

## DESIGNATED BENEFICIARY AGREEMENTS: A STEP IN THE RIGHT DIRECTION FOR UNMARRIED COUPLES

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*The institution of marriage, though deeply rooted in tradition, is becoming insufficient to meet contemporary economic and social demands on its own. Throughout history, cohabitation has been a popular choice for different-sex couples as both a precursor to marriage and as an alternative economic arrangement. Couples choosing cohabitation, however, are not provided the same rights and obligations that come with marriage. This Note argues that marital benefits based on economic and emotional interdependence should not be restricted to married couples. Providing such rights and obligations to cohabiting different-sex couples would allow the couples to enjoy the benefits of a legally recognized relationship without participating in the institution of marriage. Many economic and social advantages that marriage offers are disjointed from the institution of marriage itself; rather, these benefits are simply of the economic ebb and flow of such a relationship. Particularly, the laws of health care, social welfare, and property suggest that economics and contractual freedom offer the proper justification for granting rights typically conferred by a marriage certificate. Recently, states such as Colorado, as well as many foreign countries, have created domestic partnership laws and designated beneficiary agreements that provide unmarried, different-sex couples a stronger potential alternative to marriage. This Note argues that, although a step in the right direction, these laws could go further and should be adopted by more states.*

### I. INTRODUCTION

“Had we made the official marriage commitment, we wouldn’t still be together. The reason the relationship works is that we get to define it on our terms.”<sup>1</sup> For many, family units linked by something other than marriage conjure images of poor, uncommitted, unhealthy, and unhappy

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1. Richard Eldredge, *Oprah Dishes to Monica About Stedman*, THE ATLANTA JOURNAL-CONSTITUTION BLOG (Sept. 16, 2009, 3:41 PM), <http://blogs.ajc.com/peachbuzz/2009/09/16/oprah-dishes-to-monica-about-stedman/>.

people.<sup>2</sup> In reality, the numbers paint a different picture. Unmarried persons and unmarried committed couples constitute an increasing percentage of the population and represent various race, age, socioeconomic, and celebrity statuses.<sup>3</sup> Interestingly, the opening quote is attributed to Oprah Winfrey, who has a long-term, unmarried partner and is the quintessential icon of success—opposite many of the negative connotations associated with the unmarried.<sup>4</sup>

Marriage has played a central role in the history of the United States<sup>5</sup> and has been described by the Supreme Court as “one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”<sup>6</sup> Marriage as an institution, however, has a rocky history, including unequal divisions within the relationship and exclusionary policies, many of which still exist today.<sup>7</sup> Although marriage is deeply rooted in tradition, familiar to everyone, and provides an easy, prepackaged way to form a union, it is not the only option for two people desiring to merge their lives. Cohabitation is on the rise, not just as a precursor to marriage, but as a replacement.<sup>8</sup> It allows people to arrange their personal lives how they want and reflects a “greater prominence of the ideals of individual autonomy and privacy in intimate matters”—also described as fundamental to our existence.<sup>9</sup> State recognition of these cohabitating relationships, however, has fallen behind the times.

Given its attributed historical importance, it is no surprise that marriage is more than just a legal status. In fact, marriage provides a couple

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2. See MATTHEW D. BRAMLETT ET AL., DEP'T OF HEALTH & HUMAN SERVS., CTRS. FOR DISEASE CONTROL, COHABITATION, MARRIAGE, DIVORCE, AND REMARRIAGE IN THE UNITED STATES (2002), [http://www.cdc.gov/nchs/data/series/sr\\_23/sr23\\_022.pdf](http://www.cdc.gov/nchs/data/series/sr_23/sr23_022.pdf) (“Compared with unmarried people, married men and women tend to have lower mortality, less risky behavior, more monitoring of health, more compliance with medical regimens, higher sexual frequency, more satisfaction with their sexual lives, more savings, and higher wages.”). But see Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 159 (2003) (“That married people are better off than unmarried people does not demonstrate that marriage makes people better off. . . . [C]orrelation is not causation.”).

3. See *infra* Part II.B.

4. See *The World's Most Powerful Celebrities*, FORBES.COM (June 3, 2009) (Matthew Miller, Dorothy Pomerantz & Lacey Rose eds.), <http://www.forbes.com/2009/06/03/forbes-100-celebrity-09-jolie-oprah-madonna-intro.html>. It should also be noted that the actress who “dethroned” Oprah from the top of the most powerful celebrity list is Angelina Jolie, who is also in an unmarried, committed relationship. *Id.*

5. See NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 1 (2000).

6. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

7. See *infra* Part II.A.

8. See Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435, 1435 (2001) (“[R]esearch suggests that cohabitation has become less of an ‘engagement’ that serves as a prelude to marriage and more of an intimate arrangement that may serve as an alternative to it.”). This can be seen in the decline of the percentage of cohabitators who marry, the fact that cohabitation is responsible for part of the declining marriage rate, and the increase in the percentage of long-term cohabitators. *Id.* at 1435–36.

9. *Id.* at 1438; see also *Eisenstadt v. Baird*, 405 U.S. 438, 453–55 (1972) (extending the holding in *Griswold* to unmarried couples); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (discussing the right to marital privacy, found in a penumbra of the Bill of Rights).

with a new set of rights and obligations, not only between each other but also between the couple and the state, the latter of which is not afforded to unmarried couples. Granting benefits simply because of a marriage certificate, however, is misguided and contrary to the purpose of many of the policies behind marital benefits.<sup>10</sup> Because the policies behind granting special benefits (and obligations) to married partners are rooted not in the title of the relationship—“marriage”—but rather in the economic dependence and emotional interdependence defining that relationship, an extension of many of these benefits (and obligations) to unmarried committed couples is required.<sup>11</sup> It is an affront to the supposed purpose of marriage that a couple can marry in Las Vegas the same day they meet and have more legal recognition, and thus more mutual benefits (and obligations), than a couple that has lived together for thirty-five years and raised children together.<sup>12</sup>

Because many marital benefits (and obligations) are based on economic and emotional interdependence, this Note argues that these benefits (and obligations) must be extended to unmarried committed couples whose relationships often mirror those of married couples, minus the marriage certificate. Specifically, unmarried couples should have the right to designate their economic interests to each other and the state should give effect to these agreements, similar to the Designated Beneficiary Agreement law recently enacted in Colorado.<sup>13</sup>

This Note specifically focuses on cohabitating, unmarried, different-sex couples in committed relationships. Although the arguments for unmarried benefits apply equally to both same and different-sex couples, these relationships are different in an obvious and fundamental way: a different-sex couple chooses not to marry, whereas a same-sex couple often has no choice.<sup>14</sup> Because it is a choice, opponents of different-sex domestic partner arrangements argue that the couple can *simply* get married to receive the benefits (and obligations) of marriage, and thus an alternative is unnecessary.<sup>15</sup> This argument assumes that people do not

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10. See *infra* Part III.B.

11. See COTT, *supra* note 5, at 1–5.

12. Dorian Solot & Marshall Miller, *Taking Government Out of the Marriage Business: Families Would Benefit*, in MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS 70, 76 (Anita Bernstein ed., 2006).

13. COLO. REV. STAT. ANN. §§ 15-22-105 to -112 (West Supp. 2009) (providing a way for unmarried persons to designate another for purposes of property inheritance, visitation rights, decision making (end-of-life, medical, organ/tissue donation, burial or cremation), standing for wrongful death suits, and health or life insurance benefits).

14. See Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & FAM. STUD. 1, 3 (2007). It should also be noted that the exclusionary policy of marriage in its current state may be responsible for part of the growing number of couples who choose to cohabit. See Solot & Miller, *supra* note 12, at 83.

15. See *Irizarry v. Bd. of Educ.*, 251 F.3d 604, 606 (7th Cir. 2001) (“[T]he recognition of a domestic-partnership surrogate is more important for homosexual than for heterosexual couples, who can obtain the benefits simply by marrying.”); see also Solot & Miller, *supra* note 12, at 81 (“At the heart of the debates about marriage is a misguided belief that unmarried people can easily gain access to family protections by merely acquiring a marriage license.”).

want choices, or that choices are bad, and ignores the fact that a growing number of couples are choosing not to get married for various reasons.<sup>16</sup> Regardless, the policies behind marital rights require an extension of many of these benefits (and obligations) to unmarried couples.

Part II of this Note provides a background of the economic history of marriage and cohabitation and then gives a brief overview of the current treatment of unmarried couples, both domestically and internationally. Part III demonstrates that “marriage” is not the correct trigger for the benefits (and obligations) of marriage; rather, economics is the proper justification. Part III then analyzes three major areas in which economics justifies marital rights—health care, federal benefits (Social Security and the Family Medical Leave Act), and property laws—and argues that these justifications apply equally to many unmarried couples. Part IV recommends an alternative means of extending marital benefits to many unmarried couples, which takes the form of economic partnerships based on the newly enacted Designated Beneficiary Agreement law in Colorado.

## II. BACKGROUND

Marriage has existed as long as anyone can remember. Perhaps surprising to some, cohabitation has also existed, in some form, for a very long time.<sup>17</sup> Yet at some point, one became acceptable and the other frowned upon. Although the level of acceptance for cohabitating relationships has grown in recent years, the dividing line between married and unmarried couples persists.<sup>18</sup> Section A of this Part provides a brief description of the economic history of marriage. Section B then addresses cohabitation statistics and demonstrates that many unmarried couples are in relationships almost identical to those of their married counterparts. Finally, in Section C, this Part concludes with a brief overview of the current landscape of the treatment of unmarried couples in select countries and states.

### A. *The (Economic) History of Marriage*

Marriage exists because it always has (and the human race exists because of marriage).<sup>19</sup> This tautology is the quintessential “chicken and

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16. See Regan, *supra* note 8, at 1435–36; see also Kathryn Abrams, *Choice, Dependence, and the Reinvigoration of the Traditional Family*, 73 IND. L.J. 517, 520–23 (1998).

17. See James L. Musselman, *What's Love Got to Do with It? A Proposal for Elevating the Status of Marriage by Narrowing Its Definition, While Universally Extending the Rights and Benefits Enjoyed by Married Couples*, 16 DUKE J. GENDER L. & POL'Y 37, 39–40 (2009).

18. See *id.* at 37–39; see also Bowman, *supra* note 14, at 7–8.

19. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (“Marriage and procreation are fundamental to the very existence and survival of the race.”); *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (“[Marriage] is an institution, in the maintenance of which in its purity the public is deeply interested,

the egg” justification for marriage as it exists today. Contrary to this circular assertion, however, marriage did have a beginning in the United States. Early on, politicians recognized that marriage was “a training ground for citizenly virtue.”<sup>20</sup> It was the institution of marriage that would transform citizens of the newly created United States into social beings with responsibilities and civic obligations to the republic.<sup>21</sup> Marriage itself represented a mini-government, with the man heading the household and taking responsibility for his wife and children, who could not represent themselves.<sup>22</sup> In fact, it was this responsibility that qualified a man as a participating member of his state and fulfilled his civic and political duties.<sup>23</sup> At the same time, women were relegated to their “proper places” within the husbands’ houses, bringing increased order—and dependency—to society.<sup>24</sup>

Originally typified by the duty of support, early marriage laws required that a husband support his wife (provide food, shelter, clothing, and medical attention) and the wife provide services (cleaning, cooking, child making, and child rearing).<sup>25</sup> Indeed, “the sexes had distinct and well-defined gender roles: husbands were economic providers, disciplinarians, and the heads of families, while wives were nurturers, caretakers, and subservient to their husbands.”<sup>26</sup> State recognition of the system of support and services was initially a means of privatizing the complete dependency of women.<sup>27</sup> The husband would assume responsibility for his wife, and in return he received “the full range of [her] citizenship rights.”<sup>28</sup> Without her economic and political rights, a married woman was treated as property, and the prior marital relationship has often been compared to a state of slavery.<sup>29</sup> A wife lost not only her property and

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for it is the foundation of the family and of society, without which there would be neither civilization nor progress.”).

20. COTT, *supra* note 5, at 18.

21. *Id.* (“[T]he most reasonable and humane qualities of mankind arose in sociability rather than in isolation . . .”). Marriage became the institution to promote this social nature. *Id.*

22. *Id.* at 7.

23. *Id.*

24. See HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 110 (2000) (explaining that marital unity was important to early nineteenth-century politics because of its ability to keep women dependent on their husbands and thus establish the “terms of republican male citizenship”).

25. See Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL’Y & L. 239, 247 (2001) (discussing the history of marriage and the common law duties of support and domestic services—including sex).

26. Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 194 (2007) (quoting Martha Albertson Fineman, *Progress and Progression in Family Law*, 2004 U. CHI. LEGAL F. 1, 2); see also Fineman, *supra* note 25, at 262 (“[Marriage] is based on an unequal and hierarchical social arrangement in which men are considered the heads of households, owed domestic and sexual services by wives and obedience and deference by all family members.”).

27. Rosenbury, *supra* note 26, at 193. In fact, the impact of marriage on the spousal relationship was very similar to that of the parent-child relationship because women and children were both dependent on the man of the family. See *id.*

28. *Id.*

29. See Candice A. Garcia-Rodrigo, *An Analysis of and Alternative to the Radical Feminist Position on the Institution of Marriage*, 11 J. L. & FAM. STUD. 113, 114 (2008).

capacity to contract, but her identity as well.<sup>30</sup> As one court noted, “[a]t common law, the husband and wife were one, and the husband was that one.”<sup>31</sup> In time, the entire political and economic system of the United States would subsidize this dependency, with federal programs and employers extending benefits to (usually dependent) spouses.<sup>32</sup>

Although “reformed” to address many of the inequalities inherent in the institution of the past, subtle reminders of the flaws of historical marriage remain.<sup>33</sup> Even after recognizing women as individuals with rights equal to men, the law and stigma of marriage continue to treat women as subordinate or inferior to their partners. For example, it is still relatively uncommon for a woman to keep her last name after marriage, a remnant of the identity of a woman being subsumed into that of her husband’s after marriage.<sup>34</sup> The depth of this legal and cultural subordination remains pervasive today—a survey conducted by The Knot Wedding Network found that 88% of the eighteen thousand women surveyed planned to change their last names after their weddings.<sup>35</sup> Another survey, conducted by researchers at Indiana University and the University of Utah, found that 71% of respondents, including men and women, think it is better for women to change their last names, and 50% think it should be a legal requirement.<sup>36</sup> These are startling numbers when viewed in light of the history of marriage and the implication of giving up one’s name.

The popular form of the requirement of solemnization is another example of how the current state of marriage is reminiscent of its flawed history.<sup>37</sup> Solemnization refers to the ceremony involved in a marriage, whether performed by a religious official or a judge, and typically concludes with the proclamation “I now pronounce you man and wife.”<sup>38</sup> Although this phrase is seemingly harmless, it infers that once married, a man remains a man, but a woman changes into something else, something inferior—a “wife.”<sup>39</sup>

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30. See HARTOG, *supra* note 24, at 98–99; Rosenbury, *supra* note 26, at 219.

