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Legal Treatment of Cohabitation in the United States*

CYNTHIA GRANT BOWMAN

This article discusses the variety of ways state legal systems in the United States treat cohabitation, both by same-sex and heterosexual couples. The different approaches are described along a spectrum that ranges from one extreme, under which cohabitants have essentially no rights against one another or against third parties, to the other extreme, under which cohabitants are to be treated as though they were married under state law. Different areas of law are discussed, including the rights of cohabitants both against one another (remedies upon dissolution, inheritance) and against third parties, such as state benefits, tort claims, health-related benefits, and rights concerning children. The article concludes with speculations concerning why the remedies offered to cohabitants in the United States are so limited, as compared with other countries.

The legal treatment of cohabitation in the United States has been radically and rapidly transformed during the first few years of the twenty-first century. Two states (Vermont and Massachusetts) have now extended all of the benefits of marriage under state law to same-sex cohabitants, and another (California) is poised to do so in January 2005. Other states and localities offer variegated bundles of rights to cohabitants in domestic partnerships, typically but not always excluding opposite-sex partners. There are great regional variances—from Massachusetts, where marriage will become available to same-sex couples in May 2004, to Nebraska, where the state constitution was amended in 2000 to prohibit recognition not only of same-sex marriage but also of civil unions or domestic partnerships of any sort (Neb Const, Art I, § 29). Similar variety exists as to opposite-sex cohabitants. The state of Washington grants many of the benefits of marriage to all cohabitants, both same- and opposite-sex, while Illinois extends no recognition at all to cohabitants, for fear that to do so would somehow denigrate the institution of marriage.

The terms of the public debate have also changed quite dramatically. The Massachusetts Supreme Court's ruling in November 2003 (*Goodridge v*

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Department of Public Health) that marriage must be extended to same-sex couples produced a substantial backlash; and the discussion has become increasingly polarized, with most politicians rushing to proclaim their allegiance to protecting the sacred institution of marriage. What is astonishing, however, is that the central question discussed now is whether the states are free to grant all the privileges of marriage to same-sex couples, so long as they are denied the appellation "marriage." Leaving these matters to the states is consistent with the assignment of family law to the states under the U.S. federal system. The result is certain to be even greater regional variety than already exists in the laws governing cohabitants, and increasing differences between the treatment of same-sex and opposite-sex couples as well. Whether the extension of benefits to the former will ultimately hurt or help the latter remains a question. Indeed, whether extension of marriage-like benefits to gay and lesbian couples is a first step toward same-sex marriage or will function to keep them permanently in a second-class status is also an open question.

This article attempts to make some sense of a legal situation that is in vast flux. The discussion concerns an issue of considerable social importance. A major goal of family law—of the off-the-rack terms that states provide for the governance of marriage and divorce—is the protection of parties who have entered into long-term relationships of dependence and interdependence—both economic and noneconomic—and of their children. Moreover, official recognition of marital and family units serves to privatize many welfare functions that might otherwise fall upon the state, such as support of a dependent spouse at the end of a long marriage. Reflecting these interdependencies, vulnerabilities and functions, the law extends a variety of benefits to and imposes obligations upon couples in the officially sanctioned unions called marriage.

Increasing numbers of people now live in cohabiting relationships that result in similar dependencies. The 2000 Census showed that less than 25 percent of U.S. households were traditional nuclear families, while the number of households headed by unmarried partners had doubled during the decade from 1990 to 2000 (Fields & Casper 2001: 3 fig. 1). Unmarried partner households made up at least 5.2 percent of total households and included some 5.5 million people, 4.9 million in opposite-sex households (Simmons & O'Neill 2001: 7). Although unmarried-partner households had increased in all states, the largest number were in California, and the highest percentage in Alaska and Vermont (ibid.). Of those households, 41 percent included minor children (Fields & Casper 2001: 13).

The lives of individuals living in these unmarried-partner households become interdependent in ways that may render them extremely vulnerable if, for example, the relationship ends. Although the debate over these issues in the United States is often carried out in religious or moralistic language, this is what is at stake: Will the legal system extend some or all of the protections inherent in marriage to the many persons whose living arrangements are functionally similar to it?

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There is already some indication that courts and state legislatures have begun to acknowledge the substantial role that unmarried couples play in addressing the welfare needs of their citizens and in privatizing support. Legislative findings set forth as a preamble to the New Jersey Domestic Partnership Act (2003) make this connection explicit:

> a. There are a significant number of individuals in this State who choose to live together in important personal, emotional and economic committed relationships with another individual;
> b. These familial relationships, which are known as domestic partnerships, assist the State by their establishment of a private network of support for the financial, physical and emotional health of their participants;
> c. Because of the material and other support that these familial relationships provide to their participants, the Legislature believes that these mutually supportive relationships should be formally recognized by statute, and that certain rights and benefits should be made available to individuals participating in them. (NJ Assembly Bill 3743, § 2 [2003])

This preamble succinctly summarizes the rationale behind extending the benefits and obligations of marriage to cohabitants who fall within the qualifying characteristics of mutual caring and economic responsibility for one another's welfare. It acknowledges both the existence of substantial numbers of cohabitants and the functions they perform for the state by privatizing support for the welfare of its citizens, reaching the conclusion that the state should therefore support these couples in their performance of these functions. It is significant that this conclusion was reached by a legislature, and not forced upon it by a court. Although the New Jersey statute does not follow through with all the benefits necessary to fulfill its promise and does not apply to most opposite-sex couples, the logic of extending state recognition and support applies equally to all who have entered into committed relationships of mutual support.

In the sections that follow I describe, first, the ways in which U.S. law sought to protect cohabiting couples in the past; some of these remedial strategies still exist. I then present the immense variety of modern legal approaches to cohabitants' rights in the United States, describing approaches that range from one extreme, where cohabitants have no rights against one another or third parties, to the other extreme, under which cohabitants are treated as though they were married for all purposes of state law. Finally, I offer some conclusions about the instability of the diverse systems that now exist, as well as speculations and recommendations for the future. In discussing the various legal approaches to cohabitation, the extent to which each approach addresses the family law functions described above will be a central concern. Particular attention will be paid to the interaction between the extension of rights to heterosexual and to same-sex cohabitants, and the theoretical bases for treating the two groups in similar or different ways.

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I. PROTECTING COHABITANTS IN THE PAST

Prior to the development of modern doctrines protecting cohabitants, those who lived together without benefit of formal marriage were not totally bereft of remedy. Some were protected by the doctrine of common-law marriage, which provided a remedy for many long-term cohabitants in the event of death or divorce and in relation to the receipt of government benefits. The beneficiaries were primarily women, and especially poor women, African Americans, Mexican Americans and Native Americans (see Bowman 1996: 754–70).

Common-law marriage, continuing the ancient tradition of informal marriage, does not require solemnization or registration. Instead, heterosexual cohabitants who agree to live as husband and wife and do so, holding themselves out to the community as spouses, are treated as married for all purposes under both state and federal law (see Clark 1988: 48, 50). Some courts will infer the parties' agreement simply from cohabitation and "holding out" (see, e.g., *Metropolitan Life Insurance Company v Johnson* 1982 at 361). No particular period of time is required for the relationship to "ripen" into marriage, so long as the couple are generally known in their community as husband and wife.

