marriage.”). But see Polikoff, 79 Va L Rev at 1541 (cited in note 4) (arguing that gay and lesbian advocacy of marriage is unlikely to transform gendered marriage and threatens to distort gay and lesbian values and goals).

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 USC § 1738C (2000).

44 See, for example, Braschi v Stahl Association, 543 NE2d 49, 49 (NY 1989). In Braschi, 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.” Id at 53.

45 See notes 12 and 27.

46 See notes 12 and 27.
eventually gain acceptance—in much the same way as mixed-race marriages have become accepted in mainstream society.

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.\(^47\) In part, the argument simply advocates parity between functional families and marriage, a position that I challenge in this Article. 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 the reinforcement of mutual commitment provided by the social norms surrounding this particular relationship. Currently, non-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.\(^48\)

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 infor-


\(^{48}\) This does not mean that other families should be excluded from government benefits offered on the basis of family status. See text accompanying note 94.
mal 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. 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. Although contemporary marriage and divorce law falls short in this regard, 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 informal unions are 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 or she is what Eric Posner calls a “good type”: a responsible person ready to undertake a long-term commitment to an exclusive intimate affiliation. The marital vows also represent ex-

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49 This 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, and domestic violence. See research summarized in Linda J. Waite, 32 Demography at 483 (cited in note 8); Judith A. Seltzer, Families Formed Outside of Marriage, 62 J Marriage & Fam 1247 (2000); Nock, 16 J Fam Issues at 53 (cited in note 8); Nock, Marriage in Men’s Lives (cited in note 8); Glenn, 9 Va J Soc Pol & L at 5 (cited in note 8). An important issue in evaluating this research is whether marriage itself accounts for the differences that are observed or if other factors, such as differences in individuals who choose different types of unions, do.

50 Robert 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 and Scott, 84 Va L Rev at 1251 (cited in note 15).

51 Id at 1332-34.

plicit 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. 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 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 that has 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. 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 traditionally have regulated marriage have also reinforced hierarchical gender roles—which is one reason that feminists understandably are wary of marriage. 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. 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

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54 I have argued that the traditions and social norms regulating marriage serve to promote cooperation and to reinforce the stability of the relationship. See Elizabeth S. Scott, Social Norms and the Legal Regulation of Marriage, 86 Va L Rev 1901 (2000).
55 Gender 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 id at 1901.
56 See id.
represents an expression of each spouse's willingness to be held accountable for the faithful performance of marital duties, not only by the other spouse, but also by the broader community. Marital status also signals to the community that the spouses are not available for other intimate relationships, and thus discourages outsiders interested in intimacy from approaching married persons.\(^5\) In general, the fidelity norm is quite robust; the spouse contemplating adultery will anticipate costs associated with guilt and community disapproval.\(^6\) Finally, the normative framework of marriage generally encourages cooperation between spouses and deters exit from the relationship.\(^7\) To be sure, enforcement of marital norms has weakened considerably in the last generation or two, and thus the power of these norms should not be exaggerated. Nonetheless, the informal regime that regulates formal marriage reinforces 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 that 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.\(^8\) These functions are evident in the legal formalities associated with marriage. Although wedding

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\(^5\) See Bishop, 34 U Toronto L J at 245 (cited in note 52).

\(^6\) Contemporary survey evidence indicates a high level of disapproval of adultery. In one poll, 77 percent of respondents found extramarital sex to be "always wrong." Nock, *Marriage in Men's Lives* at 22-23 (cited in note 8). 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. Elizabeth Scott, *Social Norms and the Legal Regulation of Marriage* (cited in note 54).

\(^7\) Robert Axelrod has described the way in which reciprocal cooperative interactions can result in a stable equilibrium. Robert Axelrod, *The Evolution of Cooperation* 30-33 (BasicBooks 1984) (describing patterns of cooperation in iterated games). For an application of Axelrod's model to marital interactions, see Scott, 86 Va L Rev 1901 (cited in note 54).

\(^8\) Lon Fuller, *Consideration and Form*, 41 Colum L Rev 799, 800-01 (1941).
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 enhances 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, 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. The goals and personal expectations of most individuals entering marriage align with the legal obligations that they undertake in deciding on this formal status.