31. *Few v. Charter Oak Fire Ins. Co.*, 463 S.W.2d 424, 426 (1971).

32. See *infra* Part III.

33. See NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 23–26 (2008) (providing a brief overview of changes in the law attendant to the women’s equality movement).

34. See Emily Friedman, *A Bride’s Hardest Decision: Maiden Name vs. Married Name*, ABC NEWS (Aug. 26, 2009), <http://abcnews.go.com/Business/brides-husbands-names-marriage/story?id=8410832>.

35. *Id.*

36. *Id.*

37. See, e.g., CAL. FAM. CODE § 420 (West Supp. 2010) (listing the requirements for solemnization); 750 ILL. COMP. STAT. 5/209 (2008) (same); N.Y. DOM. REL. LAW §§ 11–12 (McKinney Supp. 2010) (listing the requirements for how and by whom a marriage may be solemnized).

38. See *supra* note 37; see also HARTOG, *supra* note 24, at 100–01; Garcia-Rodrigo, *supra* note 29, at 116–117 (explaining that the phrase reflects the treatment of women as subordinate to their husbands).

39. HARTOG, *supra* note 24, at 100–01; Garcia-Rodrigo, *supra* note 29, at 117.

In addition to the subtle reminders of the stained marriage of the past, various overt social norms exist that reflect the traditional views of man and woman. Although women now comprise a majority of students in many universities around the country,<sup>40</sup> and it is uncontested that more women work outside of the home now than in the past,<sup>41</sup> many women still put their careers on hold, or give them up completely, to accept the caretaking role of mother and wife, or partner.<sup>42</sup> There is arguably more of a “choice” between working and staying home for women today,<sup>43</sup> but the still-existing role divisions have the very real effect of creating a power imbalance, and with it, dependency.<sup>44</sup> Further, it is unclear whether choosing to stay home is a voluntary choice, and if so, whether it is fair to make a woman choose between a successful career and a successful family.<sup>45</sup> When a woman stays home to take care of her family, the man is given the opportunity to work, advance his career, and become the sole wage-earner, placing him in a more powerful position, both in his family and in society as a whole.<sup>46</sup> This is all very reminiscent of the marriage of yesteryear and leads to the question of whether the government should support an institution as gendered as marriage.<sup>47</sup> The continued exis-

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40. See, e.g., Tamar Lewin, *At Colleges, Women Are Leaving Men in the Dust*, N.Y. TIMES, July 9, 2006 (late edition), at 1 (“[M]en now make up only 42 percent of the nation’s college students.”); Mary Beth Marklein, *College Gender Gap Is Stable*, USA TODAY, Jan. 26, 2010, at 5D (reporting that the gender gap is still 57% women and 43% men); Mary Beth Marklein, *College Gender Gap Widens: 57% Are Women*, USA TODAY, Oct. 20, 2005, at 1A (reporting that the gender gap in college is 57% women and 43% men).

41. See Linda R. Hirshman, *Homeward Bound*, 16 AM. PROSPECT 20, 22 (Dec. 2005) (“As a result of feminist efforts—and larger economic trends—the percentage of women, even of mothers in full- or part-time employment, rose robustly through the 1980s and early ‘90s.”).

42. See *id.* (“The census numbers for all working mothers leveled off around 1990 and have fallen modestly since 1998. . . . [W]omen with enough money to quit work say they are ‘choosing’ to opt out.”). A 2000 survey of Yale alumni from 1979, 1984, 1989, and 1994 found that only 56% of women over the age of forty still worked compared with 90% of men; a 2005 survey found similar results. Louise Story, *Many Women at Elite Colleges Set Career Path to Motherhood*, N.Y. TIMES, Sept. 20, 2005, at A1.

43. Hirshman, *supra* note 41, at 24.

44. See *id.* at 22–23.

45. *Id.* at 23–24.

46. See Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL’Y & L. 307, 365 (2004) (“Even today, most couples continue to give higher priority to the husband’s career, while women remain far more likely than men to sacrifice their market potential in order to benefit their children and families. . . . [M]uch of the pay gap between men and women can be attributed to their different caregiving roles.”); see also Judy Goldberg Dey & Catherine Hill, AM. ASS’N OF UNIV. WOMEN EDUC. FOUND., *BEHIND THE PAY GAP*, 1, 3 (2007), <http://www.aauw.org/learn/research/upload/behindPayGap.pdf> (explaining that “[m]otherhood in our society entails substantial economic and personal sacrifices,” but that fatherhood “appears to engender a ‘wage premium’”). Parenthood, however, does not appear to be the only factor influencing the pay gap. First, women who do not have children may still be viewed as “potential mothers.” *Id.* at 3. Further, evidence suggests that the pay gap exists one year after college, before most women become mothers, with female graduates earning about 80% of what their male counterparts earn. *Id.* at 10. Finally, even after controlling for all of the factors that influence pay (hours, occupation, major, parenthood, and others), college-educated women still earn about 5% less than college-educated men, suggesting that this is a systemic problem, reflecting a gender power imbalance, and not directly related to each family’s choice. *Id.* at 18.

47. Bernstein, *supra* note 2, at 186, 200–09.

tence of state-sponsored marriage, however, is outside the scope of this Note.<sup>48</sup> Rather, the continued use of marriage as the trigger for many of the benefits conferred on married couples is at issue.

Many of the traditional reasons for using marriage as the trigger for distributing benefits and requiring obligations no longer exist. The political role of marriage—controlling the population through the dependency of women—is no longer appropriate because men and women have equal rights and is no longer necessary because of the increased presence of the government in the daily lives of its citizens.<sup>49</sup> For example, every individual is within the control of the state through schooling, employment, taxation, and social welfare, and thus, marriage is no longer necessary as a tool to maintain order in society.<sup>50</sup> As one commentator has noted: “‘Today, government and the market have taken over the family’s once-undisputed roles as the prime source of key goods; [that is], wealth production and social insurance,’ resulting in a radical change in the importance of the family to society and to the individual.”<sup>51</sup>

Not only has the substance of marriage changed radically over the years, but the procedure has also become more controlled by the government. Marriage of the past did not have such bright lines.<sup>52</sup> In fact, it was often difficult to determine who was married and who was not, yet marriage was still recognized as a private, public, and political institution.<sup>53</sup> Consequently, courts often recognized the unmarried as married, granting benefits to couples because of the form of their relationship and not based solely on the formal procedures undertaken.<sup>54</sup> Today, however, marriage is strictly regulated, both by federal and state governments.<sup>55</sup> Over one thousand federal laws confer benefits, rights, and privileges

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48. *But see* MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 228–30 (1995); Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 *CARDOZO L. REV.* 1161, 1163–64 (2006).

49. *See* COTT, *supra* note 5, at 213.

50. *See id.* (explaining how the state no longer needs to go through the household head to control or find family members).

51. Musselman, *supra* note 17, at 80 (footnote omitted) (quoting Maggie Gallagher, *If Marriage Is Natural, Why Is Defending It So Hard? Taking Up the Challenge to Marriage in the Pews and the Public Square*, 4 *AVE MARIA L. REV.* 409, 413 (2006)).

52. *See* COTT, *supra* note 5, at 30–31 (“[I]nformal marriage was common and validated among white settlers from the colonial period on. . . . Acceptance of this practice testified to the widespread belief that the parties’ consent to marry each other, not the words said by a minister or magistrate, mattered most.”); HARTOG, *supra* note 24, at 23.

53. *See* HARTOG, *supra* note 24, at 24 (“A marriage was both legally constituted and private. . . . [T]he law of marriage would have appeared in two guises. The first would have been as the constitutive structure for beginnings and endings. . . . [The second,] as public interventions into a private relationship.”).

54. *See id.*

55. *See, e.g.*, Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C); CAL. FAM. CODE §§ 300–310, 350–360 (West Supp. 2010); 750 ILL. COMP. STAT. 5/201–209 (2008).

that are contingent upon marital status.<sup>56</sup> This is ironic considering “[t]he formality and conformity of marriage-like arrangements matter far less in the law now than in the past, because support can be traced through cohabitation and biological parenthood.”<sup>57</sup> Clearly, marriage is no longer the same institution that existed forty years ago,<sup>58</sup> and it barely resembles the institution that existed when the United States was founded.<sup>59</sup>

### B. *The Unmarried Relationship*

Societal changes have affected not just marital relationships, but unmarried ones as well. The 1940 Census Bureau report defined the head of a private family as “usually a married man and the chief breadwinner in the family.”<sup>60</sup> Today, however, less than 50% of households are comprised of married couples.<sup>61</sup> The typical- or traditional-family stereotype of two married parents and their kids comprises less than 25% of households in the United States.<sup>62</sup> As one author noted, “[w]hat is bizarre is that [marriage] remains central in spite of the fact that the traditional marital family has become a statistical minority of family units in our society.”<sup>63</sup> Although marriage is still the final destination for most couples, 46% of adults in the United States are not currently married.<sup>64</sup> The dramatic increase in the rate of unmarried adults is attributed to several factors including later first marriages, more time spent single after a divorce or the death of a spouse, and an increase in the number of individuals who never marry, which includes those in unmarried, cohabitating relationships.<sup>65</sup>

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56. See Letter from Barry R. Bedrick, Assoc. Gen. Counsel, Gen. Accounting Office, to Hon. Henry J. Hyde, Chairman, H. Comm. on the Judiciary (Jan. 31, 1997) [hereinafter GAO Letter], <http://www.gao.gov/archive/1997/og97016.pdf> (listing 1049 laws in the U.S. Code in which marital status is a factor).

57. See COTT, *supra* note 5, at 213.

58. For example, prior to 1967 some states forbid people from marrying based solely on racial classifications. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967). Defining eligibility for marriage based on the race of the participants is distinct from marriage as it exists today; however, the current institution defines eligibility based on the sex of the participants. See Defense of Marriage Act.

59. See *supra* notes 17–33 and accompanying text.

60. BUREAU OF THE CENSUS, SIXTEENTH CENSUS OF THE UNITED STATES: 1940, POPULATION AND HOUSING: FAMILIES 3 (1943) (emphasis added), <http://www2.census.gov/prod2/decennial/documents/41272176.pdf>.

61. 2006–2008 *American Community Survey 3-Year Estimates*, U.S. CENSUS BUREAU, [http://factfinder.census.gov/servlet/ADPTable?\\_bm=y&geo\\_id=01000US&ds\\_name=ACS\\_2008\\_3YR\\_G00\\_-lang=en&-\\_caller=geoselect&-format=](http://factfinder.census.gov/servlet/ADPTable?_bm=y&geo_id=01000US&ds_name=ACS_2008_3YR_G00_-lang=en&-_caller=geoselect&-format=) (last visited Nov. 13, 2010) [hereinafter *2006–2008 Estimates*]. Conceivably, many of these married-couple households have a female as the chief breadwinner, thus the 1940s “usual” definition is a relic of the past. Further, approximately half of all people who marry cohabit prior to marriage, thus the married group is formed of many ex-cohabitators. See Musselman, *supra* note 17, at 44.

62. Mary Lyndon Shanley, *The State of Marriage and the State in Marriage*, in MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS, *supra* note 12, at 188, 188.

63. Fineman, *supra* note 25, at 246.

64. Solot & Miller, *supra* note 12, at 70.

65. *Id.* at 70, 82.

To reflect the growing trend of unmarried cohabitation, the category “unmarried partner” was added as a household type in the 1990 Census.<sup>66</sup> Additionally, beginning next year, the Census poverty figures will “broaden the definition [of family] to include unmarried couples.”<sup>67</sup> As of the 2008 census estimate, there are 6,186,170 unmarried-partner households in the United States, for a total of over 12 million unmarried partners.<sup>68</sup> The recent U.S. Census Current Population Survey indicates a 13% jump in unmarried couples living together—up to 7.5 million in 2010.<sup>69</sup> This increase is likely attributed to the poor economy,<sup>70</sup> but “Census data can’t discern whether couples living together will marry when the economy and job outlooks improve.”<sup>71</sup> In 2004, unmarried-partner households comprised more than 5% of all households, up from 3% a decade earlier,<sup>72</sup> and more than 9% of all coupled households.<sup>73</sup> This is an increase of 12.7% over the 2000 census number of 5.5 million couples self-identified as living in an unmarried-partner household—4.9 million in different-sex relationships—and an increase of 90% over the 1990 figure of 3.2 million.<sup>74</sup>

Looking beyond the numbers, unmarried couples are indistinguishable from married couples in many respects.<sup>75</sup> Unmarried couples are rich and poor—including such celebrities as Oprah, Brad Pitt, Angelina Jolie, and many more<sup>76</sup>—young and old,<sup>77</sup> and of various races and na-

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66. TAVIA SIMMONS & MARTIN O’CONNELL, U.S. CENSUS BUREAU, MARRIED COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000, at 2 (2003), <http://www.census.gov/prod/2003pubs/censr-5.pdf>.

67. Hope Yen, *Four in 10 Say Marriage Is Becoming Obsolete*, ASSOCIATED PRESS (Nov. 18, 2010, 6:20 AM), [http://news.yahoo.com/s/ap/us\\_declining\\_marriage](http://news.yahoo.com/s/ap/us_declining_marriage).

68. *2006–2008 Estimates*, *supra* note 61.

69. *Current Population Survey Reports*, U.S. CENSUS BUREAU, <http://www.census.gov/population/www/socdemo/hh-fam.html#cps> (follow “2010 March CPS Detailed Tables”; then follow “Opposite Sex Unmarried Couples by Labor Force Status of Both Partners: 2010, Excel”) (last visited Nov. 13, 2010) (estimating 7,529,000 different-sex unmarried couples).

70. See Jeremy Olson, *More Couples Are Living Together First*, WASHINGTON POST (Nov. 7, 2010), <http://www.washingtonpost.com/wpdyn/content/article/2010/11/05/AR2010110507583.html> (“Couples who recently moved in together were less likely to have jobs than couples who lived together more than a year.”); Yen, *supra* note 67 (“It was a sharp one-year increase that analysts largely attributed to people unwilling to make long-term marriage commitments in the face of persistent unemployment.”).

71. Olson, *supra* note 70.

72. See Musselman, *supra* note 17, at 44.

73. See Bowman, *supra* note 14, at 7. Coupled households account for approximately 61 million households; 6 million of these include people in unmarried relationships. *2006–2008 Estimates*, *supra* note 61.

74. SIMMONS & O’CONNELL, *supra* note 66, at 1. These figures also demonstrate that there was an increase in unmarried partner households of more than 70% between 1990 and 2000. *Id.*

75. This Note deals specifically with unmarried different-sex couples; therefore, to the outside world there is usually no way to determine who is actually married and who is not.

76. *Alternatives to Marriage Project, Famous Unmarried People, Past and Present*, <http://www.unmarried.org/unmarried-people.html#contempds> (last visited Nov. 13, 2010).