Unlike countries in Europe, almost half of the states in the United States recognized common-law marriage well into the twentieth century, and eleven jurisdictions still do.[1] Moreover, the doctrine is influential beyond the borders of the states that recognize it. If a relationship fits the criteria and was entered into within a recognizing jurisdiction, the marriage will also be regarded as valid in states that do not recognize common-law marriage (Clark 1988: 47, 57–59). Thus, if a couple were living in a common-law marriage in Pennsylvania and then moved to New York, courts in New York State would recognize the relationship for purposes, for example, of inheritance or divorce.

Common-law marriage, in short, was a real marriage—just one entered into in a different way. As such, it does not formally belong in a discussion of the legal treatment of cohabitants. The doctrine functioned primarily to protect women at the end of long relationships of dependence; if they qualified, courts would grant them all the rights of a wife or widow. Thus common-law marriage responded to the same types of legal dilemmas typically faced by courts deciding cases about cohabitants' rights, providing a remedy for women who were, for example, abandoned by men for whom they had performed domestic services for long periods or who were left penniless upon the death of a long-term partner to whom they were never formally married. Interestingly, common-law marriage, like gay marriage today, was also controversial on the grounds that recognizing it would somehow denigrate the sanctity of marriage (Bowman 1996: 736–37, 743–44).

The common-law marriage doctrine appears to be nearing the end of its useful career. Only eleven jurisdictions still recognize it, and it is under

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attack in some of them (see, e.g., *PNC Bank v Workers' Compensation Appeal Bd* 2002). Moreover, fewer persons could take advantage of the doctrine today. The status is available only to heterosexuals. Moreover, with the increase in cohabitation, its increased visibility and acceptance, a couple who are not married no longer feel the need to introduce themselves as husband and wife and thus will not be able to establish the basic elements of common-law marriage even in the states where it is still recognized.

Faced with cases in which great hardship might result from failure to recognize a long-term relationship as a marriage, courts have applied a number of other remedial doctrines. The only one that approaches the protections of formal marriage, however, is the putative spouse doctrine. Under this doctrine, a party who in good faith believed herself (usually it was a female in this position) to be married but was in fact not married because of some irregularity affecting the validity of the marriage ceremony was treated as though married.

The case often used to illustrate this doctrine is that of Mr. Vargas, who had a wife and children in one location and then went through a marriage ceremony (invalid because of bigamy) with another woman, setting up a separate household with her in another town; children were also born to this marriage (*In re Estate of Vargas* 1974). Amazingly, neither woman suspected the deception until Vargas died, when two widows claimed his estate. The court deciding this matter held that the second Mrs. Vargas was a putative spouse and split the estate between the two women. In short, the second Mrs. Vargas was treated as Mr. Vargas' widow although he had never legally been her husband, a situation one cannot describe as a marriage of any sort. The putative spouse is instead a remedial doctrine employed by courts to address situations where innocent parties are harmed by their reliance upon a long-term cohabitant.

In addition to the doctrines described above, courts have employed a number of equitable doctrines to provide at least partial protection to vulnerable cohabitants, most notably equitable restitution, constructive trust, and quantum meruit (see, e.g., Ellman, Kurtz & Scott 1998: 959–60). The typical situation under which one of these doctrines would be applied was when one cohabitant—usually a woman—had invested a substantial amount in property accumulated by a couple during their life together, for example, by contributing funds to the down payment on a house or to a business which was titled in the other cohabitant's name. In these circumstances, courts may disgorge the amount that had "unjustly enriched" the other party and return it to its original owner. Of course, if the two had owned the real estate jointly or entered into a formal business partnership, traditional legal remedies, such as partition, would be available.

If the disputes leading to appellate litigation are any indication, however, one of the enduring characteristics of intimate cohabitation is a simple trust that typically does not insist upon joint tenancy or a partnership contract, even though the underlying facts may reflect such a relationship. Women,

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in particular, freely contribute money and labor to the accumulation of a couple's property—property that would be jointly owned if they were married—without insisting that their names be placed upon the deeds (see, e.g., *Hewitt v Hewitt* 1979; *Ayala v Fox* 1990; *Wilcox v Trautz* 1998). Equitable doctrines available to address these situations can still be used in cohabitant cases today. Unfortunately, the types of contributions and services that trigger application of these equitable remedies must look very much like business arrangements to be recognized—that is, the sorts of co-ownership or partnership two individuals might enter into even if they were not cohabitants, especially if they are men. The more typical sorts of contributions made by female cohabitants—contributing to household expenses, including the mortgage, or rendering services within the household or within the male partner's business—are almost invariably not compensated under these doctrines upon the ending of the relationship (see Estin 2001: 1395). A variety of theories are available to explain this, most of them derived from traditional, and highly gendered, notions of marriage—for example, that services by a spouse are offered gratuitously and that contributions to their common life benefit both parties to the relationship (ibid.: 1401–02; Weisberg & Appelton 2002: 439). Thus if a long-term cohabitant is abandoned after many years of service as a homemaker, the court is likely to see her services, somewhat contradictorily, as both altruistic *and* as having been compensated by the fact that she was also supported by and benefited from the relationship (see, e.g., *Marvin v Marvin* (*III*) 1981 at 558).

In short, prior to development of the modern law of cohabitants' rights, some protection for vulnerable parties was available; but it was inadequate to protect the dependencies arising from long-term cohabitation and, in particular, to compensate for the contributions typically made by female cohabitants. To address these situations, within the last three decades many states have adopted, either by case law or statute, a variety of protections for cohabitants. Most of these are based upon contractual theories, but some base the state's legal treatment simply upon the status of cohabitation. The immense variety of these provisions, and their continuing inadequacy to protect the interests of most cohabitants, will be discussed in the section that follows.

II. THE DEVELOPMENT OF THE MODERN LAW OF COHABITANTS' RIGHTS

Over the last few decades, the legal treatment of cohabitation in the United States has developed through several strands, some of which coexist uneasily with one another in the same state. This section discusses each of those strands, in the following order: (1) states in which cohabitants are given no rights; (2) states in which cohabitants' rights are based on contract; (3) states that extend rights based upon the status of cohabitation, either by imposing that status upon cohabitants at the termination of their relationships or by

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providing for entrance into civil unions or domestic partnerships; and (4) other rights extended to cohabitants vis-à-vis third parties on a variety of bases. The section concludes with a brief discussion of cohabitants' rights pertaining to children.

A. NO RIGHTS FOR COHABITANTS

Before the development of contractual and status-based remedies for cohabitants, the traditional position was that cohabitants simply had no rights vis-à-vis one another or third parties. Three states—Illinois, Georgia,[2] and Louisiana—continue to adhere to this position (see Gordon 1998: 253–54). *Hewitt v Hewitt* (1979), the case frequently used to illustrate the Illinois position, is a stark one. Victoria and Robert Hewitt began cohabiting as students at Grinnell College. Subsequently they moved to Illinois, where he established a lucrative medical practice and she served as homemaker and mother to their children, while assisting him in building his practice. After fifteen years, they separated. Apparently believing that they were married (perhaps by common law), Victoria Hewitt sued for divorce. The court not only dismissed the divorce action but also, when she amended to add causes of action in contract and for equitable remedies, held that Mrs. Hewitt was entitled to no remedy at all, neither property distribution nor alimony. To give her any rights, the court reasoned, would be to denigrate the institution of marriage and in effect bring back common-law marriage, which Illinois had abolished in 1905 (*Hewitt* 1979 at 1209–11). In short, Mrs. Hewitt, after a fifteen-year period of reliance upon and contribution to the relationship, was left without anything.