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 stabilize marriages as relatively durable and harmonious affiliations—at least in comparison with informal unions. 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 pre-

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61 Under the necessaries doctrine, spouses are liable to third parties who provide "necessaries" to the other spouse including medical care, shelter, and other needs. *North Carolina Baptist Hospitals v Harris*, 354 SE2d 471 (NC 1987).

62 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 Ellman, Kurtz, and Scott, *Family Law* at 801 (cited in note 2).


64 See Part II B 1 b.
scribed 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, cohabitation relationships are less stable than marriages. Marriages tend to last considerably longer than do informal unions; most cohabiting couples either marry or break off the relationship within a few years.\(^65\) 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.\(^66\) Research also indicates that cohabiting partners are more likely than married persons to engage in acts of sexual infidelity\(^67\) and domestic violence,\(^68\) and that married persons generally express greater happiness with their relationships than cohabitating partners do.\(^69\) Finally, 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.\(^70\) Some cohab-

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\(^{66}\) Nock, 16 J Fam Issues at 74-75 (cited in note 8).

\(^{67}\) Id at 57. They are also less satisfied with the sexual relationship with their partner. See Linda J. Waite and Maggie Gallagher, The Case for Marriage at 78 (cited in note 65).

\(^{68}\) Linda J. Waite, Trends in Men's and Women's Well-Being in Marriage, in Waite, ed, The Ties That Bind, 379-83 (Aldine de Gruyter 2000). Waite found that engaged cohabiting couples had domestic violence rates comparable to married couples (a probability of 3.6 percent over the coming year). The probability for cohabiting couples with no plans to marry was 7.6 percent. Id at 381-82.

\(^{69}\) Id; Larry L. Bumpass, James A. Sweet and Andrew Cherlin, The Role of Cohabitation in Declining Rates of Marriages, 53 J Marriage & Fam 913 (1991).

\(^{70}\) See Seltzer, Families Formed Outside of Marriage at 1250-52; 1263 (cited in note
iting couples, to be sure, may share a long-term commitment, but
decline to marry for principled or practical reasons.71 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
a source of instability for cohabitation) is that informal unions
are “underinstitutionalized.” 72 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 cohab-
iting couple’s family, friends, and community may lack clear ex-
pectations about cohabiting behavior. Thus, the norms that regu-
late informal unions are tentative and uncertain at best, in con-
trast to the formal regime of expectations and enforcement that
reinforces cooperative behavior in marriage.73

If marriages are more stable than informal unions, then in
this regard, at least, marriage is superior as a setting for satisfy-
ing family dependency needs. Couples in stable intimate part-
nerships are better able to generate financial and emotional re-
sources that are necessary for the care of children and other de-
pendent 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

49) (explaining that a high percentage of cohabiting couples marry within a year or two).
71 For 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).
72 Nock, 16 J Fam Issues at 55 (cited in note 8).
73 Id at 56. See also Julie Brines and Kara Joyner, The Ties That Bind: Principles of
Cohesion in Cohabitation and Marriage, 64 Am Soc Rev 333 (1999). These authors de-
scribe 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 con-
duct themselves once they set up a household.” Id at 350-51.
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.\footnote{Robert Emery, \textit{Marriage, Divorce, and Children’s Adjustment} (cited in note 22).} 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.

\textit{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, but also because the formal undertaking of legal obligations that accompanies marriage can function to provide financial security to families members. When individuals exchange marital vows, they 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 of 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 members of 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 un-

\footnote{See studies described in Elizabeth S. Scott, \textit{Pluralism, Parental Preference and Child Custody}, 80 Cal L Rev 615 (1992).}
necessary. 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, neighbors, and community members.75

The formal legal status becomes even more important as a source of protection for 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.77 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 extended to 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

75 *McGuire v McGuire*, 59 NW2d 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 and Scott, 84 Va L Rev at 1230 (cited in note 15).

76 Scott, 86 Va L Rev at 1914 (cited in note 54); Scott and Scott, 84 Va L Rev at 1292-93 (cited in note 15). 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. Lydia Polgreen and Robert F. Worth, *New Jersey Couple Held in Abuse; One Son, 19, Weighed 45 Pounds*, NY Times A1 (Oct 27, 2003); Iver Peterson, *In Home That Looked Loving, 4 Boys’ Suffering was Unseen*, NY Times A1 (Oct 28, 2003). 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 and psychological conditions that contributed to their condition). Leslie Kaufma and Richard Lezin Jones, *Amid Images of Love and Starvation, A More Nuanced Picture Emerges*, NY Times 31 (Nov 2, 2003). Nonetheless, the parents face criminal charges for their conduct. Id.