77. Nearly half of unmarried couples are over the age of thirty-five; 25% are over the age of forty-five. Solot & Miller, *supra* note 12, at 74.

ationalities.<sup>78</sup> Additionally, 55% of unmarried couples eventually marry whereas about 40% end their relationship within five years; roughly 10% stay together as an unmarried couple for more than five years.<sup>79</sup> This is not an insignificant number of people—people who are arguably at a disadvantage because they did not “formalize” their relationship by getting married.<sup>80</sup> In addition to lasting power, many unmarried couples form family units much like the typical, traditional marital family. Approximately 43% of unmarried, different-sex partner households include children, and about half of these children are living with both of their biological parents.<sup>81</sup> According to census data estimates, about 43% of married-couple households are comprised of married parents and their own children,<sup>82</sup> thus, unmarried partners are very similar to their married partner counterparts—minus the marriage certificate, of course.

The numbers show an increasing trend of unmarried relationships, but the reasons for this trend are not as clear. Several reasons may explain why people choose not to get married—assuming they have the choice to begin with. Possible reasons include: still testing out the waters; trying to make sure the person they are with is Mr. (or Ms.) Right; waiting until financial situations are more stable; or “political, philosophical, or personal beliefs about the institution of marriage or its relationship to government, religion, or gender.”<sup>83</sup> Whatever the reason, it remains clear that more people are choosing a nontraditional life. This choice brings significant consequences, including social stigma (though this is less of a problem than in the past) and the withholding of many rights (and obligations) conferred upon married couples.<sup>84</sup>

On the bright side, the increase in the number of nontraditional relationships has coincided with, or perhaps caused, an increasing accep-

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78. See SIMMONS & O’CONNELL, *supra* note 66, at 6 fig.3; *Statistics*, ALTERNATIVES TO MARRIAGE PROJECT, <http://www.unmarried.org/statistics.html> (last visited Nov. 13, 2010).

79. Pamela J. Smock, *Cohabitation in the United States: An Appraisal of Research Themes, Findings, and Implications*, 26 ANN. REV. SOC. 1, 3 (2000). This data suggests that of the 10% who stay together and stay unmarried for more than five years, about half will get married and the rest will stay in unmarried relationships. See *id.* “[F]or one tenth of cohabitators, it is a long-term relationship that seldom ends in marriage . . . . In the majority of cases, cohabitation shares many of the qualities of marriage . . . . [F]or a nontrivial proportion of cohabitators, it is a permanent living arrangement, a replacement for marriage.” Bowman, *supra* note 14, at 16 (quoting Susan L. Brown & Alan Booth, *Cohabitation Versus Marriage: A Comparison of Relationship Quality*, 58 J. MARRIAGE & FAM. 668, 668–69 (1996)).

80. Although it is recognized that many people in unmarried relationships do not have the option of marriage, this Note specifically addresses different-sex couples, who at least have the *right* to get married, regardless of other factors making marriage a real *choice*.

81. Martha Albertson Fineman, *The Meaning of Marriage*, in MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS, *supra* note 12, at 29, 43; Solot & Miller, *supra* note 12, at 74.

82. *2006–2008 Estimates*, *supra* note 61.

83. Solot & Miller, *supra* note 12, at 83.

84. See Hamilton, *supra* note 46, at 357–58 (pointing out that married couples get more protections and benefits than unmarried couples, including social security, pensions, and health insurance benefits).

tance of alternative family forms.<sup>85</sup> A 2008 Gallup poll found that 57% of respondents indicated that they believe an unmarried couple that has lived together for five years is equally committed as a couple married for five years.<sup>86</sup> Additionally, 43% of those participating in a 2001 survey conducted by The National Marriage Project indicated that they believe cohabitating couples, in addition to married couples, should receive government-granted benefits.<sup>87</sup> A growing number of young people opine that the government should not be involved in licensing relationships at all.<sup>88</sup> Significantly, in the 2001 survey, eight out of ten respondents agreed that marriage is nobody's business except the two people involved.<sup>89</sup> States should take note of the growing trend of unmarried couples, the similarities between these couples and their married counterparts, and the increased acceptance of unmarried relationships. Recognizing that the dynamics between unmarried committed couples are similar in many respects to married couples, and that the form of the relationship, and not the title, is what necessitates marital benefits, states should expand many of these benefits (and obligations) to unmarried couples in committed relationships. Unfortunately, the current treatment of unmarried couples in many states does not reflect the changing times.

### C. *The Current Landscape*

If one thing is clear regarding the treatment of unmarried couples throughout the world, it is that anything goes. States and countries are free to define "family" however they want and can attribute benefits and assign obligations based on that definition.<sup>90</sup> And the treatment spans the full spectrum, ranging from almost equal benefits (and obligations) for married and unmarried couples in Canada<sup>91</sup> to statutes criminalizing cohabitation in Mississippi.<sup>92</sup> In Subsection 1, this Note examines the

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85. As this Note was going to press, the Pew Research Center released data indicating that "about 39 percent of Americans said marriage was becoming obsolete." Yen, *supra* note 67. The study further found that "[a]bout 34 percent of Americans called the growing variety of family living arrangements good for society, . . . 32 percent said it didn't make a difference and 29 percent said it was troubling." *Id.*

86. *Marriage*, GALLUP, <http://www.gallup.com/poll/117328/Marriage.aspx#1> (last visited Nov. 13, 2010). A 2006 poll on the same topic found that only 54% of respondents thought it was "very important" that a couple planning to spend the rest of their lives together get married. *Id.*

87. Barbara Dafoe Whitehead & David Popenoe, *Who Wants to Marry a Soulmate?*, in *THE STATE OF OUR UNIONS 2001: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA* 6, 13 (2001), <http://www.stateofourunions.org/pdfs/SOOU2001.pdf>.

88. *See id.* (observing that 45% of respondents agree that the government should not be involved in licensing marriages).

89. *Id.*

90. *In re Burrus*, 136 U.S. 586, 593–94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.").

91. *See infra* Part II.C.2.

92. *See infra* Part II.C.1.c.

treatment of unmarried couples in the United States. Subsection 2 describes the favorable treatment of these couples internationally by looking at select countries.

### 1. *The Unmarried Relationship in the United States*

As demonstrated, there has been a significant increase in the number of unmarried families in the relatively recent past.<sup>93</sup> The reaction in the United States to this “new” family structure has varied widely, from full acceptance to condemnation.<sup>94</sup>

#### a. Official Recognition: Unmarried Cohabitants Are People Too

In response to the changing structure of families, and the increased demand by same-sex couples for the right to marry, many states have created alternative relationship statuses, including civil unions, domestic partnerships, and designated beneficiary agreements.<sup>95</sup> Originally sought as an “alternative to marriage,” early proponents of these alternative statuses recognized that different-sex couples could marry but believed that they should not have to.<sup>96</sup> Unfortunately, however, the justification for different relationship statuses shifted away from creating alternatives and toward granting concessions to same-sex couples, in order to avoid the same-sex marriage discussion.<sup>97</sup> This resulted in many, though not all, domestic partner laws limited to those couples who could not legally marry.

The most creative domestic partner legislation is Colorado’s Designated Beneficiary Law, enacted July 1, 2009.<sup>98</sup> Under this law, designated beneficiary agreements are available to both same- and different-sex couples who are over the age of eighteen, competent to enter contracts, not married (or a designated beneficiary) to another person, and who en-

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93. See *supra* Part II.B.

94. See *infra* Part II.C.1.a–b.

95. See, e.g., CAL. FAM. CODE § 297 (West Supp. 2010) (domestic partners and partnerships); COLO. REV. STAT. ANN. §§ 15-22-101 to -112 (West Supp. 2009) (designated beneficiary agreements); D.C. CODE § 32-701 (LexisNexis Supp. 2010) (domestic partnership registry); HAW. REV. STAT. ANN. §§ 572C-1 to -7 (LexisNexis Supp. 2009) (reciprocal beneficiaries); ME. REV. STAT. ANN. tit. 22, § 2710 (Supp. 2009) (domestic partner registry); OR. REV. STAT. § 106.300 (2009) (domestic partnership); WASH. REV. CODE ANN. §§ 26.60.010–901 (West Supp. 2010) (domestic partnerships); WIS. STAT. §§ 770.001–.18 (2009) (domestic partnership). For the purpose of simplicity in this Note, any status less than marriage is called a domestic partnership.

96. Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 529, 532 (2009) (explaining that the early push for domestic partnerships was as an alternative to marriage, available to same- and different-sex couples).

97. See POLIKOFF, *supra* note 33, at 57–62 (discussing the shift from “family diversity” to “remedy[ing] the exclusion of same-sex couples from marriage”).

98. H.R. 09-1260, 66th Gen. Assemb., Reg. Sess. (Colo. 2009), [http://www.leg.state.co.us/clics/clics2009a/csl.nsf/fsbillcont3/7B41525D3772D99987257547006300AE?Open&file=1260\\_enr.pdf](http://www.leg.state.co.us/clics/clics2009a/csl.nsf/fsbillcont3/7B41525D3772D99987257547006300AE?Open&file=1260_enr.pdf).

ter the agreement willingly, without force, fraud, or duress.<sup>99</sup> A designated beneficiary agreement is “legally sufficient” if the wording of the agreement is similar to that contained in the standard form provided by the statute, and if the agreement is completed, signed, acknowledged, and registered with the clerk and recorder.<sup>100</sup> The Colorado law provides for significant protections and benefits between unmarried persons, including joint ownership and property inheritance (in the absence of a will), hospital and nursing home visitation rights, medical decision making (e.g., end-of-life), health and life insurance benefits (if the employer elects to provide dependent coverage for designated beneficiaries), appointment as guardian or conservator, organ and tissue donation decision making, burial or cremation decision making, and the ability to sue for wrongful death.<sup>101</sup> Uniquely, the Colorado law is not an “all-or-nothing” law. Unmarried partners are permitted to select which of the offered benefits and protections they want to grant to each other, and there is no requirement of reciprocity.<sup>102</sup> Further, the standard form makes forming a designated beneficiary agreement cheap and accessible to everyone (no attorney needed!).<sup>103</sup>

Although not as inventive as the Colorado law, Maine is one of a minority of states to provide domestic partner status to both same- and different-sex partners.<sup>104</sup> Enacted in 2004, the Maine law provides registered domestic partners “a legal status similar to that of a married person with respect to matters of probate, guardianships, conservatorships, inheritance, protection from abuse, and related matters.”<sup>105</sup> To be eligible for a registered domestic partnership (1) each domestic partner must be mentally competent, (2) the domestic partners must have lived together in Maine for at least one year, (3) neither domestic partner may be married or in another registered domestic partnership, and (4) each domestic

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99. COLO. REV. STAT. ANN. § 15-22-104 (listing the “[r]equirements for a valid designated beneficiary agreement”); *see also* Colorado’s Designated Beneficiaries Law, <http://www.designatedbeneficiaries.com> (last visited Nov. 13, 2010).

100. COLO. REV. STAT. ANN. § 15-22-104.

101. *Id.* § 15-22-105 (listing the rights and protections afforded by the statute).

102. *See* Nancy Polikoff, *The Extraordinary New Colorado Law*, BEYOND (STRAIGHT AND GAY) MARRIAGE (Apr. 15, 2009, 7:38 PM), <http://beyondstraightandgaymarriage.blogspot.com> (“[T]he form allows the two people to select which of the legal consequences available to them they actually want, and they don’t require both people to pick the same consequences.”); *see also* DESIGNATED BENEFICIARY AGREEMENT (n.d.), <http://www.designatedbeneficiaries.com/PrintableBeneficiaryAgreement.pdf>.

103. COLO. REV. STAT. ANN. § 15-22-106.

104. ME. REV. STAT. ANN. tit. 22, § 2710 (Supp. 2009). Notably, there is no requirement that the partners be of the opposite sex. *Id.*; *see also* D.C. CODE § 32-701 (LexisNexis Supp. 2010) (defining a domestic partner to be “a person with whom an individual maintains a committed relationship,” and requiring that each partner is (1) over eighteen years old, (2) the sole domestic partner of the other person, and (3) not married).

105. *Domestic Partner Registry*, ME. CTR. FOR DISEASE CONTROL & PREVENTION, <http://www.maine.gov/dhhs/boh/phs/odrvs/vital-records/order/domstcptnrspge.html> (last visited Nov. 13, 2010) (providing a link to download the required Declaration of Domestic Partnership Form); *see also* ME. REV. STAT. ANN. tit. 22, § 2710.

partner must be the only domestic partner of the other and intend to stay that way.<sup>106</sup>

Similarly, California enacted the Domestic Partner Rights and Responsibilities Act in 2003, which provides that

Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.<sup>107</sup>

The California statute, however, is more limited in scope than the Maine statute. To qualify as a domestic partner in California, the couple must file a Declaration of Domestic Partnership and meet the following requirements: (1) live together; (2) neither is married or in a domestic partnership with another person; (3) not related by blood; (4) over the age of eighteen; (5) either (a) members of the same sex, or (b) at least one person over the age of sixty-two; and (6) capable of consenting.<sup>108</sup> Notably, the California domestic partner law applies mainly to couples of the same sex, with different-sex eligibility limited to senior citizens.<sup>109</sup>

Currently, the vast majority of domestic partner laws are limited to same-sex unmarried couples.<sup>110</sup> As the same-sex marriage movement gained momentum in the 1990s, domestic partnership “ceased being about creating alternatives to marriage” and became an “equity issue for gay [couples] who could not marry.”<sup>111</sup> The push for family diversity and the exclusion of same-sex couples from marriage diverged into two separate issues.<sup>112</sup> Today, the primary justification for excluding different-sex couples from domestic partner legislation is that they have the right to marry and thus do not need special status to gain access to the rights, benefits, and obligations of marriage.<sup>113</sup> Consequently, of the five states

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106. ME. REV. STAT. ANN. tit. 22, § 2710.

107. CAL. FAM. CODE § 297.5(a) (West Supp. 2010).

108. *Id.* § 297; STATE OF CAL., SEC’Y OF STATE, DECLARATION OF DOMESTIC PARTNERSHIP, <http://www.sos.ca.gov/dpregistry/forms/sf-dp1.pdf>.

109. CAL. FAM. CODE § 297; *see also Domestic Partner Registry*, CALIFORNIA SECRETARY OF STATE, <http://www.sos.ca.gov/dpregistry/> (last visited Nov. 13, 2010).

110. *See, e.g.*, HAW. REV. STAT. ANN. § 572C-4 (LexisNexis Supp. 2009) (requiring that the “parties be legally prohibited from marrying one another”); N.H. REV. STAT. ANN. § 457-A:1 (LexisNexis Supp. 2009), *repealed by* H.R. 436-FN-Local, 161st Gen. Court, Reg. Sess. (N.H. 2009) (effective Jan. 1, 2010) (“The state of New Hampshire recognizes the civil union between one man and another man or one woman and another woman.”); OR. REV. STAT. § 106.310 (2009) (limiting civil unions to “two individuals of the same sex”); VT. STAT. ANN. tit. 15, § 1202 (Supp. 2009) (requiring that the two parties be of the same sex to enter a civil union); WASH. REV. CODE ANN. § 26.60.030 (West Supp. 2010) (“Either (a) both persons are members of the same sex; or (b) at least one of the persons is sixty-two years of age or older.”); WIS. STAT. § 770.05 (2009) (requiring that “[t]he individuals are members of the same sex”).