Although *Hewitt* was decided in 1979, it appears still to be alive and well in Illinois. It was followed and, indeed, extended in *Ayala v Fox* (1990).[3] Illinois courts have also consistently refused to give any legal protection to cohabitants in other contexts, turning down, for example, claims for loss of consortium by cohabitants (*Medley v Strong* 1990) and holding that cohabitation may constitute appropriate grounds to remove children from the custody of cohabiting parents (*Jarrett v Jarrett* 1980), all based on *Hewitt*.

The *Hewitt* court's reasoning that extension of recognition to cohabitants would somehow harm the institution of marriage is open to dispute. In *Hewitt*, protections for the female cohabitant were denied even though the relationship was virtually identical to the most traditional of marriages, as Mrs. Hewitt stayed home to raise their children and assist her partner in his career. To deny property and support rights to cohabitants in a case like that in fact creates an incentive to *avoid* marriage—Mr. Hewitt was able to extract the benefit of his partner's contributions and get away with all the couple's accumulated wealth.

In states like Illinois, it is risky for a cohabitant to make any investment in a nonmarital relationship. As the leading cases show, the cohabitants most likely to make such investments—either because they simply trust the

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men they love or because they do not have the bargaining power to insist either upon marriage or even joint title for property—are women. The law's refusal to protect their investments leaves these women extremely vulnerable at the termination of a cohabiting relationship. The men in these relationships clearly benefit from such a legal rule.

B. COHABITANTS' RIGHTS BASED ON CONTRACT

With the exception of Illinois, Georgia and Louisiana, almost every state will now recognize express contracts between cohabitants, especially if they are written. This state of affairs required the breakthrough of the *Marvin v Marvin* "palimony" case in 1976. Prior to that time, cohabitants' contracts were considered unenforceable because they rested upon "meretricious" consideration, that is, the exchange of sex. The *Marvin* court, however, held that cohabitants could enter into contracts with one another just as other individuals could and, indeed, that the courts would enforce both written and oral express contracts; in dicta the court also indicated that recovery might be based upon contracts implied from the conduct of the parties and a variety of equitable grounds as well (*Marvin I* 1976 at 122–23).

Michelle Triola alleged that the well-known actor Lee Marvin had entered into a contract to support her for the rest of her life, in return for her service as his homemaker, entertainer and companion, and that she had given up her own career to do so. When they separated after six years, Marvin argued that such a contract was unenforceable under California law. In *Marvin I*, the court ruled against him on these grounds, thus establishing the cause of action, and remanded, but in *Marvin II* found that no such contract existed. Thus the *Marvin* case, which was attended by a great deal of publicity, in fact resulted in no recovery at all for the plaintiff; it simply established the principle that cohabitants' rights in California could be based upon express or implied contracts and that the consideration for them could include homemaking services.

While many states have adopted the *Marvin* approach, other states reacted with alarm to the long and messy *Marvin* litigation, especially because it required the court to examine and weigh highly intimate details of the couple's relationship. The Illinois court in *Hewitt* declined to adopt similar contract-based rights; other states moved to accept *Marvin* but to limit its application. New York, for example, restricted *Marvin* rights to those based on express contracts (*Morone v Morone* 1980). Minnesota and Texas went further, passing Statutes of Frauds that require cohabitants' contracts to be in writing (see, e.g., Minn Stat §§ 513.075–513.076 [2002]).

Indeed, the application of the *Marvin* case has been quite limited, even in California. In a 1993 California appellate court decision that attracted a good deal of attention, the court denied relief to a disabled woman after a relationship of twenty-five years and two children (*Friedman v Friedman* 1993; see also Ellman 2001: 1370–72). Terri and Elliott Friedman began to

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live together in 1967, when they were in their twenties, bought a house to which they took title as husband and wife, signed joint tax returns, and lived as a fairly conventional family, with Terri staying home to care for their children and Elliott going to law school and prospering economically. By the time she sued in 1992, however, Terri was disabled and could hardly walk. The case seemed to be a good one for the application of *Marvin* remedies; compared to *Marvin*, the relationship was longer in term, more conventional, and included the birth of children. Nonetheless, Elliott argued that he had never made a commitment to support Terri if their relationship terminated, and the court found that the couple's course of conduct did not support an implied contract to that effect.

The outcome of the *Friedman* case leads one to question the efficacy of contract remedies in general, so long as one party denies the contract. (Of course, if that were not so, that party would simply pay up and there would be no litigation at all.) Oral contracts are notoriously difficult to prove. Moreover, in *Friedman* the proof of an implied contract was rejected because the conduct of the parties did not specifically indicate an agreement by Elliott to provide spousal support upon termination. From this outcome, one may infer that cohabitants are only slightly more likely to obtain "palimony" in California than in New York if the claim rests upon an implied contract; and at least the courts in New York are more candid about disallowing it. In fact, California courts are inconsistent in this respect, with the result depending upon the discretion, and perhaps the personal prejudices, of the judge.

This inconsistency has been especially notable in cases where gay or lesbian cohabitants have sued for remedies upon dissolution of their relationships; courts have been very reluctant to grant support rather than property distribution in such cases. Two cases illustrate this trend. In one, *Jones v Daly* (1981), the lover-housekeeper-companion-cook alleged an oral agreement by his deceased partner to support him for life. Because the promise explicitly included a sexual component, by referring to his services as (among other things) "lover," the court refused to enforce it. By contrast, in *Whorton v Dillingham* (1988), a gay lover sued for property acquired during a relationship that had ended, alleging an oral agreement, yet the court severed any allegations referring to his services as companion and lover (which are, of course, implicit in all cohabitation contracts) and enforced the contract based upon the plaintiff's services as chauffeur, bodyguard, secretary and business partner. As commentators have noted, neither court regarded homemaking services as consideration for the contract; the only consideration that counted was that which appeared to have monetary value (see, e.g., Bullock 1992: 1048). This may reflect the fact that courts find it difficult to envisage a male in the role of a homemaker (see Chambers 1996: 483–84) or a more general distaste for same-sex cohabitant cases; but it does not derive from *Marvin*, in which compensation for homemaking services was approved in gender-neutral terms. And again, as with the equitable remedies described

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above, the more like a "male" business deal, the more likely the service is to be compensated.

A much more profound problem with the use of contract principles to redress inequities that may arise on termination of a cohabiting relationship is that cohabiting couples—like married couples—typically do not make contracts; they simply proceed trusting that their relationship will endure and that each party will treat the other fairly. One empirical study of Minnesota residents who self-identified as being in a committed unmarried relationship found that only 21 percent had written agreements about property; of these, 52.1 percent had a provision for dividing property if the relationship were to end, but only 35.4 percent set up duties of support upon termination (Robbennolt & Johnson 1999: 435–36, 439, 441). Most cohabitants simply proceed under vague agreements to pool resources and make no provision for remedies upon termination (Blumberg 1981: 1164–65).