77 Scott and Scott, 84 Va L Rev at 1263 (cited in note 15). 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 relationships with their children. See Elaine Sorenson and Ariel Halpern, *Child Support Enforcement Is Working Better Than We Think*, URBAN INSTITUTE REPORT No A-31 (Mar 1999), available online at <http://www.urban.org/UploadedPDF/Af31.pdf> (visited May 15, 2004).
(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. Informal unions function far less effectively to assure that 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 defines 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 lives 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 will 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 that 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 expectations about financial responsibility. Moreover, even in marriage-like unions, dependent partners confront a harsh reality when the relationship ends. Because informal unions carry no prescribed legal obligations and because cohabiting couples usually do not formalize

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78 Some critics have argued that the availability of spousal support encourages dependency by wives, and that this is harmful to women. See discussion in note 113.
their understandings contractually, ex post determinations of the nature of the parties’ expectations about financial sharing and support are difficult. As a result, legal enforcement of financial obligations is an uncertain business. Even in long-term 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. Thus, in comparison to marriage with its set of relatively clear obligations, informal unions provide little financial security for vulnerable family members.

The A.L.I. Domestic Partnership Principles (“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. 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 (three years is suggested as “reasonable”) are presumed to be domestic partners. If the status is

79 See, for example, Friedman v Friedman, 24 Cal Rptr 2d 892, 901 (Cal App 1993); Morone v Morone, 429 NE2d 592 (NY 1992); Tapley v Tapley, 449 A2d 1218 (NH 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 S2d 759 (Fla App 1997); Minn Stat §§ 513.075; 513.076; Tex Bus & Com Code § 26.01 (b)(3). Since few cohabiting couples execute written agreements, a writing requirement means that few claims will be recognized. See Jennifer K. Robennolt and Monica Kirkpatrick Johnson, Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Therapeutic and Preventative Approach, 41 Ariz L Rev 417 (1999).

80 Many 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. California Registered Domestic Partners Rights and Responsibilities Act of 2003, Assembly Bill 205 of Sept 19, 2003. Several European countries have adopted comprehensive “registered partnership” laws, which extend marital rights to same-sex couples. See Ellman, Kurtz, and Scott, Family Law at 982-86 (cited in note 2).

81 Couples who live together with their common child for a prescribed period (the “cohabitation parenting period”) are also presumed to be domestic partners. A.L.I. Principles, § 6.03(2) (cited in note 7).
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 a commitment to one another.\textsuperscript{8}

One aspect of the A.L.I. domestic partnership status deserves further attention. As I have mentioned, the status is imposed automatically at the end of the cohabitation period, without the parties' consent. Couples who do not want to be subject to the property distribution and support obligations of marriage can opt out through express agreement—at least in theory.\textsuperscript{83} However, the Principles limit couples' ability to contract out of domestic partnership obligations by giving courts broad discretion to refuse to enforce these contracts.\textsuperscript{84} 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 provide 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, potentially 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 the relationship quali-

\textsuperscript{82} Id.

\textsuperscript{83} Chapter 7 of the Principles regulates agreements between parties that opt out of the obligations established under the Principles. A.L.I. Principles, § 7.02 (cited in note 7).

\textsuperscript{84} The Commentary in Chapter 7 of the Principles emphasizes that contracts dealing with the consequences of family dissolution cannot 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 A.L.I Principles, § 7.02 Comments a and b (cited in note 7). 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) or if an unanticipated change of circumstances has occurred, where there is a substantial disparity between the outcome under the agreement and the outcome under prevailing legal principles. See discussion in note 119.
fies as a domestic partnership. This uncertainty makes domestic partnerships rather unreliable as a means of fulfilling family dependency needs.\(^8\)

The substantial cost and limited utility of the A.L.I. domestic partnership derive 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 and the pay-off for successful claimants, it seems likely that many marginal claims will arise when informal unions dissolve—particularly if the suggested three year cohabitation period is adopted. 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 turn shortly 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. 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 receive support and a share of property should the relationship end, but that will happen only if a

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\(^8\) This uncertainty does not hold for couples that live together with a common child; for those couples, the standard for determinations of domestic partnership status is far simpler. A.L.I. Principles, § 6.03(2) (cited in note 7).
court concludes that the criteria for a 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. Principles. 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 partners 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.