111. Polikoff, *supra* note 96, at 538–39.

112. POLIKOFF, *supra* note 33, at 62.

113. *See* Regan, *supra* note 8, at 1464 (suggesting that if same-sex marriage were legal, some of the pressure for domestic partner legislation would abate). The ability to marry has also been used as

that have legalized same-sex marriage, two have repealed their domestic partner legislation, two do not have domestic partner legislation, and one will continue to recognize existing civil unions, but no longer allows the establishment of new unions.<sup>114</sup> Additionally, the District of Columbia originally included the elimination of domestic partnerships in the Religious Freedom and Civil Marriages Equality Amendment Act of 2009, which legalized same-sex marriage.<sup>115</sup> The Bill as enrolled, however, allows domestic partners to convert the partnership into marriage without paying an additional fee, but only terminates the domestic partnership if there is a marriage.<sup>116</sup>

#### b. The In-Between

In addition to preemptive action taken by state governments in the form of formal partnership recognition, many courts have addressed the issue of how to deal with unmarried (and unregistered, in qualifying states) couples. As will be demonstrated, this typically involves issues arising at the end of a relationship, and the rulings have been varied and inconsistent.

Conceding that unmarried relationships require special recognition, the state of Washington provides a test for the distribution of property if those relationships end.<sup>117</sup> If the court determines that a relationship was

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a justification for striking down equal protection claims when domestic partner benefits are offered to same-sex domestic partners but not to different-sex partners. *See, e.g., Irizarry v. Bd. of Educ.*, 251 F.3d 604, 606 (7th Cir. 2001) (“[T]he recognition of a domestic-partnership surrogate is more important for homosexual than for heterosexual couples, who can obtain the benefits simply by marrying.”); *Foray v. Bell Atlantic*, 56 F. Supp. 2d 327, 330 (S.D.N.Y. 1999) (“[A] woman with a female domestic partner is differently situated from plaintiff in material respects because under current law, she, unlike plaintiff, is unable to marry her partner.”).

114. CONN. GEN. STAT. § 46b-38, *repealed by* Conn. Pub. Act No. 09-13, § 21 (effective Oct. 1, 2010); N.H. REV. STAT. ANN. § 457-A:1, *repealed by* H.B. 436-FN-Local (N.H. 2009) (effective Jan. 1, 2011). Although it appears the Vermont civil union statute is still on the books, the State of Vermont Legislative Council explained that “[w]hen the [same-sex marriage] act takes effect on September 1, 2009, same sex couples will have access to civil marriage laws, but may no longer establish a civil union.” STATE OF VT. LEGISLATIVE COUNCIL, FREQUENTLY ASKED QUESTIONS ABOUT S.115, <http://www.leg.state.vt.us/misc/s115faq.pdf>. Even though new civil unions are not permitted, “[c]ivil unions established before September 1, 2009 will continue to be recognized in Vermont.” *Id.* Iowa and Massachusetts dealt with the same-sex marriage issue through the courts, determining that prohibiting same-sex couples from marrying violated the Equal Protection Clause of the Iowa and Massachusetts Constitutions. *See Varnum v. Brien*, 763 N.W.2d 862, 906–07 (Iowa 2009) (determining that limiting civil marriage to heterosexual couples violates the constitution and thus deciding not to create a “parallel civil institution[] for same-sex couples”); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

115. B18-0482, 2009 Council, 18th Sess. (D.C. 2009) (as introduced by Council, Oct. 6, 2009), <http://www.dccouncil.washington.dc.us/images/00001/20091008141223.pdf> (proposing that domestic partner registration be discontinued, but allowing existing partnerships to continue or convert to marriage).

116. *Id.* (as enrolled by Council, Dec. 18, 2009), <http://www.dccouncil.washington.dc.us/images/00001/20091218103236.pdf>.

117. *See* NW. JUSTICE PROJECT, WASHINGTON PROPERTY LAW FOR UNMARRIED COUPLES WHO ARE SEPARATING 2–3 (2010), <http://www.lawhelp.org/documents/2783213913EN.pdf> [hereinafter NJP REPORT].

marriage-like, it will assume that property acquired during the relationship was owned together and, after considering the interests of both parties, will divide that property in a way that is “just and equitable.”<sup>118</sup> To determine if the relationship was marriage-like, the court considers several factors, including duration; purpose of relationship; whether cohabitation was continuous; whether the relationship was stable and committed; and whether the partners pooled resources and services, “intended to function like a married couple,” and knew they were not married.<sup>119</sup>

The majority of states follow a California rule from 1976 for the distribution of property at the dissolution of an unmarried relationship.<sup>120</sup> In the foundational case *Marvin v. Marvin*, the Supreme Court of California held that contracts between unmarried partners should be enforced, not because they fall under the Family Law Act governing the distribution of property acquired during a marital relationship, but because of basic contract principles, including *quantum meruit* and equitable remedies.<sup>121</sup> The court found that, although expectations based on the belief that the couple was married were not valid, other expectations and equitable considerations could be taken into account.<sup>122</sup> Reasoning that cohabitating couples were as competent as any other parties making contractual agreements, the court concluded that contract remedies should apply.<sup>123</sup>

Rejecting the *Marvin* approach, the Supreme Court of Illinois in *Hewitt v. Hewitt* found that using contract law to resolve disputes concerning distribution of property at the termination of an unmarried relationship would be against public policy.<sup>124</sup> Citing the Illinois Marriage and Dissolution of Marriage Act, the court reasoned that granting mutual property rights to unmarried cohabitants would violate the explicit purpose of “strengthen[ing] and preserv[ing] the integrity of marriage and safeguard[ing] family relationships.”<sup>125</sup> The court explained that granting property rights to unmarried cohabitants could result in making

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118. *In re Marriage of Pennington*, 14 P.3d 764, 770 (Wash. 2000). Because the court considers several factors, there is a significant amount of discretion and the threshold for finding a marriage-like relationship may be set very high. *See id.* at 771–73 (holding that even though both relationships were for a significant amount of time and some resources had been pooled, the other factors were not sufficiently satisfied).

119. NJP REPORT, *supra* note 117, at 2–3 (2008).

120. Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 832 (2008).

121. 557 P.2d 106, 110 (Cal. 1976).

122. *Id.* at 121. For example, a couple may have expectations about how property will be divided in the case of dissolution of the relationship. *Id.*

123. *Id.* at 116 (“[A]dults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights.”). Contract remedies discussed by the court in *Marvin* include “inquir[ing] into the conduct of the parties to determine whether that conduct demonstrates an implied contract or implied agreement of partnership or joint venture,” “employ[ing] principles of constructive trust,” and “recover[y] in quantum meruit.” *Id.* at 122.

124. 394 N.E.2d 1204, 1207–08 (Ill. 1979).

125. *Id.* at 1209.

marriage less attractive and, thus, would weaken the institution.<sup>126</sup> Recognizing that laws criminalizing cohabitation (and, perhaps, the social policy) had evolved, the court still relied on a public-policy argument to determine that it was not the court's place to grant legal status to a private arrangement in place of marriage; rather, that power fell to the legislature.<sup>127</sup>

Although most states follow the *Marvin* approach and recognize at least basic contract rights, the in-between states still allow a significant degree of judicial discretion that can leave many couples vulnerable. A sympathetic judge may treat the separating couple similar to a divorcing couple, but others may set the threshold above what any cohabitating couple could meet.

### c. Unlawful Cohabitation

The “in-between” states offer few rights to unmarried couples, but that is better than the treatment of these couples in the minority of states that still criminalize cohabitation—at least according to the official statutes. Although most states have abandoned their anti-cohabitation statutes,<sup>128</sup> there are four states that currently have laws on the books criminalizing cohabitation—in other words, that make it illegal to live with an unmarried partner.<sup>129</sup> For example, in Mississippi, “[i]f any man and woman shall unlawfully cohabit, whether in adultery or fornication, they shall be fined in any sum not more than five hundred dollars, and imprisoned in the county jail not more than six months.”<sup>130</sup> These statutes are rarely enforced and their constitutionality is questionable.<sup>131</sup> The reality

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126. *Id.*

127. *Id.* (“The question whether change is needed in the law governing the rights of parties in . . . marriage-like relationships involves evaluations of sociological data and alternatives we believe best suited to the superior investigative and fact-finding facilities of the legislative branch in the exercise of its traditional authority to declare public policy in the domestic relations field.”).

128. *See, e.g.*, 1969 Conn. Pub. Acts 828, § 214 (repealing CONN. GEN. STAT. § 53-219, which prohibited fornication); 2007 N.D. Laws 615 (repealing N.D. CENT. CODE § 12.1-2010, which prohibited unlawful cohabitation); 1983 Wis. Sess. Laws 37, 55, Act 17, § 4, Act 27, § 1790(e) (codified at WIS. STAT. § 944.15 (2009)) (modifying the acts falling within the prohibition of fornication); Hobbs v. Smith, No. 05 CVS 267, 2006 WL 3103008, at \*1 (N.C. Super. Aug. 25, 2006) (holding the North Carolina lewd and lascivious cohabitation statute unconstitutional).

129. FLA. STAT. ANN. § 798.02 (West Supp. 2010) (misdemeanor of the second degree); MICH. COMP. LAWS ANN. § 750.335 (West Supp. 2010) (misdemeanor); MISS. CODE ANN. § 97-29-1 (2006) (misdemeanor); VA. CODE ANN. § 18.2-345 (2009) (class 3 misdemeanor); *see also* W. VA. CODE ANN. § 61-8-4 (LexisNexis Supp. 2010) (misdemeanor).

130. MISS. CODE ANN. § 97-29-1.

131. *See Doe v. Duling*, 782 F.2d 1202, 1206 (4th Cir. 1986) (holding that plaintiffs lacked standing to challenge the constitutionality of the Virginia cohabitation statute because no real threat of prosecution existed); *McCready v. Hoffius*, 586 N.W.2d 723, 727 (Mich. 1998) (“The lewd and lascivious behavior statute has not been used to successfully prosecute unmarried couples who were cohabitating for nearly sixty years.”), *vacated in part* by 593 N.W.2d 545 (Mich. 1999); *Sullivan v. Stringer*, 736 So.2d 514, 516–17 (Miss. 1999) (recognizing that, although unmarried cohabitation is illegal, the law is frequently broken and holding that evidence of nonmarital cohabitation cannot, alone, justify a change in custody).

is that most unmarried couples do not face overwhelming barriers in their everyday lives. Unmarried couples are, however, denied significant economic and material benefits granted to married couples, solely because of their “single” status.<sup>132</sup>

## 2. *The Unmarried Relationship Internationally*

In many respects, the United States is “traditional” when compared to the treatment of unmarried different-sex couples internationally.<sup>133</sup> Although the treatment varies, many countries provide at least minimum support, protection, or legal recognition to unmarried different-sex couples.

In 1995, the Supreme Court of Canada found that “[d]iscrimination on the basis of marital status touches the essential dignity and worth of the individual. . . . [It violates] fundamental human rights norms.”<sup>134</sup> Shortly thereafter, in 2000, the Canadian Parliament amended sixty-eight federal laws giving legal recognition to couples, both same- and different-sex, who have lived together for at least one year, in the aptly titled Modernization of Benefits and Obligations Act.<sup>135</sup> Taking a “common law partner” approach, the law grants automatic rights and responsibilities to unmarried couples equal to those conferred on married couples, except with regard to some property distribution laws.<sup>136</sup> Even those property laws, however, make it easier for unmarried partners to qualify for post-relationship property division than in the United States.<sup>137</sup>

Similarly, France passed the Civil Solidarity Pacts (PACs) in 1999, granting limited rights to unmarried couples, both same- and different-sex.<sup>138</sup> These rights include letting parties contract for dissolution of their property, testamentary and inter vivos gift tax exceptions (after two years), tax breaks (after three years), social security benefits, work benefits for civil service employees, and a property interest in a deceased partner’s residential lease.<sup>139</sup> Although originally passed as a means to

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132. See Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2115 (2005). Arguably, the rigid dichotomy between “married” and “unmarried” does some harm because the distinctions are not always easy to justify. *Id.* at 2119.

133. For a detailed survey of unmarried cohabitation in Western Europe, see Kathleen Kiernan, *Unmarried Cohabitation and Parenthood in Britain and Europe*, 26 LAW & POL’Y 33 (2004).

134. POLIKOFF, *supra* note 33, at 111 (quoting *Miron v. Trudel*, [1995] 2 S.C.R. 418, 420 (Can.)).

135. Modernization of Benefits and Obligations Act, S.C. 2000, c. 12 (Can.); see also POLIKOFF, *supra* note 33, at 112–13.

136. POLIKOFF, *supra* note 33, at 112–13.

137. *Id.* at 113. The standards for property division of unmarried couples are those established by the Supreme Court of Canada in the 1980s. *Id.*

138. For a more in depth discussion of PACs, see Christina Davis, *Domestic Partnerships: What the United States Should Learn from France’s Experience*, 24 PENN ST. INT’L L. REV. 683 (2006). Although the author argues that the experience in France should serve as a warning for states considering domestic partner legislation, it is unclear that the increase in PACs correlates with a decrease in marriage. Presumably, many of the couples who formed PACs instead of marriage would have opted for nothing in the alternative.

139. *Id.* at 691.

appease gay-marriage advocates, PACs have found increasing popularity with different-sex couples.<sup>140</sup> Of the approximately 67,000 couples who registered for PACs in the first two years, it is estimated that 40% were different-sex.<sup>141</sup> According to official statistics, of the over 140,000 couples who registered for PACs in 2008, 92% were different-sex couples.<sup>142</sup> The overwhelming popularity of these unions in France suggests that people are increasingly seeking alternative forms of relationship recognition.

Similarly, Sweden provides some rights to unmarried cohabitants.<sup>143</sup> The Cohabitees Act of 2003 (Sambolag) was enacted to “provide a minimum protection for the weaker party at the dissolution of the cohabiting relationship.”<sup>144</sup> The protections offered under this law, however, are fairly limited and apply only to joint household goods and the couple’s home.<sup>145</sup> Unmarried couples do not receive inheritance rights (without the existence of a will), maintenance obligations, or the right to jointly adopt, although cohabitants are treated like spouses for some tax and social insurance laws.<sup>146</sup>

Although the examples may not be perfect, unmarried couples have significantly greater recognition internationally, and the divide between married and unmarried is not as clear as in the United States.<sup>147</sup> The social structures in those countries granting benefits to unmarried couples have not collapsed. The United States should take note of the changing domestic relations around the world.