It is hard to know what to make of the absence of a contract, whether to infer a caring relationship that would have resulted in provisions for property and support upon dissolution if the parties had thought to do so or to infer that the parties (or at least one of them) intended not to undertake such responsibility to one another. Much may depend upon the group of cohabitants under consideration. Some couples, like the Friedmans, fall into a cohabiting relationship that then persists, leaving them in circumstances neither would have envisaged when their union commenced. Terri Friedman, for example, eventually gave up her goal of obtaining a college degree because of the sickness of one of their children (*Friedman* 1993 at 895). Others may explicitly desire to stay unmarried because of objections to involving state or church in their relationship but still intend a caring and mutually supportive relationship. Or—the case most observers worry about—one or both may specifically intend to avoid any monetary commitments to one another. The implications of cohabitation are likely to differ for each of these groups, thus affecting the expectations that accompanied their living together and the likelihood of an implied contract between them. In short, even though contracts between cohabitants are now enforceable in many states, both the probability that such a contract can be proved and the desirability of inferring one from the conduct of the parties may vary, with the result that few cohabitants will in fact find a remedy in contract for any vulnerability they experience upon the ending of their relationship.

In sum, a contractual approach to cohabitants' rights returns to them the rights and remedies they would have had as individuals to enter into contracts of various sorts with one another, in a sense commodifying their relationships. The more the arrangement looks to the court like a business deal, the more likely it is to be recognized and compensated. By contrast, women's traditional contributions to relationships continue to be under-recognized and uncompensated. Although postrelationship support is theoretically available under a contract doctrine, it needs to have been a quite explicit expectation of the parties. Thus contractual remedies may not protect

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the Victoria Hewitts and the Terri Friedmans of this world, whose partners either never intended a caring and supportive relationship or—more likely—no longer recall their earlier intentions at the acrimonious point when the relationship is ending.

Moreover, cohabitants' rights based upon contract theories are severely limited in scope, applying only to rights *inter se*. That is, they are limited to rights of the two parties vis-à-vis one another and cannot create any rights against third parties. Thus, for example, inheritance, tort claims based on injury to the relationship or government benefits cannot be derived from a theory of contract. For this, a status-based theory of cohabitants' rights is required, although some status-based laws may also not provide all of these benefits. Ironically, given the derivation in California of cohabitants' rights for gay and lesbian persons out of contract theories developed for the protection of heterosexuals, in 2005 same-sex cohabitants there will become eligible for a broad range of benefits, including not only property distribution and support but also inheritance, standing in tort and government benefits if they are registered as domestic partners—a status unavailable to most heterosexuals in that state. I turn now to discuss the current variety of status-based legal approaches to cohabitation.

C. COHABITANTS' RIGHTS BASED ON STATUS

Dissatisfied with many of the limitations of contract-based remedies, a number of states have instead conferred rights upon cohabitants based upon their status as such, an approach that was rejected by the *Marvin* court (*Marvin I* 1976 at 119–22). Some of these remedies are available to both opposite- and same-sex couples, although the more comprehensive approaches are primarily limited to gay and lesbian couples, presumably because marriage has not been an alternative for them. There are now four general types of status-based regimes in the United States: (1) meretricious relationships in Washington; (2) civil unions in Vermont and gay marriage in Massachusetts; and (3) domestic partnerships in Hawaii, New Jersey and California. An important distinction among them—one many think relevant to the amount of backlash they occasion—is whether they have been initiated by the judiciary or the legislature. In a sense, however, virtually all of these arrangements have had their initial push from litigation, as states have enacted domestic partnership laws in response to court decisions invalidating the restriction of marriage to heterosexuals.

1. *Meretricious Relationships in Washington*[4]

The Washington Supreme Court rejected a contract approach to the thorny legal issues presented upon dissolution of cohabitant relationships. Its approach instead confers rights generally upon couples in what it calls a

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"meretricious relationship," defined as "a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist" (*Connell v Francisco* 1995 at 834; see also *In re Marriage of Lindsey* 1984 at 331). Upon dissolution or death, property of individuals in such relationships which would have been community property if they were married is to be divided between them in a just and equitable distribution. Thus all income and property acquired by either party during the relationship is presumed to be owned by both—a type of community property by analogy. This legal rule, which protects vulnerable parties at the end of a relationship if they have property to divide, has been extended to same-sex couples (*Vasquez v Hawthorne* 2001).

The inquiry under a status-based cohabitant regime of this type is not whether the couple had any kind of agreement for property or support at dissolution or death (although their intent is relevant to the inquiry) but rather whether their conduct fits them into the definition of cohabitants. The Washington court directed judges to consider the following factors, among others, in making this determination (*Connell* at 834, quoting *Lindsey* at 331):

- continuous cohabitation
- duration of the relationship
- purpose of the relationship
- pooling of resources and services for joint projects, and
- the intent of the parties.

Unlike a contract-based system, the Washington approach, rather than assuming (and encouraging) individual autonomy, presumes that a couple in such a relationship is in fact a joint economic unit, thus encouraging the type of sharing behavior typical of marriage. If a couple in a long-term unmarried relationship do not wish to pool their income and undertake economic responsibility for one another, they need to contract *out* of such obligations in the state of Washington, unlike in California and other states following *Marvin*, where such obligations are undertaken by contracting *in*. Because registration is not required, Washington residents who are not well-versed in the law may have an unpleasant surprise upon ending their relationships.

Evaluating the status-based approach taken in Washington from the touchstone of protection for vulnerable parties, it clearly improves upon contract schemes in this respect, imposing upon cohabitants who have become interdependent an obligation to share their property upon termination of the relationship without the necessity of proving a contract. Washington's approach is limited in several ways, however. First, it only applies to property distribution; so if the couple have not accumulated property, it is worthless. Second, it pertains only to rights against one another, thus excluding, for example, both standing for tort claims and the plethora of government benefits tied to marital status. Third, it is activated only upon

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termination of the relationship by dissolution or death; the pseudo-community property does not attach during the relationship.

The inclusion of property distribution upon death is nonetheless important. Except in New Hampshire, where long-term cohabitants may be given inheritance rights under a form of common-law marriage applicable only at death (NH Rev Stat Ann § 457: 39 [2001]), cohabitants have been excluded from inheritance under the law of every state. Thus, unless they make wills, which many do not,[5] cohabitants receive no property upon the death of their partners. Yet recent studies show that a majority of both heterosexual and same-sex cohabitants prefer that a substantial share, if not all, of their estates go to their surviving partners upon death (Fellows et al. 1998: 9). Thus inheritance can be an important issue for cohabitants. It can be especially problematic for gay and lesbian couples, who may be alienated from family members, who then contest a will leaving property to the cohabitant; such will contests often succeed (Sherman 1981: 246). The desire to ensure such rights has led some gay males to attempt to adopt one another in order to obtain inheritance by a different route, but this approach is not available in all states and the adoption may also be challenged by relatives (see, e.g., *In re Adoption of Swanson* 1993; contra *Matter of Adoption of Robert Paul P.* 1984). Theoretically, of course, if the adoption is successful, the two could risk prosecution for incest as well. If the two live in Washington, however, the surviving partner may receive 50 percent of the total property accumulated by the two during their relationship at his partner's death.