C. A Functional Justification for Marital Privilege

The upshot of my analysis is that lawmakers 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 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

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86 Marital privilege (referring to what distinguishes marriage as a special legal status) is conventionally interpreted to include government benefits, privileges, rights, and duties, legal presumptions giving spouses priority for certain purposes, and the rights and obligations between the parties.

87 It must be noted that the privileging of marriage has the cost of weakening somewhat the effectiveness of marriage as a sorting mechanism. See notes 52 and 53 and accompanying text. Marriage is an effective signal because the willingness to marry identifies each party as an individual ready to undertake serious family obligations, a commitment that is made at personal cost. The signal becomes diluted if the decision is motivated in part by the incentive to receive the benefits of a privileged status.
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 re-
gime.\footnote{See, for example, 42 USC § 402 (2000) (making Social Security benefits available to
surviving spouses); 29 USC § 2612 (a)(1) (2000) (allowing employees up to twelve weeks a
year to care for a child, spouse or parent suffering from a “serious medical condition”).}
Other dimensions of marital privilege, such as inheri-
tance rights and guardianship designation, give each spouse a
special status in relation to the other, acknowledging the pre-
sumed preferences of married persons.\footnote{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. See, for example, 410 Ill Comp Stat Ann §
50/3.1(b) (West 1998) (allowing a spouse to consent to experimental procedures if the
patient is unable to consent). Inheritance rights under intestate succession statutes simi-
larly embody presumed preferences, with the important qualification that spouses cannot
be disinherited.}

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. Ful-
fillment 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 gov-
ernment subsidies. In short, modest levels of government bene-
fits would likely be money well spent if the desired effect of en-
couraging marriage is produced.\footnote{Of course, if the package of marriage benefits is too generous, some individuals or
couples who lack commitment may be tempted to marry. See note 87 and text accompany-
ing note 52-53. Sham marriages offer little social benefit. Spouses who marry opportunis-
tically cannot 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 inti-
mate family relationships. Elizabeth S. Scott and Robert E. Scott, \textit{Parents as Fiduciaries},
81 Va L Rev 2401 (1995). Moreover, dissolution can be costly and disruptive and post-
divorce enforcement of obligations could be costly.}

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.\footnote{See text accompanying notes 5-7.}
The privileged status of marriage has symbolic, as well as functional impor-
tance, signaling society’s approval of this family form. Although
many conventions that define marriage as a status of social dis-

tinction are not legal in nature, 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. Moreover, other families are (and should be) entitled to many of the legal benefits of marriage, and may be eligible for other government benefits needed to provide adequate support. Nonetheless, this concern reinforces the 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. If marriage (in part) is a contractual exchange

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92 Non-legal symbols include engagement and wedding rings, announcements, name change, and fancy weddings. See Scott, 86 Va L Rev at 1917-18 (cited in note 54). Some of these are less prevalent than in earlier periods—name change and wedding bands, for example.

93 Advocates for access to marriage for same-sex couples have emphasized its symbolic importance. See Eskridge, *The Case for Same-Sex Marriage* at 127-33 (cited in note 27).

94 Benefits 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. See note 88. Single-parent families may also be eligible for direct financial subsidies that are not available to married couples, under programs such as TANF. 42 USC §§ 601-619 (2000). This is not to suggest that the package of benefits available to other families currently is adequate to satisfy family dependency needs.