### III. ANALYSIS

As a consequence of the traditional role division between husband and wife, marriage may be responsible for the ingrained gender roles that

140. See Edward Cody, *Straight Couples in France Are Choosing Civil Unions Meant for Gays*, WASH. POST (Feb. 14, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/13/AR2009021303365.html>; see also *Civil Union (PACS)*, INSTITUT NATIONAL D’ÉTUDES DÉMOGRAPHIQUES, [http://www.ined.fr/en/pop\\_figures/france/mariages\\_divorces\\_pacs/pacs/](http://www.ined.fr/en/pop_figures/france/mariages_divorces_pacs/pacs/) (last visited Nov. 13, 2010).

141. See Davis, *supra* note 138, at 684. This figure is only an estimate, because French law originally prohibited keeping statistics about who registered for domestic partnerships. *Id.* at 695.

142. See Cody, *supra* note 140; see also INSTITUT NATIONAL D’ÉTUDES DÉMOGRAPHIQUES, *supra* note 140.

143. See REGERINGSKANSLIET, MINISTRY OF JUSTICE, SWEDEN, COHABITEES AND THEIR JOINT HOMES (2010), <http://www.regeringen.se/content/1/c6/15/52/55/2e04fa16.pdf> (discussing THE COHABITEES ACT (SFS 2003:376) (Swed.)); see also Erin Cleary, Note, *New Jersey Domestic Partnership Act in the Aftermath of Lewis v. Harris: Should New Jersey Expand the Act to Include All Unmarried Cohabitants?*, 60 RUTGERS L. REV. 519, 528–29 (2008).

144. MAJA K. ERIKSSON, E.U. NETWORK OF INDEP. EXPERTS ON FUNDAMENTAL RIGHTS, REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN SWEDEN IN 2003, at 35 (2004), <http://crldho.cpd.r.ucl.ac.be/documents/Download.Rep/Reports2003/R.Nationaux2003/CFRCDF.repSweden.2003.pdf>; see REGERINGSKANSLIET, MINISTRY OF JUSTICE, SWEDEN, FAMILY LAW: INFORMATION ON THE RULES (2009), <http://www.sweden.gov.se/content/1/c6/13/83/44/12624b3b.pdf>.

145. See ERIKSSON, *supra* note 144; Cleary, *supra* note 143, at 528–29.

146. See ERIKSSON, *supra* note 144.

147. POLIKOFF, *supra* note 33, at 110–20.

many couples find difficult to escape even today.<sup>148</sup> It is this division that is partly responsible for the necessary expansion of some marital rights to unmarried couples. More than just a role division, however, the economics of relationships lead to the conclusion that “[l]aws that distinguish between married couples and everyone else need to be reexamined.”<sup>149</sup> This Part demonstrates that the economic justifications for many marital benefits are equally compelling for the expansion of these benefits to unmarried couples who are in long-term, committed relationships. First, Section A discusses the role that economics plays as a basis for marital rights. Section B then analyzes the laws of health care, federal social welfare programs, and property to demonstrate that economics, and not marriage, is the proper justification for many of the rights granted to married couples, and, therefore, an extension of these rights to unmarried couples is necessary.

#### A. *Economics as a Basis for Marital Rights*

Many marital rights exist because they make economic sense.<sup>150</sup> Although some people may get married for social reasons—(because that is what everyone does and always has done, because that is the only way to legitimize the relationship in the eyes of a superior being, or just because of love)—the reasons for an individual choosing to marry must be separated from the reasons the state supports the institution. The fact is that when two people get married (or form partnerships in another meaningful way) they merge economic aspects of their lives.<sup>151</sup> Historically, the economic impact of marriage resulted from the husband receiving all of the rights of his wife, including all property and financial obligations.<sup>152</sup> Even though many of the inequalities in the institution of marriage have been addressed, economic impacts still exist.<sup>153</sup>

In any partnership where two people join their lives—and for purposes of this Note, their household—the couple makes investment decisions together, including decisions about “career assets and human capital that ultimately benefit the marital family as a whole.”<sup>154</sup> Housing and utilities are shared, food and other necessary supplies can be purchased in a way to maximize usage for two people versus one, and planning for the future can involve two careers or delegating household production in

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148. See COTT, *supra* note 5, at 3; Hirshman, *supra* note 41 (discussing how well-educated, highly successful women still end up staying home with their children and performing the traditional “wife” duties).

149. Nancy D. Polikoff, *Law that Values All Families: Beyond (Straight and Gay) Marriage*, 22 J. AM. ACAD. MATRIMONIAL LAW. 85, 94 (2009).

150. Hamilton, *supra* note 46, at 362 (“[M]arriage is also an economic institution.”).

151. See *id.* at 362–63.

152. See *supra* Part II.A.

153. See, e.g., Hamilton, *supra* note 46, at 365.

154. *Id.* at 362–63 (“The normative modern marriage is an economic partnership built on sharing principles.”).

another way (e.g., one person as a stay-at-home homemaker or both work part-time).<sup>155</sup> This economic joinder produces benefits to both the couple and society. Combining assets gives greater buying power, sharing living space allows for bigger, more expensive housing arrangements, dividing labor can produce increased returns, and risk sharing can lead to greater gains.<sup>156</sup> In fact, marriage has been likened to other partnerships (think business) with comparisons between a family and “a little factory,” “a little city,” and “a little club.”<sup>157</sup> Commentators argue that the benefits derived from shared public goods are what make marriage a more desirable status than living alone.<sup>158</sup>

In addition to the benefits that accrue naturally with economic partnership formation, the government confers many benefits on couples who make their relationships “formal” through marriage, including more fluid property rights (allowing married partners to transfer property without tax consequences), joint tax filing (allowing couples to merge income for purposes of determining the proper tax bracket), and extending health benefits.<sup>159</sup> Further, the benefits do not flow only from the state to the couple; the state receives many benefits from encouraging people to form their own economic partnerships.<sup>160</sup>

It is these economic realities that justify state support of the institution of marriage. There is no economic justification, however, for limiting this support to marital relationships. Benefits accrue to a couple and the state by virtue of the form of the relationship and the combining of assets and lives, not because of the existence of a marriage contract. As noted by the Colorado legislature: “The power of individuals to care for one another and take action to be personally responsible for themselves and their loved ones is of tremendous societal benefit, enabling self-determination and reducing reliance on public programs and services.”<sup>161</sup> This “power” is not based on a legal formality. Probably the greatest examples of “marital capital” that benefit society are children, which are neither common among all marriages, nor limited to married couples.<sup>162</sup>

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155. Yoram Weiss, *The Formation and Dissolution of Families: Why Marry? Who Marries Whom? And What Happens Upon Divorce*, in 1A HANDBOOK OF POPULATION AND FAMILY ECONOMICS 81, 82–83 (Mark R. Rosenzweig & Oded Stark eds., 1997) (describing the important economic functions of marriage as (1) the division of labor, (2) coordinated investment activities, (3) sharing collective goods, and (4) risk pooling).

156. *See id.* at 83–89.

157. *See* Theodore C. Bergstrom, *A Survey of Theories of the Family*, in 1A HANDBOOK OF POPULATION AND FAMILY ECONOMICS, *supra* note 155, at 21, 22 (arguing that the standard tools of economics can help to understand the functions of a family).

158. *Id.* at 24.

159. *See* GAO Letter, *supra* note 56 (listing 1049 laws in the U.S. Code in which marital status is a factor).

160. *See infra* Part III.B.

161. COLO. REV. STAT. ANN. § 15-22-102(1)(d) (West Supp. 2009); *see also* Fineman, *supra* note 25, at 268 (explaining how the family can internalize costs that would otherwise fall on the government).

162. Weiss, *supra* note 155, at 83.

Therefore, many of the marital benefits conferred by the government should be expanded to unmarried couples in economic partnerships.

*B. Expanding the Economic Realities to the Unmarried*

Under current contract law, unmarried partners may construct some of the benefits (and obligations) gained through marriage.<sup>163</sup> For example, one or both of the partners can draft a will or trust to define inheritance and a health power of attorney to give the other the right to make medical decisions in case of incapacitation.<sup>164</sup> In addition, unmarried partners living in states that follow the *Marvin* approach to property division are entitled to basic contract remedies, including unjust enrichment.<sup>165</sup> These “constructive” benefits, however, are far inferior to those granted to married couples upon signing a marriage certificate. Preliminarily, many people are excluded from accessing these benefits because of prohibitory transaction costs and legal language that can be impossible to understand, sometimes even for lawyers.<sup>166</sup> Further, as recognized by the Colorado legislature when enacting the Designated Beneficiary Agreement law, “[b]eyond legal impediments, people often fail to plan for their own mortality. . . . [S]ignificant numbers of Americans do not have a valid will, and even fewer have executed powers of attorney or other estate planning documents.”<sup>167</sup> Barriers aside, hundreds of marital benefits (and obligations) cannot be replicated with any other existing law.<sup>168</sup> These include joint tax filing, holding property as tenants by the entirety, automatic inheritance rights, medical benefits, equitable divi-

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163. Ryan Nishimoto, Book Note, *Marriage Makes Cents: How Law & Economics Justifies Same-Sex Marriage*, 23 B.C. THIRD WORLD L.J. 379, 385 (2003) (discussing the ways same-sex couples can create “more economically efficient” partnerships). Clearly, any method same-sex couples have of economizing their relationship would apply equally to different-sex couples, except for in those jurisdictions that limit domestic partnerships to same-sex couples, as discussed above. See *supra* notes 110–16 and accompanying text.

164. Nishimoto, *supra* note 163, at 385.

165. *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976); see also, e.g., *In re Dahlgren*, 418 B.R. 852, 861 (Bankr. D.N.J. 2009) (“[A]n agreement between unmarried cohabitating adults is generally enforceable and no express agreement is required.”); *Salzman v. Bachrach*, 996 P.2d 1263, 1268–69 (Colo. 2000) (finding *Marvin* and other authorities persuasive and stating that courts should determine whether “general contract laws and equitable rules” apply for disputes involving cohabitators); *Watts v. Watts*, 405 N.W.2d 303, 311, 314 (Wis. 1987) (explaining that “*Hewitt* is not widely followed” and holding that unmarried cohabitants who have terminated their relationship can “raise claims based upon unjust enrichment”).

166. See Nishimoto, *supra* note 163, at 389–90 (explaining that people may fail to utilize existing contract law because they feel excluded from that law or just do not have access to it); see also COLO. REV. STAT. ANN. § 15-22-102(1)(c) (West Supp. 2009) (“Many [people] lack access to legal services due to the expense of drafting legal instruments and the necessity to keep these documents current.”).

167. COLO. REV. STAT. ANN. § 15-22-102(1)(b).

168. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 955–57 (Mass. 2003); GAO Letter, *supra* note 56 (listing 1049 laws in the U.S. Code in which marital status is a factor).

sion upon divorce (in all jurisdictions), and access to state and federal family-based rights.<sup>169</sup>

As this Note has demonstrated, unmarried relationships are increasingly common and treatment of these couples varies significantly depending on the jurisdiction.<sup>170</sup> Further, the economic justifications used to confer many rights on married couples are equally compelling for the application of these rights to unmarried couples. By analyzing the laws of health care, federal social welfare programs, and property rights, this Section shows that unmarried partnerships are deserving of some state-sponsored benefits for many of the same reasons that these benefits are granted to marital partnerships.

### 1. *The Health Care Debate and the Public Option*

Providing healthcare to a broader spectrum of citizens of the United States would benefit not only those covered, but society as a whole. The U.S. Census Bureau estimated that in 2008, 15.4% of the population was uninsured,<sup>171</sup> resulting in government expenditures of \$42.9 billion, with federal dollars accounting for 60% of this cost.<sup>172</sup> Government spending accounts for about 75% of uncompensated care for the uninsured, with the remaining 25%, about \$14.5 billion, left to private sources.<sup>173</sup> Inevitably, this cost will pass back to society through increased rates and health care premiums.<sup>174</sup> A significant issue in the political climate of today, the health care debate has focused extensively on who should pay for the extra costs associated with the high number of uninsured Americans.<sup>175</sup> One easy way to spread the cost of healthcare is to require that unmarried partners be given access to employer-based dependent benefits when similarly situated married partners have that access.

Currently, there is no requirement that employers provide health insurance to employees or their partners, whether spouses or domestic

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169. See *Goodridge*, 798 N.E.2d at 955–57 (listing Massachusetts state benefits that are available only to married individuals); GAO Letter, *supra* note 56.

170. See *supra* Part II.B–C.

171. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2008, at 21 (2009), <http://www.census.gov/prod/2009pubs/p60-236.pdf>.

172. JACK HADLEY ET AL., KAISER COMM'N ON MEDICAID AND THE UNINSURED, COVERING THE UNINSURED IN 2008: KEY FACTS ABOUT CURRENT COSTS, SOURCES OF PAYMENT, AND INCREMENTAL COSTS 5 (2008), <http://www.kff.org/uninsured/upload/7810.pdf>. This is in addition to \$100–200 billion in indirect costs associated with lost health, decreased work productivity, shorter life spans, and developmental losses among children. *Id.* at 1.

173. *Id.* at 7.

174. *Id.*

175. See, e.g., David M. Herszenhorn, *White House and Hospitals Are Reported to Be Near Deal*, N.Y. TIMES, July 7, 2009, at A11; Elizabeth Moore, *Most Agree: Repair Health Care*, NEWSDAY, Oct. 13, 2009, at A02; Robert Pear, *New Fee on Health Insurance Companies Is Proposed to Help Expand Coverage*, N.Y. TIMES, Sept. 7, 2009, at A8; Armstrong Williams, *Philosophical Gap on Health Care*, WASH. TIMES, Sept. 9, 2009, at A04.

partners.<sup>176</sup> Yet many employers do offer these benefits. Employment-based health insurance accounts for approximately 58% of total coverage,<sup>177</sup> and, in 2003, 31% of Americans received benefits as a dependent of an employer-provided insurance policy.<sup>178</sup> In fact, employers are allocating a growing share of employees' annual compensation to benefit plans, with health insurance as the primary benefit.<sup>179</sup> Wages and salaries now account for only 81% of an employee's compensation, down from 95% in 1950—the remaining 19% is a combination of benefit plans.<sup>180</sup> Similarly, many employers have extended this coverage to spouses of employees.<sup>181</sup>

Presumably, dependent healthcare benefits were initially attractive to employees because of the sharp divide in marital responsibilities, with the wife usually staying home to take care of the family and the husband as the sole wage-earner. As society has shifted, the need for these dependent healthcare benefits has remained constant, but the segment of society requiring them has changed.<sup>182</sup> One-worker families still rely on employer-based dependent benefits to provide health insurance to the stay-at-home partner.<sup>183</sup> Defining eligibility based on marital status, however, is misplaced. For example, a husband and wife who both work outside of the home may both have health insurance benefits provided by their respective employers. For them, the dependent benefits are wasted assets—especially considering that many employers are replacing wages with benefits.<sup>184</sup> Alternatively, an unmarried couple with a single wage-earner does have a need for these dependent benefits, without which the stay-at-home partner will likely forgo the added expense and remain uninsured, thus contributing to the pool of uninsured health expenses.<sup>185</sup>

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176. *Compliance Assistance*, U.S. DEP'T OF LABOR, [http://www.dol.gov/ebsa/compliance\\_assistance.html](http://www.dol.gov/ebsa/compliance_assistance.html) (last visited Nov. 13, 2010) (“ERISA does not require any employer to establish a [health] plan. It only requires that those who establish plans must meet certain minimum standards.”).