In short, the approach taken in Washington provides some important, though limited, protections to many individuals who have become economically interdependent in the course of a longstanding relationship. Although now applicable in only a relatively small part of the United States, this is the general approach recommended by the American Law Institute (ALI) for adoption in all states.[6] Under the ALI *Principles of the Law of Family Dissolution*, the same rules that apply upon divorce of married persons are to be applied to either same-sex or heterosexual cohabitants if they qualify as "domestic partners" within the statute; those rules presume equal division of property acquired during the relationship and also provide for compensatory payments—alimony or spousal maintenance—to dependent parties in long-term unions (ALI 2002: §§ 6.04–6.05, 4.09–4.10, 5.04). Individuals are presumed to qualify either if they have cohabited continuously for a state-defined period and act jointly with respect to household management or if they have a common child; if not, they are entitled to establish a domestic partnership by proof of a number of factors having to do with financial interdependence, intimacy and reputation as a couple (ibid.: § 6.03; see also Ertman 2001: 107–09). Although ALI formulations have been influential upon state law in the past, thus far no state has moved to adopt its most recent recommendations in this respect.

The Washington scheme for meretricious relationships does not go as far as the ALI suggests, because it is limited to property distribution and does

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not include provision for postrelationship support if there is no property to distribute. It does offer, however, the most far-reaching protection available thus far in the United States for heterosexual cohabitants. It is interesting that the system is not very well-known—interesting because it has been in place since 1984 (although not extended to gay and lesbian couples until 2001) yet apparently has not occasioned widespread public controversy. This has not been the case when courts have moved to extend the rights of marriage to couples of the same sex.

2. *Civil Unions Versus Gay Marriage: Vermont and Massachusetts*

Apart from the Washington approach described above, most status-based cohabitation regimes in the United States have been created in response to the pressure for same-sex marriage. Cases challenging the denial of marriage licenses to gays and lesbians have been brought since the 1970s (*Baker v Nelson* 1971; *Jones v Hallahan* 1973), but the first to succeed was that in Hawaii (*Baehr v Lewin* 1993). A variety of legal bases have been used for these constitutional challenges. Sex discrimination was the successful ground in Hawaii (either member of the couple could have obtained the license if they were of the other sex), but only because the state constitution, unlike the U.S. Constitution, included an Equal Rights Amendment. In Alaska, a Superior Court case held that a fundamental right to choose one's life partner was contained within the state constitution's clause guaranteeing the right to privacy (*Brause v Bureau of Vital Statistics* 1998). In both states, however, the decision finding the denial of marriage licenses to same-sex couples unconstitutional was quickly overturned by constitutional amendment (Hawaii Const, Art I § 23; Alaska Const, Art I § 25).

When gay and lesbian couples challenged their exclusion from marriage in Vermont, they met with a more favorable outcome, again linked to a unique provision of the state's constitution. In 1999, the Vermont Supreme Court held, under the state constitution's Equal Benefits Clause, that same-sex couples could not be excluded from all the benefits associated with marriage under state law (*Baker v State* 1999). In response, the Vermont legislature passed a statute recognizing an alternative status to marriage, styled "civil unions" (15 Vt Stat Ann §§ 1201–1207 [Supp 2000]). Couples who register under this law receive all the benefits and protections of marriage under state law, including, among other things, property rights, adoption, tax treatment, insurance benefits, spousal standing for tort and criminal law, hospital visitation, and intestacy. No rights under federal law are available, however; and heterosexual cohabitants are not eligible to enter into civil unions. Nonetheless, unlike the contractual and status-based remedies discussed thus far, the benefits of a civil union expand beyond those the parties have vis-à-vis one another and include rights against third parties and the state.

In 2003, a same-sex marriage case made it to the Supreme Judicial Court of Massachusetts (*Goodridge I*). All of the arguments raised in other states

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were raised here as well—sex discrimination under the state's equal rights clause, as in Hawaii; the fundamental right to choose one's partner, as in Alaska; and the unconstitutionality of excluding one group from the state's benefits, as in Vermont. The only thing that had changed since all of those opinions was that the Supreme Court had invalidated laws criminalizing sodomy (*Lawrence v Texas* 2003), so that states could no longer argue that they were being asked to approve potentially criminal conduct.

The astonishing thing about *Goodridge* is that it was decided on none of these grounds, but rather on the basis that there was simply no rational reason for the state to exclude same-sex couples from the benefits conferred by the status of marriage. The argument came down, as in Vermont and Hawaii, to the effects upon children; but the state's position here, as in Vermont, had been seriously compromised by its previous approval of adoption by gays and lesbians. Indeed, the *Goodridge* court emphasized the detriments to children already living in same-sex-parented families if these unions are *not* recognized. As one commentator has remarked, in the United States, unlike Western Europe, the courts had already recognized gay and lesbian families; now it was being asked to recognize the same-sex unions around which those families were structured (*Harvard Law Review* 2003: 2027).

In Massachusetts, as in Hawaii, Alaska and Vermont, the legislature met to consider what to do in the wake of its supreme court's decision. In Hawaii and Alaska, the cases were not sufficiently advanced at the point of decision to cut off the time necessary to pass a constitutional amendment defining marriage as a heterosexual institution, which both promptly did. In Vermont, the state supreme court gave the legislature the option of conferring all the benefits of marriage without the status, and it did so. The Massachusetts legislature asked for an Advisory Opinion from the court as to whether establishing civil unions would comply with the court's holding. On February 3, 2004, the court replied that nothing short of marriage would do (*Goodridge II*). Moreover, the state was given only until May 17, 2004 to begin issuing marriage licenses to same-sex couples, which does not allow time for the passage of a constitutional amendment to overrule the court (which is not possible to effect before 2006). Thus Massachusetts is the first state in the United States where same-sex marriage will be allowed.

One problem that has already become apparent from the Vermont experience, however, is that couples who enter into civil unions have trouble obtaining "divorce" remedies and inheritance if they actually reside in or move to other states that do not recognize the status (Bernstein 2003: 2). This reflects the more general conflict of law problems attendant upon the vastly differing treatment of cohabitants' rights in different states (see Reppy 2002: 303–11). For example, will a cohabitant couple moving from Washington to California receive status-based rights upon dissolution? If they move to Illinois? If recognition is against the state's public policy, an exception to the Full Faith and Credit referred to in the U.S. Constitution

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may excuse it from recognizing a status entered elsewhere (ibid.: 275). Many states (more than thirty-five) and the federal government have also passed either "Defense of Marriage" acts or constitutional amendments providing that only marriages between opposite-sex partners will be recognized (Developments 2003: 2006, 2014). The federal Defense of Marriage Act also includes a provision to the effect that states are not required to give Full Faith and Credit to same-sex marriages (28 USC § 1738C [2000]). In contrast, the domestic partnership statutes recently passed by California and New Jersey (discussed below) explicitly provide that civil unions or domestic partnerships entered into in other jurisdictions where they are valid *will* be recognized in those states (CA Assembly Bill 205, § 299.2 [2003]; NJ AB 3743, § 6(c)).

The problems posed by conflict among the laws of different states will be exacerbated by the availability of same-sex marriage in Massachusetts, when as will doubtless occur, Massachusetts residents joined in same-sex marriages move to other states and then seek to dissolve their relationships. The legal issues arising from the many conflicts posed will doubtless require lengthy litigation to decide. In the meantime, there is a growing movement to pass an amendment to the U.S. Constitution confining the status of marriage throughout the country to persons of the opposite sex. The amending process is a slow one, however; and before it can be completed, numerous same-sex couples will become legal spouses in Massachusetts, posing serious questions about whether they can be deprived of that status retroactively.