95 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 twenty-four states, focuses on procedural fairness, applying an unconscionability standard to substantive review. See Uniform Premarital Agreement Act (“UPMA”) § 6(a)(2), 9C ULA 369 (1987). 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 UPAA 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, and Scott, *Family Law* at 822-32 (cited in note 2). The recent A.L.I. Principles give courts considerable discretion to set aside premarital agreements on fairness grounds. See note 84.
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 NONMARITAL 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. Withholding legal enforcement would often result in harsh inequity and is not justified in a social environment that is morally neutral toward cohabitation. Under ordinary contract principles, courts should enforce 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. Often, however, no express agreement can

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96 This 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, 394 NE2d 1204 (Ill 1979), for example, the Illinois Supreme Court pointed to the abolition of common law marriage as evidence of a legislative policy against recognizing contractual claims in informal unions. The Hewitts had lived together for many years with their children and held themselves out as being married. See also Morone, 413 NE2d at 1159 (NY 1980) (declining to recognize implied contracts; case involved property or support claim by woman in twenty-five 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 twenty-five year marriage-like union in which couple lived together with two children).

97 In Marvin v Marvin, 557 P2d 106 (Cal 1976), 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.

98 A 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 A2d 902 (NJ 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 (NJ Super Ct App Div 2003) (recognizing joint venture and dividing assets between couple who held themselves out as husband and wife in a twenty-six year personal and business relationship).
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 cohabitating parties based on conduct rather than express promise have been mixed.99 In general, contracts implied in fact will be legally enforced if the 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.100 Parties claiming post-dissolution support have been less successful, as courts have declined to infer promissory conduct from the parties’ adoption of marital roles.

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 vary in informal un-

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99 Although some courts have insisted that only express contracts between cohabitants will be enforced, others have been more open to implied contracts. Compare Morone, 413 NE2d at 1159; Merrill v Davis, 673 P2d 1285 (NM 1983); Tupley, 449 A2d at 1218 (only express contracts enforced) with Goode v Goode, 396 SE2d 430 (W Va 1990); Boland v Catalano, 521 A2d 142 (Conn 1987); Watts v Watts, 405 NW2d 303 (Wis 1987); Hay v Hay, 678 P2d 672 (Nev 1984); Marvin, 557 P2d at 122 (express and implied-in-fact contracts enforced). See also Kozlowski, 403 A2d at 907-08.

100 One court found an agreement by the couple who cohabited for twenty-three 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, 678 P2d at 674. 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 Goode, 396 SE2d at 438; Watts, 405 NW2d at 313; Byrne v Laura, 60 Cal Rptr 3d 908 (Cal App 1997); Shuraleff v Donnelly, 817 P2d 764 (Or App 1991) (intent to share assets found in couple’s discussions of saving and investing for retirement); Glasgo v Glasgo, 410 NE2d 1235 (1nd App 1980) (intent found in situation and relation of parties). Courts also point to a course of conduct between the parties as evidence of an oral agreement. See Cook, 691 P2d at 667. 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, Ordinary Cohabitation, 76 Notre Dame L Rev 1381 (2001). See, for example, see Morone, 413 NE2d at 1154.
ions, and the ability of third parties (for example, 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 conclude that the parties' understandings are not sufficiently definite for contractual enforcement. 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. 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.

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. 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 of using a contract framework in this setting. 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.

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 provides clear evidence through conduct that the relationship is marriage-like, an agreement to assume marital obligations can be inferred—and legally enforced. 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 relationship dissolve. 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.

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106 Some courts have implicitly adopted this approach. In Recigno v Recigno, A-2023-0175 slip op at *5, the court, in recognizing a joint venture and dividing the assets between a couple who lived together for twenty-six 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." Id.

107 See Scott and Scott, 84 Va L Rev at 1247 (cited in note 15), arguing 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.
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.\textsuperscript{108} A cohabitation period of five years or more, for example, supports a presumption that the relationship was marriage-like and discourages opportunistic and marginal claims. After five years, 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.\textsuperscript{109} Thus, a presumption based on this duration promises to be a relatively accurate sorting mechanism for separating marriage-like unions from casual unions. To be sure, this means that some deserving parties will not receive the benefit of the default rule. However, dependent partners in unions of extended duration present 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

\textsuperscript{108} Clearly, parties can enter a cohabitation union with marriage-like commitment from the outset, but duration is the only practical means by which third parties can identify marriage-like unions ex post.