177. DENAVAS-WALT ET AL., *supra* note 171, at 20. Another study found that about 80% of non-elderly insured people in the United States receive coverage through an employer-based insurance provider, either as the main beneficiary or a dependent. Michael A. Ash & M.V. Lee Badgett, *Separate and Unequal: The Effect of Unequal Access to Employment-Based Health Insurance on Same-Sex and Unmarried Different-Sex Couples*, 24 CONTEMP. ECON. POL'Y 582, 582 (2006).

178. See SAMIR LUTHER, HUMAN RIGHTS CAMPAIGN FOUNDATION, DOMESTIC PARTNER BENEFITS: EMPLOYER TRENDS AND BENEFITS FOR THE GLBT FAMILY 1 (2006), <http://www.hrc.org/documents/Guide-to-Employer-Trends-and-Benefits-Equivalency-for-the-GLBT-Family.pdf>.

179. *See id.*

180. *See id.*

181. This trend likely has its roots in the historical duty of support. Because the husband was typically the sole worker outside of the home, benefits for his dependent wife would have been a significant enticement, as private insurance was the only other option. Today, dependent benefits may not play as large a role in employment decisions because in a two-worker family each spouse may have his or her own employer-provided insurance.

182. *See infra* notes 186–93 and accompanying text.

183. *See* Ash & Badgett, *supra* note 177, at 588.

184. *See* LUTHER, *supra* note 178, at 1.

185. Ash & Badgett, *supra* note 177, at 588 (suggesting that exclusionary health insurance policies limit access to health insurance for many unmarried partners); *see also* AMY B. BERNSTEIN ET AL.,

Some employer practices have evolved with society. Many companies have initiated domestic partner benefits, an opt-in program for providing employer-covered health insurance to unmarried couples.<sup>186</sup> About one-third of Americans now work for an employer that provides domestic partner benefits, in addition to spousal benefits.<sup>187</sup> Justifications for the spread of these benefits are similar to those provided for the inclusion of spouses in the first place: market competition, diversity, attracting and retaining better employees, and fairness.<sup>188</sup> But there is still a long way to go. Approximately 28% of married people, but only 2% of people in unmarried different-sex relationships, receive employer-based dependent coverage.<sup>189</sup> Furthermore, it does not appear that the lower instance of dependent coverage is resulting in higher rates of private coverage, implying that this practice is resulting in higher rates of uninsured persons.<sup>190</sup> Of particular note, 11.5% of people who are married are uninsured, compared with 32.4% of people in unmarried different-sex relationships.<sup>191</sup> One possibility for the significant gap in insurance coverage between married and unmarried persons may be the lack of employer-based dependent coverage for unmarried partners. Studies have indicated that “[u]niversal partner coverage would cut that uninsured rate by as much as 50%.”<sup>192</sup> Requiring that domestic partners qual-

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CTR. FOR DISEASE CONTROL PREVENTION, MARITAL STATUS IS ASSOCIATED WITH HEALTH INSURANCE COVERAGE FOR WORKING AGE WOMEN AT ALL INCOME LEVELS 1 (2008), <http://www.cdc.gov/nchs/data/databriefs/db11.pdf> (finding that unmarried women ages twenty-five to sixty-four years are 60% more likely to be uninsured than married women).

186. Human Rights Campaign has a searchable list of employers that offer domestic partner benefits. *Private Sector Employer Search*, HUMAN RIGHTS CAMPAIGN, [http://www.hrc.org/issues/workplace/search.asp?form=private\\_quick\\_search.aspx](http://www.hrc.org/issues/workplace/search.asp?form=private_quick_search.aspx) (last visited Nov. 13, 2010).

187. See Solot & Miller, *supra* note 12, at 97. A 2004 study found that 14% of firms offered domestic partner benefits to same-sex domestic partners, and 12% offered them to different-sex domestic partners. Ash & Badgett, *supra* note 177, at 583. Comparably, a 2007 survey found that 54% of employers surveyed offered domestic partner coverage, with 17% limiting this coverage to same-sex dependents. EMP. BENEFIT RESEARCH INST., DOMESTIC PARTNER BENEFITS: FACTS AND BACKGROUND (2009), <http://www.ebri.org/pdf/publications/facts/0209fact.pdf> [hereinafter EBRI REPORT].

188. EBRI REPORT, *supra* note 187.

189. Ash & Badgett, *supra* note 177, at 587; see LUTHER, *supra* note 178, at 1.

190. Ash & Badgett, *supra* note 177, at 588. “[The numbers] suggest[] that employer benefits practices do not simply rearrange the kind of coverage that unmarried individuals obtain. Those practices may result in less access to health insurance coverage for unmarried partners.” *Id.*

191. *Id.* at 587. In addition to the raw data, the authors ran a sample controlling for the possibility of adverse selection (age, education, employment, children) and found that the gap between the number of uninsured people in married and different-sex unmarried relationships remained (the unmarried group was about 15–17% points worse). *Id.* at 590; see also BERNSTEIN ET AL., *supra* note 185, at 4 (“Married women are more likely to have an offer of health insurance through an employer than unmarried women, because they may have an offer either through their own workplace or that of their spouse.”); EQUALITY MD., DOMESTIC PARTNER BENEFITS: EQUAL PAY FOR EQUAL WORK 1 (2006), [http://equalitymaryland.org/pdfs/dp\\_fact\\_sheet.pdf](http://equalitymaryland.org/pdfs/dp_fact_sheet.pdf) (“[P]eople with same-sex or different-sex unmarried partners are two to three times more likely to be uninsured than married people.”).

192. EQUALITY MD., *supra* note 191, at 1.

ify for employer-based dependent coverage, when offered to spouses, would alleviate a portion of the cost associated with the uninsured.<sup>193</sup>

A common criticism of the movement to expand domestic partner benefits to different-sex unmarried partners is that if these couples want the benefits, all they have to do is get married.<sup>194</sup> Concededly, this is true. But there are various reasons why a couple may choose not to get married, and the existence of a marriage certificate does not change the need for health insurance, nor does it decrease the savings to governments resulting from an increase in insured citizens.<sup>195</sup> Increasing health-insurance coverage for unmarried different-sex couples would economically benefit society by reducing the amount of uncompensated care required annually.<sup>196</sup> Thus, if benefits are provided to employees' spouses, it makes sense that they should also be provided to unmarried partners. Further, the benefits to society of greater insurance coverage necessitate equal treatment of domestic partner benefits by the Internal Revenue Service (IRS) for tax purposes. Currently, spousal benefits do not constitute a taxable transfer of income, but domestic partner benefits do.<sup>197</sup>

Opponents have also argued that if employers are required to provide coverage for unmarried different-sex partners, they will drop all domestic partner benefits or perhaps even all dependent benefit coverage.<sup>198</sup> This argument is unpersuasive. First, the cost of providing domestic partner benefits is negligible. It is estimated that at companies currently offering domestic partner benefits, only about 1% of eligible employees take advantage of it, and in 88% of these firms the cost is less

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193. One possible method for enforcing coverage to unmarried dependents would be to add "marital status" to Title VII, which currently prohibits discrimination with regard to terms, conditions, and privileges of employment because of "race, color, religion, sex, or national origin." Providing dependent coverage for married dependents, but not to unmarried dependents, clearly discriminates on the basis of marital status by providing similarly situated married employees with higher compensation for equal work. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) (holding that not providing pregnancy benefits to employees' spouses constituted discrimination under Title VII because female employees received greater compensation, via their spousal coverage, than male employees). Arguably, mandating that employers provide coverage to all of their employees, and their dependents, would further spread the cost of health insurance and maximize the number of those insured. *See, e.g., Katharine Q. Seelye, Employer Mandate Becomes Sticky Issue in Reconciling Bills*, N.Y. TIMES, Nov. 1, 2009, at A33 (discussing three bills considered by Congress regarding mandatory employee health coverage).

194. *Irizarry v. Bd. of Educ.*, 251 F.3d 604, 606 (7th Cir. 2001) ("[T]he recognition of a domestic-partnership surrogate is more important for homosexual than for heterosexual couples, who can obtain the benefits simply by marrying.").

195. *See supra* notes 171–93.

196. *See supra* notes 171–93.

197. I.R.C. § 105(b) (2006). "Spouse," as used in the Code, is limited to the meaning given by the Defense of Marriage Act of 1996 and thus excludes same-sex spouses and unmarried partners. *See* Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

198. *Irizarry*, 251 F.3d at 609 (arguing that extending domestic partner benefits to all couples would result in the termination of domestic partner benefits because of the excessive cost and consequence of encouraging cohabitation and illegitimate births).

than 2% of all total benefit costs.<sup>199</sup> Projections indicate that offering domestic partner benefits would likely lead to an increase in enrollment of between 1.4–2.1% of current firm employment.<sup>200</sup> This cost is trivial when compared to the estimated savings for the government of between \$0.5–1.8 billion.<sup>201</sup> Additionally, not providing domestic partner benefits to unmarried different-sex partners results in those partners being uninsured, the cost of which is ultimately borne by tax-payers and purchasers of health insurance (including these same companies).<sup>202</sup>

Second, employee health benefits are elective to begin with.<sup>203</sup> The most persuasive justification for providing these benefits is to attract and retain the best and the brightest employees.<sup>204</sup> Although employers could elect to discontinue employee benefit plans, it is unlikely that they would do so because there will always be another employer that offers them.<sup>205</sup> The better employees will choose to work for the employers that provide the most compensation, which includes benefit packages. Thus, basic economics will prevent the collapse of dependent benefits.

Expanding employer-based dependent health coverage to unmarried couples will both further the goal of these benefits—for employers to attract better employees and for society to provide more access to health insurance—and support the correct segment of the population—those who are dependent, regardless of marital status. Further, there is little concern that couples will take advantage of the system. Couples who have access to their own health insurance benefits will not require employer-based dependent coverage. Only those who are actually dependent (in this case, those who do not have their own source of health insurance or those who have inadequate coverage and rely on their partner) will elect to receive dependent benefits. Unmarried partners, therefore, should be eligible for employer-based dependent health care benefits when those benefits are offered to spouses.

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199. EBRI REPORT, *supra* note 187, at 2. Possible reasons for the low level of election are because those who are eligible for domestic partner coverage—those who are unmarried—tend to be younger, and thus healthier, and there are less instances of children. *Id.* A comparative study found that for 64% of employers offering these benefits, the total financial impact was less than 1% of total benefit costs, and for only 5% of employers the cost was greater than 3% of total benefit costs. LUTHER, *supra* note 178, at 6.

200. Ash & Badgett, *supra* note 177, at 596.

201. *Id.*

202. HADLEY ET AL., *supra* note 172, at 7.

203. *Compliance Assistance*, *supra* note 176 (“ERISA does not require any employer to establish a [health] plan. It only requires that those who establish plans must meet certain minimum standards.”).

204. See Solot & Miller, *supra* note 12, at 97.

205. But see Carol Sanger, *A Case for Civil Marriage*, 27 CARDOZO L. REV. 1311, 1317 (2006) (“[I]n 2005, the Montana Supreme Court held that if unmarried heterosexual couples could purchase health insurance from a state employer, unmarried same-sex couples must be offered the same benefit. Montana Blue Cross Blue Shield thereupon dropped *all* unmarried couples from coverage.” (footnote omitted) (discussing *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445 (Mont. 2004))).

## 2. *The Federal Subsidy (Social Security and the FMLA)*

In addition to private health care benefits, many federal programs were enacted to help those in need and were then extended in recognition of the provider-dependent roles in marital relationships. Because of the marriage incentive, some people are provided increased benefits solely because of their marital status. This Subsection looks specifically at the Social Security system and the Federal Medical Leave Act to demonstrate that “marriage” is not the appropriate dividing line for determining benefit eligibility. Rather, programs intending to subsidize dependence should be based on actual “economic dependence” when determining which relationships to cover.

### a. Social Security: So Long as You’re Married

The federal government provides a married couple with options for deciding how to elect social security benefits. Each spouse can elect to take his own benefit or instead to take fifty percent of his spouse’s benefit.<sup>206</sup> In granting benefits to the spouses of workers, it appears that every worker (married, unmarried, single, straight, or gay) is subsidizing the economic security of married persons.<sup>207</sup> Actually, however, the system is only subsidizing a married couple with disparate incomes.<sup>208</sup> If both spouses are in a similar salary range, their benefits will be similar, thus it would maximize their collective benefit for each spouse to take his or her own social security payment, leaving the spousal benefits for someone else. If one spouse makes significantly more (or only one spouse works), however, at some point the disparity in available benefits will be large enough to make it economically beneficial for the lower income spouse to take fifty percent of the higher payment instead of his or her own benefit. Therefore, it does not appear to be “marriage” that the Social Security Administration is subsidizing through spousal benefits, but, rather, some form of dependency.

Logically, this makes sense. If each spouse is financially independent and has contributed to Social Security throughout her own career, there is no need for government welfare programs to step in and provide unearned benefits. When this stops making sense, however, is when an unmarried couple, one of which is a full-time worker and the other a stay-at-home caregiver, is denied spousal benefits because of the lack of a marriage certificate.<sup>209</sup> The stay-at-home partner is providing the same

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206. SOC. SEC. ADMIN., SOCIAL SECURITY: RETIREMENT BENEFITS 9–10 (2010), <http://www.ssa.gov/pubs/10035.pdf> [hereinafter SSA RETIREMENT BENEFITS]; see also Polikoff, *supra* note 96, at 548–49.

207. See COTT, *supra* note 5, at 177–78.

208. See Polikoff, *supra* note 96, at 548.

209. A “spouse” for Social Security purposes requires a valid marriage or having the status of husband and wife with respect to the taking of intestate property. SOC. SEC. ADMIN., SOCIAL

economic (and social) benefits to the working partner and, arguably, to society as a married stay-at-home caregiver.<sup>210</sup> Similarly, if both partners work, but one makes significantly less, there is no reason to exclude the partner with lower benefits from collecting the higher spousal benefits.

The Social Security benefit for divorced spouses is further evidence that “marriage” is not the correct proxy when determining “dependent” benefit eligibility. Under the current system, a worker’s divorced spouse (or surviving divorced spouse) is eligible for benefits (or survivor benefits) if the marriage lasted ten years or more.<sup>211</sup> If a divorced surviving spouse is caring for a child under sixteen years of age who would be entitled to survivor benefits, the length of the previous marriage is not taken into consideration.<sup>212</sup> Because, in this scenario, marriage is specifically excluded as an element of the relationship, it cannot possibly be the justification for the extension of spousal benefits.