The law governing interstate recognition of marriages is quite complex and cannot be fully discussed here (see Developments 2003: 2028–51). Whatever happens, however, cohabitants of the same sex in Vermont and Massachusetts may now receive all the protections state law provides for married couples, both during and upon termination of their relationships, at least as long as they remain residents of the state.

3. *Domestic Partnership Laws: Hawaii, New Jersey and California*

The demand for equal benefits has also resulted in a plethora of domestic partnership schemes throughout the United States, often passed by municipal or county ordinances; many apply to heterosexuals as well as same-sex cohabitants. Many such programs provide merely a system of registration and dissolution, with no attendant benefits except for municipal or county employees, who may receive family leave, family medical insurance and the like (Bowman & Cornish 1992: 1192). In California, for example, San Francisco provided a partnership registry in 1989, granting cohabitants hospital visitation rights, paid bereavement leave for city employees and health insurance for the partners of city employees (Hein 2000: 35–37). In 1996 San Francisco also passed an ordinance requiring contractors doing business with the city to extend benefits to domestic partners of employees (ibid.).

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By contrast, in other states—Georgia, for example—similar municipal ordinances have been overturned as *ultra vires*, that is, exceeding the authority given to municipalities by the state (Christensen 1998: 1739; see also, e.g., *City of Atlanta v McKinney* 1995 at 520–21). Nonetheless, domestic partnership ordinances have proliferated, driven in large part by a desire to obtain employee benefits. Eligibility to enter into such a status may be relatively stringent, requiring nonrelationship, indefinite commitment, common residence and an agreement to joint responsibility for basic living expenses (Bowman & Cornish 1992: 1192–95).

More recently, a number of statewide domestic partnership laws have originated as a direct response to the litigation campaign for gay marriage. The scenario in Hawaii is a good illustration. Although the Hawaii Supreme Court's decision in favor of same-sex marriage was overturned by constitutional amendment, the legislature passed the Reciprocal Beneficiaries Act in 1997, giving couples excluded from the protections of marriage a few of its benefits (Hawaii Rev Stat §§ 572C-1 to -7 [1998]). Under the Act, couples legally prohibited from marrying may register and then receive rights of inheritance, workers' compensation survivorship benefits, health-related benefits such as hospital visitation rights, family leave and the right to make health care decisions for a partner, the right to sue in tort for wrongful death and the right to become beneficiaries of one another's health and life insurance policies (see Habegger 2000: 1002). Thus, the Hawaii statute gives cohabitants certain rights against third parties, but not against one another in case they dissolve the relationship, which either party is free to do at will. While in California and Washington rights for same-sex couples were derived from those granted to opposite-sex couples, the motivation of the Hawaii statute was clearly to benefit gay and lesbian couples; but it includes benefits for a limited group of heterosexuals as well—any persons who are unable to marry, thus covering, for example, mothers and their adult sons (or grandsons) who share the same residence.

The relationship between the drive for gay marriage and domestic partnership laws has not been as direct in New Jersey and California as it was in Hawaii, but it is still there. In New Jersey, a case challenging the exclusion of same-sex couples from marriage has been wending its way up through the state courts (*Lewis v Harris* 2003). Without any State Supreme Court decision on that question, however, the New Jersey legislature—apparently influenced by the dilemmas of those who lost domestic partners on September 11, 2001—passed a Domestic Partnership Act in January 2004, unaccompanied by any declaration that marriage was to be restricted to persons of the opposite sex (NJ AB 3743). The Act, effective on passage, provides that same-sex couples and heterosexual couples age sixty-two or older (who might lose their full individual entitlement to Social Security benefits from a former spouse if they remarry) may fill out an affidavit of domestic partnership if neither is married or has been in another domestic partnership dissolved less than six months previously, the partners are not related to one another,

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and they share a common residence in the state, are jointly responsible for each other's common welfare (evidenced, for example, by joint ownership of various assets), agree to be jointly responsible for each other's basic living expenses, and "have chosen to share each other's lives in a committed relationship of mutual caring" (ibid.: § 4(b)).

Partners filing such an affidavit in New Jersey receive exemption from inheritance taxes and a limited state income tax deduction, along with hospital visitation privileges, health care decision making, and employment benefits, such as health insurance coverage if they are state employees, and broad protection against discrimination in relation to employment, housing and credit. There are no other benefits against third parties or the state, and no provision for equitable property distribution or support on dissolution of the relationship.

In contrast to domestic partnerships in Western Europe, domestic partners in New Jersey are required to go through a judicial dissolution proceeding to terminate their relationships, on grounds virtually identical to those for divorce in that state (NJ Stat Ann 2A: 34-2 [2000]):

- sexual intercourse with a person not the partner
- desertion for twelve months
- extreme cruelty
- separation of eighteen months with no reasonable prospect of reconciliation
- addiction or habitual drunkenness
- institutionalization for mental illness
- imprisonment

In short, domestic partnerships in New Jersey have quite stringent requirements for both entry and exit and very few benefits (NJ AB 3743, § 10). It will be interesting to see how many people find the arrangement attractive.

The demand by gays and lesbians for marital status is very high in California, although a statute prohibiting same-sex marriage was passed by a public initiative (Proposition 22) in March 2000 (Defense of Marriage Act, Cal Fam Code § 308.5 [2002]; Sawyer 2003: 733). Reflecting this demand, when the mayor of San Francisco decided unilaterally to begin issuing marriage licenses to same-sex couples in February 2004, thousands of individuals lined up to be joined in marriage, provoking a lawsuit to enjoin the practice as invalid under state law (Marshall 2004).[7]

In response to demand for equal benefits, the California legislature passed its first domestic partnership law in 2001, under which both same-sex cohabitants and heterosexual cohabitants over the age of sixty-two may register (Domestic Partner Registration Act, Cal Family Code § 297 [2000]). One of the factors leading to its passage was the highly publicized death of Diane Whipple, who was mauled to death by a dog in the hallway of the apartment she shared with her lesbian partner in San Francisco, and the desire to allow persons in her partner's situation to sue for wrongful death and negligent infliction of emotional distress (Gorback 2002: 275–77).

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Under the new partnership act, domestic partners received the right to sue for these torts, as well as to make health care decisions for one another, to receive sick leave and unemployment benefits for reasons related to a partner, to adopt a partner's child as though a stepparent, and to administer a partner's estate (Sawyer 2003: 742–43).

As in New Jersey, heterosexual couples are included in the California domestic partnership statute if one member of the couple is over the age of sixty-two. One commentator has described this as "marriage lite" for older straight couples, allowing them to receive some benefits of marriage without losing rights that a surviving or divorced spouse would lose upon remarriage (Oldham 2001: 1431). Because inheritance was not included in this initial partnership law in California, registration as domestic partners also did not interfere with older couples' typical desire to leave their assets to children of a previous relationship. However, inclusion of heterosexuals over sixty-two in the statute is difficult to explain from a theoretical standpoint. There is no reason to believe that older cohabiting couples are more interdependent than ones who are younger; indeed, they may be less so, given the absence of children in common. The probable reason for including this group of heterosexuals in a statute clearly intended to benefit gay and lesbian couples was simply to gain more widespread support for passage of the legislation by extending the group who would benefit from it (Callan 2003: 458). By the same token, however, the inclusion of some heterosexuals within the statute may provide a wedge by which other opposite-sex couples may challenge their exclusion in the future, perhaps with the support of the sixty-two-plus set.