\textsuperscript{109} Only about 10 percent of cohabiting couples live in informal unions for five years or longer. See Nock, 16 J Fam Issues at 60 (cited in note 8); Bumpass & Lu, Trends in Cohabitation 54 Population Studies at 33 (cited in note 2). If the cohabiting couple has children, it makes sense for the birth of the child to trigger the presumption. This is the A.L.I. approach. See A.L.I. Principles, § 6.09(5) (cited in note 7).
on the dissatisfied party to identify himself explicitly as a "non-committer."\textsuperscript{110}

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 partner's 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 structure financial arrangements in ways that undermine her future claims.\textsuperscript{111} 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.\textsuperscript{112} In the latter situation, his partner can make an informed choice about whether to end the union or to remain in a role that leaves her financially vulnerable.\textsuperscript{113} In any event, the


\textsuperscript{111} He may do this by maintaining separate bank accounts and by acquiring real and personal property titled only in his name.

\textsuperscript{112} 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. Ayres and Gertner, 99 Yale L J at 87 (cited in note 110). 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. Given the social benefits of the protection provided by the default rules to vulnerable parties, legal authorities might conclude that a written agreement is required to opt out.

\textsuperscript{113} Alternatively, she can adapt her role in the relationship so that she is more financially self-sufficient. See Herma Hill Kay, \textit{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-
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 formal marriage is, and factfinding will sometimes be complex. Nonetheless, the proposed 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 does 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.

Although common law marriage is recognized in a few states today, it has been abolished in many jurisdictions over the

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114 Carol Rose's famous distinction between "crystal" and "muddy" rules in property law is apt in this context. Carol M. 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, lawmakers 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.

115 For 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, _Family Law_ at 64-67 (cited in note 2). Ariela Dubler argues that legal recognition of common law marriage was a means to privatize dependency of women and children in the nineteenth century—although she acknowledges that many of the claims were brought by women themselves (and not by the state). Ariela R. Dubler, _Governing Through Contract: Common Law Marriage in the Nineteenth Century_, 107 Yale L J 1885 (1998).
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 array of 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 A.L.I. Principles, which also imposes marriage-like obligations on cohabitants. The contract-based default framework has some advantages, however, over the A.L.I. approach. First, critics have argued that the Principles will generate a flood of marginal claims because the suggested cohabitation period is brief and the standard is complex. The five-year time period that I propose will function more effectively to separate casual from committed unions and to reduce litigation.

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 legal authorities are likely to view with some wariness.

Finally, and most fundamentally, a contractual framework is compatible with liberal values, and thus has a normative appeal that the status-based A.L.I. approach lacks. The proposed default rules rest on realistic empirical assumptions about the intentions...
of many couples in informal unions, while at the same time offering protection to naïve 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. 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. 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 principle that government should not interfere with the freedom of individuals to pursue their goals for personal happiness, absent some evidence

119 As noted above, although parties can opt out of the obligations of domestic partnership status through contract, courts have rather broad discretionary authority to set aside these agreements where enforcement would work a “substantial injustice.” See A.L.I. Principles, §§ 6.01(2), 7.05 (cited in note 7). See discussion in note 84. The Principles treat contracts between cohabitants the same as premarital agreements in this regard. In my view, giving unmarried couples broad freedom to limit their mutual obligations by contract can be justified, whereas this may not be the case with married couples. See text accompanying note 95.

120 The extent to which inequity results will depend in part on what evidence is required to demonstrate that the parties have opted out of the default rule. If a written agreement is required, for example, evidence that one party made clear his intentions not to share property would be inadmissible. In Carney v Hansell, 831 A2d 128 (NJ Super 2003), a New Jersey court regretfully found that a cohabiting partner had no financial obligation to his partner of sixteen 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. Carney, 831 A2d at 128. On these facts, the outcome might be the same under the default framework unless a written agreement between the parties opting out of the default rule is required.
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 the relationship, paternalistic government restrictions that inhibit freedom in this private realm are hard to justify.

**CONCLUSION**

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. 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.

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 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.

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121 Numerous surveys of young adults reveal that a high percentage plan to marry and believe that marriage will contribute to their personal happiness. See note 1. Substantial evidence supports that many homosexual persons would marry if this option were available to them. See Eskridge, *The Case for Same-Sex Marriage*, 78-79 (cited in note 27) (noting that one 1994 poll revealed that almost two-thirds of gay men wanted to marry someone of the same sex, and only 15 percent said they were "uninterested in marriage").