Spousal benefits reflect a time when the wife was typically a “household worker” with no claim to her own benefits.<sup>213</sup> If the marriage dissolved, the wife still needed to be taken care of, and because of her previous dependency on her ex-husband, it was his Social Security benefits that would provide for her.<sup>214</sup> The justifications for providing spousal Social Security benefits are equally applicable to providing those same benefits to an unmarried (dependent) partner.

#### b. Family Medical Leave Act: The Unmarried Partner Left Behind

The Family Medical Leave Act (FMLA) requires that covered employers grant employees up to twelve weeks of unpaid leave per year for the (1) birth of a child, (2) adoption of a child, (3) care of an immediate family member with a serious medical condition, or (4) employee’s own serious health condition.<sup>215</sup> Notably, the FMLA applies only to employers with more than fifty employees and it provides only *unpaid* leave, although job security certainly has a value.<sup>216</sup> Further, an immediate family member is defined as a spouse, child, or parent,<sup>217</sup> with spouse defined as

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SECURITY HANDBOOK § 306.1, available at [http://www.socialsecurity.gov/OP\\_Home/handbook/handbook.03/handbook-0306.html](http://www.socialsecurity.gov/OP_Home/handbook/handbook.03/handbook-0306.html).

210. For a discussion about whether there are benefits to society, through children, of a stay-at-home parent, see Abrams, *supra* note 16, at 528–31.

211. SOC. SEC. ADMIN., SOCIAL SECURITY: SURVIVOR BENEFITS 6 (2009), <http://www.ssa.gov/pubs/10084.pdf> [hereinafter SSA SURVIVOR BENEFITS]; SSA RETIREMENT BENEFITS, *supra* note 206, at 11. Further, the amount of benefits a divorced spouse can receive has no effect on the amount of benefits the worker or the worker’s current spouse can receive. *Id.* at 11.

212. SSA SURVIVOR BENEFITS, *supra* note 211, at 9.

213. See *supra* Part II.A. Notably, it is under the heading “What Every Woman Should Know” on the Social Security website where information about household workers can be found. SOC. SEC. ADMIN., SOCIAL SECURITY: WHAT EVERY WOMAN SHOULD KNOW 11 (2009), <http://www.ssa.gov/pubs/10127.pdf> [hereinafter SSA: WOMAN SHOULD KNOW].

214. SSA: WOMAN SHOULD KNOW, *supra* note 213, at 19–21.

215. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601, 2612 (2006).

216. *Id.* § 2611(4).

217. *Id.* § 2612(a)(1)(A)–(E).

“a husband or wife, as the case may be.”<sup>218</sup> The stated purposes of the FMLA include work-life balance, promotion of stability and economic security of families, and the national interest in preserving family integrity.<sup>219</sup> Additionally, as Chief Justice Rehnquist noted, an underlying rationale for the enactment of the FMLA was “to protect the right to be free from gendered-based discrimination in the workplace” by requiring employers to grant family-care leave to male and female workers, thereby ensuring women were not fired for taking leave for childbirth and lessening the stereotype that females had to be the primary caretaker.<sup>220</sup>

The FMLA provides significant benefits to both employers and society, including “the retention of valuable human capital, having more productive employees at work, lower long-run health care costs, lower turnover costs, lower presenteeism [opposite of absenteeism] costs, and lower public assistance costs.”<sup>221</sup> When a person has a serious health condition, it is likely that some care will be required. The FMLA internalizes this cost into the familial relationship by providing unpaid leave to a spouse, parent, or child, instead of relying on the health care system to provide this care.

Unfortunately, the restrictive definition of “family” has severely limited the attainment of the policies and benefits of the FMLA. Commendably, the FMLA does allow leave to care for the “child of a person standing in *loco parentis*,” which is defined as persons “with day-to-day responsibilities to care for and financially support a child . . . . A biological or legal relationship is not necessary.”<sup>222</sup> The Act, however, fails to recognize that children are not the only people who may be in relationships that have not been formally sanctioned—or even those that have been formally sanctioned, but not in a sufficiently formal manner for purposes of the Act.<sup>223</sup> By limiting the partner caretaking benefit to spouses, the federal government is refusing to place this burden with the unmarried couple and instead is allowing it to be borne by society.<sup>224</sup> The

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218. *Id.* § 2611(13).

219. *Id.* § 2601(b)(1)–(5).

220. Michael Selmi, *Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. & POL’Y 65, 65–66 (2004) (quoting *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 722 (2003)); see also POLIKOFF, *supra* note 33, at 169 (explaining that the originally proposed FMLA did not allow spouses to take leave to care for each other, but was solely intended to ensure women would not be fired for taking childbirth leave).

221. DEP’T OF LABOR, *FMLA COVERAGE, USAGE, AND ECONOMIC IMPACT* 142 (2007), <http://www.dol.gov/whd/FMLA2007Report/Chapter11.pdf> [hereinafter *FMLA COVERAGE*].

222. 29 C.F.R. § 825.122(c)(3) (2009).

223. Because FMLA is a federal law, the definition of spouse is governed by the Defense of Marriage Act, which is limited to the husband of a woman or the wife of a man. See *Defense of Marriage Act*, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 and 28 U.S.C. § 1738C). This works to exclude same-sex marriages performed in those states where it is legal and all forms of domestic partnerships.

224. *Regan*, *supra* note 8, at 1454 (arguing that a “willingness to take on the burdens that flow from intimate commitment to another person” “militates in favor of amending the Act to include the provision of care for an unmarried partner as a basis for leave”).

FMLA should be extended to cover unmarried partners so that the cost of partner care can be internalized within each relationship.<sup>225</sup>

Some commentators have criticized the cost and effectiveness of the FMLA.<sup>226</sup> Whatever FMLA benefits cost society, however, this cost is borne by everyone—consumers, workers, and economic stakeholders—whether they benefit from the FMLA or not.<sup>227</sup> Thus, so long as the FMLA exists, there is no sufficient justification for limiting the partner caretaking benefits to married couples. Furthermore, it does not appear that including unmarried partners in the definition of “family” would drastically increase the cost of this benefit. In 2000, 18.5% of people who took leave under FMLA took it to care for a newborn or adopted child, whereas 52.4% took it because of their own illness, leaving just over one quarter who took leave to take care of a seriously ill family member.<sup>228</sup> Another report found that between 1995 and 2000, 19.4% of those who took leave did so to take care of a family member (not a child).<sup>229</sup> Additionally, a significant number of people eligible to take FMLA leave do not actually take it. It is estimated that between 6.5–10% of workers employed at FMLA-eligible companies take advantage of this benefit.<sup>230</sup> Therefore, although providing leave to unmarried partners would provide a significant benefit when it was needed, it does not appear that partner caretaking is ultimately what most people use the FMLA for.

Another concern of the FMLA is fraud—that people are taking leave for unauthorized reasons.<sup>231</sup> Adding coverage for unmarried partners, however, will not increase these fraudulent actions. Because an employee who is covered under the FMLA is always eligible to take leave for his or her own serious health condition, there is no reason to assume that adding the option of caring for an unmarried partner would increase the instances of fraud. Therefore, because the FMLA benefits both society and employers, and because the purposes of the FMLA would be best fulfilled by expanding the definition of family, unmarried partners should be an available category of persons for which a covered employee may take leave to care for.

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225. *Id.*; see also POLIKOFF, *supra* note 33, at 170 (arguing for paid leave as a way “to implement the collective responsibility for dependency”).

226. See generally LARRY F. DARBY & JOSEPH P. FUHR, DARBY ASSOCS., BENEFITS AND COSTS OF THE FAMILY AND MEDICAL LEAVE ACT OF 1993: A CONSUMER WELFARE PERSPECTIVE (2007), [http://www.protectfamilyleave.org/research/darby\\_fmla.pdf](http://www.protectfamilyleave.org/research/darby_fmla.pdf).

227. FMLA COVERAGE, *supra* note 221, at 145. For a discussion of the estimated direct and indirect costs associated with the FMLA, see DARBY & FUHR, *supra* note 226, at 19–22, 26–27.

228. Selmi, *supra* note 220, at 74.

229. DARBY & FUHR, *supra* note 226, at 9.

230. FMLA COVERAGE, *supra* note 221, at 130–31 (stating that of those companies surveyed who reported FMLA usage, the median was between 7–10%, which is consistent with the national average findings in a 2000 report of 6.5%); see also DARBY & FUHR, *supra* note 226, at 9 (finding that only about 17% of those eligible for FMLA leave actually took it).

231. DARBY & FUHR, *supra* note 226, at 11.

### 3. *Property Laws*

In addition to health care and federal benefits, the division between married and unmarried couples in property law is misplaced. When a couple gets married, the rights of automatic inheritance and property division upon dissolution attach, even without a will or other relevant contract.<sup>232</sup> Although it is possible for unmarried couples to designate who receives their property upon death, this can be a time-consuming, expensive, and difficult process. Further, most Americans do not plan for their own death,<sup>233</sup> and they likely do not plan for the dissolution of a relationship. Additionally, wills and trusts are complicated documents, which every first-year law student learns are often created with conflicting language that does not fully identify the desires of the deceased.<sup>234</sup> Because of these barriers, it is not inconceivable to imagine that many people, especially those who die young, may not have prepared in advance, and that upon the dissolution of a relationship, the division of property becomes a messy situation.

Most state intestacy laws provide a default order if the deceased has not left a will, typically passing first to the spouse, if not married, “to children, if no children, to [the deceased’s parents], if no parents, to siblings, and so on.”<sup>235</sup> Nearly every state omits the deceased’s unmarried partner from the intestacy list.<sup>236</sup> One of the main purposes of intestacy law is to closely approximate the wishes of the deceased “based on assumptions about the relative importance of various relationships in his or her life.”<sup>237</sup> Therefore, property is supposed to pass to the person that would most likely have been named beneficiary, if the deceased had planned ahead. If a person is married, the surviving spouse is the logical choice. If a person is unmarried, however, but has an unmarried partner, it seems equally logical to assume that the deceased would have valued that relationship above the others and given the surviving partner preference to receive her property.<sup>238</sup>

One of the main benefits upon the death of a spouse is the marital estate tax exemption, so long as the surviving spouse is a U.S. citizen.<sup>239</sup> An estate that is worth more than a predetermined value set by the IRS

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232. See, e.g., CAL. FAM. CODE §§ 760, 2550 (West Supp. 2010) (community property and division of community estate); CAL. PROB. CODE § 6401 (West Supp. 2010) (inheritance); 750 ILL. COMP. STAT. 5/503 (2008) (marital property); 755 ILL. COMP. STAT. 5/2-1 (2008) (inheritance).

233. See COLO. REV. STAT. ANN. § 15-22-102(1)(b) (West Supp. 2009).

234. See Margaret W. Hickey, *Estate Planning for Cohabitants*, 22 J. AM. ACAD. MATRIMONIAL LAW. 1, 18–25 (2009).

235. *Id.* at 24.

236. *Id.*

237. Regan, *supra* note 8, at 1452.

238. *Id.*

239. See I.R.C. § 2056 (2006).

must pay a heavy tax before it is distributed.<sup>240</sup> Thus, even if a surviving unmarried partner does manage to receive property from his deceased partner's estate, this property will not be exempt from the estate tax if it is worth more than the taxable estate minimum. The marital tax exemption reflects a view that the property of each spouse is part of the (single) marital estate, and thus, the surviving spouse should not be taxed to receive her own property.<sup>241</sup> Although this does make some sense if the married couple actually did create the marital estate together, there is no reason why a newly married couple should get the estate tax exemption, yet an unmarried committed partner of twenty years should not. Therefore, "marriage" is not the correct proxy for determining when an estate tax exemption is appropriate.

Similar to the estate tax, laws regarding the treatment of property upon dissolution of an unmarried relationship need to be reexamined. The current laws are varied, ranging from treating the unmarried couple much like a married couple to refusing to use contract law to resolve any disputes.<sup>242</sup> Again, it is unclear that marriage is the correct proxy for determining how to divide property at the end of a relationship.

The popularity of prenuptial agreements suggests that many married couples do not want to divide their property equally upon divorce (or even death).<sup>243</sup> Conversely, the lack of a marriage certificate does not always mean that each partner in an unmarried relationship is financially independent. Contrary to popular opinion, most unmarried cohabitants do share joint finances.<sup>244</sup> A study of the "internal economic[s]" of unmarried cohabitants found that almost 52% of these couples joined their incomes and that 24% split expenses fifty-fifty, resulting in 75.3% of unmarried cohabitants being "substantially interdependent economically."<sup>245</sup> Significantly, this represents the number of unmarried couples who pool their money even though treatment upon death and dissolution is uncertain. If the legal status of unmarried couples or the treatment of their joint property were protected, presumably the number of unmarried cohabitants with joined finances would be higher.<sup>246</sup> Consequently, unmarried couples may also have a "single estate" and thus recognition of this economic partnership for purposes of intestacy and dissolution laws would be more equitable.

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240. Currently "the estate tax only affects the wealthiest 2 percent of all Americans," with a filing of an estate tax return only required for estates worth more than \$3.5 million. *Estate Tax*, IRS.GOV, <http://www.irs.gov/businesses/small/article/0,,id=164871,00.html> (last visited Nov. 13, 2010).

241. Cain, *supra* note 120, at 822–23.

242. See *supra* Part II.C.1.a–b.

243. See Jill Heitler Blomberg, *Putting Your Cards on the Table: Even Not-So-Rich Couples Should Consider Prenuptial Agreements*, CONN. L. TRIB., Aug. 18, 2008, at 12 (explaining how and why more people sign prenuptial agreements than in the past).

244. Bowman, *supra* note 14, at 23.

245. *Id.* at 23–24.

246. See *id.* at 24 (suggesting that some cohabitants keep their money separate because the legal status of cohabitation is unprotected, not because the relationship is any less serious).

Because the treatment of property after both death and dissolution is supposed to reflect the intent of the parties and the realities of a joint economic partnership, using marriage as the determinative factor is misguided. Instead, a true intent and a history of a joined life, married or not, should be what determines the treatment of property between couples in the case of a death or dissolution of the relationship.

*C. A Quick Note on Emotional Interdependence*

Some of the rights and benefits that accrue to married couples are not economic, yet fairness and common sense require an extension to those who can show a relationship of sufficient commitment. For instance, spouses often have standing to sue for wrongful death and negligent infliction of emotional distress.<sup>247</sup> Citing a concern about the need to limit the number of people with standing in these types of cases (alternatively, to limit the number of persons the negligent actor owes a duty to), courts have routinely denied standing to unmarried partners.<sup>248</sup> This limitation is misplaced. Although the burden of proving a sufficient commitment, and thus, a valid loss, may be higher for unmarried persons, the emotional interdependence between two people in a committed relationship does not depend on the existence of a valid marriage certificate. Further, expanding these benefits to unmarried partners will not drastically increase the number of people to whom negligent actors owe a duty. Limiting recovery to either a spouse or an unmarried partner would prevent multiple “significant others” from bringing a claim.