In September 2003 California passed a second partnership act, the Domestic Partner Rights and Responsibilities Act, which is to go into effect in January 2005 (AB 205). In the meantime, currently registered domestic partners are being given notice that as of that date the rights and obligations they have toward one another will be radically changed if they do not opt out. The new act will give the most extensive rights to cohabitants outside of Vermont and Massachusetts; indeed, it will affect many more people, both because such a large proportion of cohabitants live in California and because it includes opposite-sex couples over the age of sixty-two.

The provisions of the new California act are simple:

> Registered domestic partners shall have the same rights, protection, 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 [or former spouses, widows and widowers]. (Ibid.: §§ 297.5 (a)(b)(c)).

In short, a regime equivalent to marriage will become available to same-sex and certain opposite-sex couples in California for all purposes of state law, except joint filing status on tax returns. Unlike comparable

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regimes in Vermont and Massachusetts, however, the new system was the result of legislative action rather than stemming from a decision of the state's highest court.

As in New Jersey, the dissolution proceedings necessary to end such a union under the new California Act are equivalent to divorce, but divorce is available in California on pure no-fault grounds. As under California divorce law, a summary procedure is provided by which shorter-term (five years or less) relationships without children, real property or many assets may be terminated if both parties consent; but a formal judicial proceeding will be required to end most domestic partnerships, at which property issues will be decided under California's community property rules, support will be considered, and all issues concerning custody and support of children adjudicated (ibid.: § 299). This marks a substantial departure from the system that now exists, in which partnerships may be dissolved by notice, hence the warnings being mailed to all current partners that they must file a Notice of Termination before January 1, 2005 or their relationship will be transformed into one involving many more benefits but also substantially more obligations.

Finally, the California legislation requires couples entering domestic partnerships to agree to continuing jurisdiction by the California courts over dissolution of their relationship, even if one or both should move out of the state—an obvious attempt to avoid the conflict of laws problems described in the previous section (ibid.: § 298 (c)(3)).

In sum, the legal landscape for cohabitants has become much more complicated with the passage of new partnership statutes and other status-based regimes with varying provisions, some exclusive to same-sex couples and some not, varying benefits and a variety of interstate recognition schemes. Partners or spouses will apparently be free to move among Vermont, Massachusetts, California and New Jersey without losing protection (although the marital status of Massachusetts couples may not be recognized as such in other states). At the same time, many domestic partnership arrangements provide only a limited number of benefits, and many are available only to limited groups of cohabitants. In Hawaii, New Jersey and California, very few heterosexuals are eligible. Moreover, unlike Washington's meretricious relationships, domestic partner status must be deliberately chosen by going through the procedure for registration. Thus if one member of a couple desires to register and the other does not, no protection is available; and couples are left to whatever other protections may be offered by the state's law on cohabitants' rights.

In a state like California, the result is a "hybrid" legal regime for cohabitants.[8] For most heterosexuals (those sixty-two and younger), cohabitants' rights *inter se* rest upon and are limited by contract, although a number of rights against third parties may be available from a domestic partnership ordinance if one exists in the city or county in which they live and it applies to opposite-sex couples. Same-sex couples who do not register as domestic

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partners will also be limited to contract-based rights under *Marvin* when they dissolve their relationships. By contrast, all of the benefits of marriage will be conferred in January 2005 upon those who choose to register as domestic partners.

Under the U.S. federal system, the states are often touted as laboratories of democracy, allowing experimentation with new arrangements that may subsequently be adopted in other regions. The new California domestic partnership law will be an ideal experiment. While some have objected to conferring benefits upon couples unwilling to undertake the obligations of marriage, California is now putting people to the choice. Those who now receive benefits without obligations will need to opt out before January 2005 if they do not want to become economically responsible for one another's support or to subject their property to community property rules. It will be very instructive to see how popular the newly enacted scheme is, how many new registrants it attracts and how many drop out by New Year's Eve 2004. For those who do not secede, the new law will fulfill the purposes of protecting vulnerable parties to the extent the state's marriage and divorce law performs this function; and it will fulfill the state's interest in the privatization of support as well.

D. A MILANGE OF RIGHTS AGAINST THIRD PARTIES

In addition to those available to registered domestic partners and spouses in the few states that confer that status, a number of benefits against third parties are available to cohabitants in some areas—both to heterosexuals and to same-sex cohabitants who live in states without domestic partnership or civil union laws or who fail to register their partnerships. As commentators have noted, rights and benefits against third parties may well be of more importance to working-class and middle-class cohabitants who have not acquired substantial amounts of property than are rights to property and support upon conclusion of their relationship (Blumberg 1981: 1126–27). In some states, benefits against third parties may be conferred upon cohabitants by a mishmash of remedies derived from case law, statute or ordinance. In this section, I describe a few of these approaches, in three areas: (1) benefits from the state, such as workers' compensation and taxation; (2) tort claims against third parties, such as for negligent infliction of emotional distress; and (3) health-related benefits, such as insurance and health care decision-making power.

1. *Benefits from the State*

One way in which third-party benefits for cohabitants may be derived is by courts embracing a functional definition of the family, which has happened in some areas with respect to workers' compensation and unemployment

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insurance. Workers' compensation statutes are typically written to cover "dependents" who survive the individual worker. The statutory concern to provide for dependents who have lost the wage earner upon whom they depend would seem to dictate that a dependent cohabitant should qualify for benefits, but courts historically refused recovery by cohabitants on grounds of public policy (ibid.: 1141). This may be changing. In California, opposite-sex cohabitants have been recognized as eligible for workers' compensation survivors benefits since 1979 if they can show that they were dependent upon the worker at the time of his or her death, and this eligibility was extended to the same-sex partner of a deceased employee in 1982 (*State v Workers' Compensation Appeals Board* 1979 at 186; *Donovan v Workers' Compensation Appeals Board* 1982 at 873). Similarly, although California courts in the past denied unemployment insurance benefits to cohabitants who had to relocate for reasons related to their partner's needs (*Norman v Unemployment Insurance Appeals Board* 1983), subsequent case law supports an award of benefits in these circumstances as well (*MacGregor v Unemployment Insurance Appeals Board* 1984). Thus while the recent California domestic partnership legislation guarantees eligibility for unemployment compensation benefits to same-sex and older heterosexual couples who register, the case law extends these benefits to a more extensive group of cohabitants.

Many of the most significant government benefits are universally unavailable to cohabitants, however, because they derive from federal law. Social Security survivors' benefits are available only to those who qualify as spouses as defined by state law (Social Security Act 2003: § 416(h)). Common-law spouses are eligible under this provision, but Congress hastened to ensure that same-sex spouses would not qualify for any benefits by providing that under all federal laws and regulations "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife" (Defense of Marriage Act, 1 USC § 7 [2000]). Cases challenging the denial of Social Security benefits to cohabitants have been unsuccessful, on the ground that the wage-earner was never legally required to support his or her surviving cohabitant (Blumberg 1981: 1144–45). This rationale would no longer apply to registered or married partners in California, New Jersey, Vermont and Massachusetts, all of whom do have a legal duty of support.