Additionally, spouses are often responsible for medical and end-of-life decision making.<sup>249</sup> The power to make health care decisions is grounded in the idea that if a person becomes incapacitated, decisions should be made that “most closely approximate those the incompetent person would make based on familiarity with her values and wishes.”<sup>250</sup> Clearly, the easiest measure for this person would be a spouse because the implication of being married is that the two people live and share a life together. If the incompetent person is not married, but instead has

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247. See, e.g., CAL. CIV. PROC. CODE § 377.60 (West Supp. 2010) (including domestic partners, however, these are limited to same-sex relationships or relationships where one partner is over sixty-two); 740 ILL. COMP. STAT. 180/2 (2008); ME. REV. STAT. ANN. tit. 18–A, § 2-804 (Supp. 2009).

248. See, e.g., *Milberger v. KBHL, LLC*, 486 F. Supp. 2d 1156, 1167 (D. Haw. 2007) (holding that unmarried partner is not sufficiently close to bring a claim for negligent infliction of emotional distress). *But see* *Leong v. Takasaki*, 520 P.2d 758, 766 (Haw. 1974) (holding that the lack of a blood relationship was not a bar to recovery for negligent infliction of serious mental distress when child saw his step-grandmother killed).

249. See, e.g., 755 ILL. COMP. STAT. 40/25 (surrogate decision making); MISS. CODE ANN. § 41-41-211 (2006) (only if a spouse, adult child, parent, or adult sibling is unavailable may an adult who “has exhibited special care and concern for the patient” act as a surrogate for health-care decision making purposes); *see also* CAL. PROB. CODE § 4717 (West 2009) (decision maker can be a “family member” or other person the hospital reasonably believes has authority to make decisions).

250. Regan, *supra* note 8, at 1453.

an unmarried partner, that partner is likely to be the person that can most closely approximate those wishes and values.

Under current law, some decision-making powers can be extended to unmarried partners. Both unmarried partners can fill out health care powers of attorney, designating the other as responsible to make medical decisions in the event that one becomes incapacitated.<sup>251</sup> Although it is possible to anticipate such needs and fill out the appropriate forms, the absence of the legal document does not make the unmarried partner any less appropriate for the decision making if he is willing to accept the responsibility that comes with making such difficult decisions.<sup>252</sup> Additionally, as already discussed, these forms can often be confusing and it is rare that a person plans for her incapacitation.<sup>253</sup> Therefore, fairness, common sense, and the policy justifications for many of the emotional benefits (and obligations) of marriage require an extension to unmarried committed couples.

As this Part has demonstrated, many of the rights (and obligations) that the government confers on married persons are justified not by the existence of a marriage contract, but by the economic consequences of the relationship. It is, therefore, necessary to extend these rights (and obligations) to persons in unmarried committed relationships.

#### IV. RECOMMENDATION

Marriage was founded on economics and ideas of dependency: the wife was dependent on her husband and the state was dependent on the man to keep his family in order, thereby achieving social stability through mini-governments.<sup>254</sup> The laws governing marriage, and the rights (and obligations) imposed on that institution, were also founded on economics and dependency.<sup>255</sup> The only problem is that “marriage,” as it is known in today’s society, is breaking away from its provider-dependent form.<sup>256</sup> Often, both spouses work and their lives are more independent. Yet many laws still use marriage as the trigger when, in fact, economics and emotional interdependence are the real justifications for these rights and obligations.<sup>257</sup>

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251. See, e.g., ILL. DEP’T OF PUB. HEALTH, POWER OF ATTORNEY FOR HEALTH CARE (2006), <http://www.idph.state.il.us/public/books/PwrOf.PDF> (“[T]he purpose of this power of attorney is to give the person you designate (your ‘agent’) broad powers to make health care decisions for you, including power to require, consent to or withdraw any type of personal care or medical treatment for any physical or mental condition and to admit you to or discharge you from any hospital, home or other institution.”).

252. See Regan, *supra* note 8, at 1453.

253. See *supra* notes 166–67 and accompanying text.

254. See *supra* notes 21–24 and accompanying text.

255. See *supra* Part III.

256. See *supra* note 26 and accompanying text.

257. See *supra* Part III.B–C.

As an example, imagine that two friends, Jane and Jill, go to Las Vegas for the weekend. Jane is having the time of her life when she meets John and they decide it would be funny if they got married at one of those little chapels you always hear about (like the one where Britney Spears got married<sup>258</sup>). So they go to the Little White Wedding Chapel. For \$55 they can use the chapel, \$95 gets the couple twenty-five photos, \$25 buys flowers, \$40 gets a drive-through service (why bother getting out of the car?), and there are even rental gowns and a free copy of “Rules for a Happy Marriage.”<sup>259</sup> The next morning, Jane and John have all the rights of a married couple. Jill, however, may have none of these rights with Jack, her unmarried partner of twenty years and the father of her three children, even though Jill sacrificed her career to stay home with the kids. Does this make any sense?

As this Note has demonstrated, economics and emotional interdependence are the most relevant bases for many of the benefits conferred upon married couples.<sup>260</sup> The analysis in the previous Part dictates that Jane and John deserve no economic benefits because they have shared neither expenses, nor life experiences, and they do not have the emotional connection necessary to act as decision maker or suffer serious harm from a wrongful death.<sup>261</sup> Jack and Jill, on the other hand, do deserve many of the benefits and obligations conferred on married couples because they have merged their lives into a single unit (e.g., shared rent/mortgage, food, utilities, and experiences). This partnership exists independent of the social construct of marriage, and society should give recognition where it is due.

#### A. *To Opt-In or to Opt-Out, That Is the Question*

Concededly, there are some unmarried couples that do not want the rights, obligations, and economic intermingling that comes with marriage.<sup>262</sup> Because a background theme of this Note is that people should be able to organize their lives in a way that they see fit, forcing upon couples a relationship status that they do not want would be equally misplaced. For that reason, most of the economic benefits and obligations should be achieved through an opt-in program, similar to the domestic partner arrangements already provided for in some states.

Many of the decision-making and standing benefits and obligations, however, should be provided based on the form of the relationship, re-

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258. Jeffrey Gettleman, *Local Girl Leaves Town, Makes Good, Breaks Heart*, N.Y. TIMES, Jan. 7, 2004, at A12.

259. THE WORLD FAMOUS LITTLE WHITE WEDDING CHAPEL, <http://www.alittlewhitechapel.com/alacarte.html> (last visited Nov. 13, 2010).

260. See *supra* Part III.

261. See *supra* Part III.B.

262. See Renata Forste, *Prelude to Marriage or Alternative to Marriage?: A Social Demographic Look at Cohabitation in the U.S.*, 4 J.L. & FAM. STUD. 91, 93 (2002).

ardless of a deliberate action on the part of the unmarried couple. The closeness of the relationship, and not the existence of a marriage certificate, should determine who can recover for wrongful death or negligent infliction of emotional distress and who should be eligible for medical and end-of-life decision making. Although an unmarried couple would be advised to plan ahead and opt-in if possible, in order to avoid the high burden of proving a relationship of sufficient closeness, not doing so should not be a bar. This is especially important when the purpose of the underlying law is to most closely approximate the wishes of the other partner, as in the case of end-of-life decision making and property inheritance.<sup>263</sup>

*B. It's a Start: Following Colorado's Lead*

Family is no longer synonymous with marriage.<sup>264</sup> As this Note has demonstrated, people are increasingly choosing alternative relationships to form their family; most notable is the unmarried cohabitating relationship.<sup>265</sup> An expansion of marital benefits to these couples is required to fulfill the underlying purposes of those laws, and domestic partner agreements are the optimal mechanism through which the state can address the changing needs of unmarried couples. To address both the interests justified by economics and those implicated because of the emotional interdependence, the optimal domestic partner legislation would:

(I) Make existing laws relating to health care, medical emergencies, incapacity, death, and administration of decedent's estates available to more persons through a process of documenting designated beneficiary agreements; and

(II) Allow individuals to elect to have certain default provisions in state statutes provide rights, benefits, and protections to a designated beneficiary in situations in which no valid and enforceable estate planning documents exist.<sup>266</sup>

The Designated Beneficiary Agreement law enacted in Colorado, from which the above language is quoted, is currently the most efficient means of granting many of these rights and obligations to unmarried couples.

Although some of the rights argued for in this Note are already possible between unmarried partners—e.g., intestacy property rights via a will or trust, healthcare power of attorney, power of attorney—there needs to be an easier way. As recognized by the Colorado legislature: “Many [people] lack access to legal services due to the expense of drafting legal instruments and the necessity of keeping these documents current.”<sup>267</sup> Under the current system, transactions costs can be prohibitive-

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263. See *supra* Part III.B.3–C.

264. Fineman, *supra* note 25, at 245.

265. See *supra* Part II.B.

266. COLO. REV. STAT. ANN. § 15-22-102(2)(b) (West Supp. 2009).

267. *Id.* § 15-22-102(1)(c).

ly expensive, in terms of dollars, time, and the risk of constructing faulty agreements that do not result in the desired outcome.<sup>268</sup> Therefore, similar to the approach in Colorado, a statute that includes a simple form requiring a signature and a checkmark would simplify the process immensely and make these designations more accessible.<sup>269</sup>

Additionally, the new domestic partner agreement should be re-recognized as providing an alternative to couples, rather than as a concession for same-sex couples. The Colorado law again provides guidance. The Colorado legislature set up the general scheme of benefits—in other words, the maximal benefits that a couple can receive—but each couple is allowed to choose the specific benefits and obligations that are appropriate for their relationship. The growth of cohabitation “reflects the greater prominence of the ideals of individual autonomy and privacy in intimate matters.”<sup>270</sup> Allowing couples to choose which benefits and obligations are appropriate for their relationship is in line with this shift in societal thinking. In addition to providing options in the new domestic partner laws, states should stop overturning existing domestic partner legislation when same-sex marriage is legalized.<sup>271</sup> The domestic partnership should not be thought of solely as a compromise to appease same-sex marriage advocates; rather it should offer a way for couples to take more control over the formation of their relationships and the designation of benefits and obligations allowed by the state.

Although Colorado’s Designated Beneficiary Agreement Law is a significant step in the right direction, there is still room for improvement. In addition to the ability to designate significant economic and emotional interests, employers that offer dependent benefits to spouses of employees should be required to extend these benefits to unmarried partners. Conceivably, the federal government is in the best position to do this, possibly by adding “marital status” to Title VII.<sup>272</sup> Additionally, the federal government needs to update the tax code, Social Security, and the FMLA to account for the significance of unmarried cohabitating relationships.<sup>273</sup> Finally, and most importantly, the steps taken in Colorado need to be adopted throughout the United States.

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268. Nishimoto, *supra* note 163, at 389–90.

269. The Colorado Statute includes a statutory form for registering a designated beneficiary agreement, which requires the signature of both parties and initials next to the rights each person wishes to designate to the other. COLO. REV. STAT. ANN. § 15-22-106.

270. Regan, *supra* note 8, at 1438.

271. *See supra* notes 110–16 and accompanying text.

272. Title VII currently prohibits an employer from engaging in discrimination with respect to the terms, conditions, or privileges of employment because of a person’s race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2 (2006). Health insurance benefits are a privilege of employment. Adding marital status to the list of prohibited characteristics would conceivably forbid an employer from granting benefits to one employee based solely on his or her marital status and thus would require an extension of dependent benefits to both married and unmarried partners.

273. *See generally* Cain, *supra* note 120 (discussing the current implications of the tax code on families).

C. *It's Not the Cost*

There is some concern that granting benefits to an unmarried couple would be too hard to police because there is no official marriage-like act to prove the relationship is sufficiently committed, and thus deserving of the state conferred benefits and obligations.<sup>274</sup> This argument is unpersuasive for several reasons. First, courts must make similar assessments all the time. For example, the law is full of instances when the reasonable person standard is used as a measure for determining liability or guilt.<sup>275</sup> Determining the nature of a relationship would be no harder than anything else that courts are already expected to do.

Second, administrative costs or burdens are not a sufficient justification for valuing some types of families over others.<sup>276</sup> In response to the changing family forms in the early 1970s, the Supreme Court held that cost is not a sufficient justification for distinctions based on sex.<sup>277</sup> Because the form of family has changed even further, and the policies of marital benefits require an extension to unmarried couples, cost is not a sufficient justification for distinctions based on marital status. Further, many of the obligations that arise out of emotional interdependence do not need to be policed by the state; if an individual is willing to accept responsibility for another person, there is no reason the state needs to make a judgment call about the relationship.<sup>278</sup> For example, if John wants to designate Jane as his medical and end-of-life decision maker, and Jane accepts, thereby relieving all other interested parties, the state need not intervene.

Finally, this Note has demonstrated that basic economics will regulate the distribution of many partner benefits to those who really need them (usually those who are “dependent”).<sup>279</sup> Once a threshold showing of a committed unmarried relationship is made—for example, requiring a minimum time of cohabitation—the economics of financial independence will shuffle out those who need (and are allowed) to receive the benefits from those who do not. For example, if both partners are em-

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274. See Elizabeth Fella, Comment, *Playing Catch Up: Changing the Bankruptcy Code to Accommodate America's Growing Number of Non-Traditional Couples*, 37 ARIZ. ST. L.J. 681, 686–87 (2005) (conceding that the regulation of unmarried partner benefits would be difficult because of the “highly individualized nature of intimate relationships”).

275. See, e.g., CAL. PROB. CODE § 4717 (West 2009) (decision maker can be a “family member” or other person the hospital *reasonably* believes has authority to make decision); *Katz v. United States*, 389 U.S. 347, 353 (1967) (the Fourth Amendment protects against *unreasonable* searches); RESTATEMENT (SECOND) OF TORTS § 283 (2009) (an actor must act like a *reasonable* man to avoid being considered negligent).

276. See POLIKOFF, *supra* note 33, at 130–31 (arguing that assumptions valuing marriage over cohabitation “achieve[] certainty or efficiency based on outdated generalizations at the expense of the well-being of much of the population”).

277. *Id.* at 130 (citing *Reed v. Reed*, 404 U.S. 71 (1971)).

278. See *supra* Part III.C.

279. See *supra* Part III.B (demonstrating that financially independent unmarried couples will not need many of the dependent benefits offered to unmarried partners).

ployed and provided sufficient employer-based health insurance, they will neither require nor elect the dependent coverage through their partner's employer. For Social Security benefits, each partner will elect to receive his or her own benefit unless one partner was actually financially dependent on the other and financial dependence played a part in their relationship.

## V. CONCLUSION

The role of marriage in the United States has changed dramatically from the days when a wedding signified the privatization of the dependency of women.<sup>280</sup> Unsurprisingly, the justifications for many of the state-sponsored benefits (and obligations) either no longer exist or are no longer appropriate. Economics, however, provides a sufficient basis for many of the rights conferred upon a married couple, but not because of the marriage certificate. In actuality, it is the form of the relationship that justifies these benefits. In a society where unmarried cohabitation is increasingly common, an extension of the marital rights (and obligations) to these couples is necessary in order to fulfill the purpose of these laws.

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280. See Rosenbury, *supra* note 26, at 194.