Cohabitants also cannot file joint federal income tax returns, claim one another as dependents, or take advantage of spousal exclusions from federal estate and gift taxation (see Chambers 1996: 472–75). State tax benefits are available now, however, to same-sex couples in Vermont and Massachusetts; and cohabitants in Arizona may claim one another as dependents on their state tax forms (Ariz Rev Stat Ann § 43-1001 [2002]). California and New Jersey have not followed suit, apparently in order to maintain the same filing status on both state and federal returns.

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2. *Tort Claims Against Third Parties*

Standing to bring a variety of tort claims—for the wrongful death of a partner or negligent infliction of emotional distress, for example—has been conferred by statute upon domestic partners in Hawaii, New Jersey and California and is available to persons in civil unions in Vermont and same-sex marriages in Massachusetts. In other states, and for persons who do not qualify as officially recognized partners in those jurisdictions (most heterosexuals), these issues have been fought out in the case law, with different states reaching opposing conclusions. Tort claims for negligent infliction of emotional distress (NIED) provide a good example. NIED damage claims are available in both California and New Jersey to family members who are at the scene of an accident caused by the defendant's negligence and witness the death or serious injury of a close family member (*Dillon v Legg* 1968; *Portee v Jaffee* 1980). But when a heterosexual cohabitant in California brought such a claim after witnessing his partner's death in an auto accident, recovery was denied on the familiar grounds that granting cohabitants such rights would interfere with the state's interest in promoting marriage (*Elden v Sheldon* 1988 at 586–87).[9] The court was also determined to draw a "bright line rule" that would not require courts to inquire into the details of an intimate relationship and would prevent extension of NIED claims to vast numbers of people (ibid. at 587–88). Thus same-sex couples registered as domestic partners in California may bring these claims, while heterosexual cohabitants cannot.

By contrast, when a similar case arose in New Jersey, involving a woman who witnessed the death of her fiancé in an auto accident caused by the defendant's negligence, the court rejected a bright-line approach based upon marriage and allowed recovery for NIED by cohabitants who could show that they were in an intimate and familial relationship, tested by its duration, mutual dependence and the like (*Dunphy v Gregor* 1994). The New Jersey court expressed itself confident that courts could identify relationships that entitled the parties to such treatment and disagreed with the California court that extension of this right would in any way damage the state's interest in protecting marriage, pointing out that the prospect of tort recovery in such a disastrous case would be unlikely to figure into the decision whether or not to get married (*Dunphy* at 379, quoting dissenting judge in *Elden* 1988). The inquiry the court must undertake to determine whether the couple is in a marriage-like relationship is similar to that for identifying meretricious relationships in Washington. The Supreme Court of New Mexico has followed similar reasoning in extending a cause of action for loss of consortium to cohabitants in an intimate familial relationship (*Lozoya v Sanchez* 2003).

In sum, the right of cohabitants to sue third parties for injuries to their relationships is limited and depends upon the state in which they live. Given the New Jersey court's insistence upon limiting these claims to cohabitants

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whose relationship mirrors traditional, conventional models of marriage, it is ironic that the majority of couples who are now in fact protected under these circumstances are same-sex—a result, apparently, of publicizing and personalizing their plight after 9/11 and the Diane Whipple dog-mauling case.

3. *Health-Related Benefits*

The final area in which a number of benefits are available from a variety of noncontract, nonstatus sources is health care. Health insurance coverage of cohabitants, especially of same-sex partners, is increasingly offered not only by municipalities and counties to their employees but also by private companies throughout the United States, especially high-tech companies, those in the entertainment industry and academic institutions, particularly on the east and west coasts (see Hein 2000: 28–34). The cost of providing this benefit has been fairly low, given the low participation rate, either because fear of coming out prevents gay and lesbian couples from applying or because cohabitants are likely each to be employed and thus may have separate health insurance already (ibid.: 32). Moreover, the net economic cost of the insurance is greater to cohabitants than to married couples because the benefit is taxed as income to the unmarried (Chambers 1996: 475). Challenges to exclusion of cohabitants from family health coverage as discrimination based on either marital status or sexual orientation have generally failed, on the grounds that married and unmarried couples may be treated differently since the latter have no legal duty of mutual support (see, e.g., *Phillips v Wisconsin Personnel Commission* 1992; see also Christensen 1997: 1375–79). In one Alaska case, however, the court found that denial of coverage to the gay male partner of an employee constituted discrimination on the basis of marital status (*Tumeo v University of Alaska* 1995).

Health care decision making can also be an important issue for cohabitants. It is possible for cohabitants to execute Power of Attorney for Health Care documents to designate one another in advance as the person to make decisions, including life and death decisions, in the event of incapacity; but many fail to do so (Robbennolt & Johnson 1999: 455 and n. 144).[10] To address this common failure to make provision in advance, states have passed health care surrogate statutes that list, in order of priority, the family members entitled to make health care decisions, beginning with a spouse and extending to more distant relatives; but very few states include domestic partners in such a list and at least one prioritizes them lower than adult children (ibid.: 426 and n. 69).[11] True to its policy of denying rights and benefits to cohabitants, Illinois considered but then intentionally excluded domestic partners from the list in that state, for fear that the bill would be politically unacceptable to the legislature (Closen & Maloney 1995: 491).

Unprotected by statute, cohabitants are left to the courts if they desire to assert rights in this respect. One especially egregious case in Minnesota attracted a great deal of attention to this issue. In it, the lesbian partner of

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Sharon Kowalski, who had been incapacitated in an accident, sought both hospital visitation and the right to be named her partner's guardian and to make health care decisions on her behalf (*In re Guardianship of Kowalski* 1991). However, Sharon's parents, to whom she had never come out as a lesbian, succeeded in cutting off her partner's visitation, being named as her guardians, and in making health care decisions that placed Sharon in nursing homes without appropriate rehabilitative services. It took eight years of litigation for her partner to obtain the right to care for Sharon, concluding only when the Minnesota appellate court finally accepted a functional definition of family and also recognized Sharon's own rights and preferences in this matter. In other states, cohabitants may face similar legal battles, particularly if their authority is not recognized by hostile family members. Of course, in each of these situations—exclusion of cohabitants from health care surrogate statutes and court battles like *Kowalski*—the underlying purpose of the substitute decision making is defeated, for the partner is the person most likely to be able to articulate what the incapacitated individual would have wanted if she were able. Those who register as partners or spouses in California, New Jersey, Vermont and Massachusetts are now protected. Indeed, in all three of the areas described in this section, same-sex couples are now much more likely to be protected than are heterosexual cohabitants.

E. COHABITANTS AND THEIR CHILDREN

Finally, significant legal consequences can attach to cohabitation with respect to children. Historically cohabitation was seen and in some states can still be seen as tantamount to *per se* unfitness and thus grounds to lose custody of a child after divorce (*Jarrett v Jarrett* 1980). However, the trend in most states, with respect to heterosexual sexual behavior at least, is to provide that a parent's sexual behavior is relevant only if his or her conduct has an adverse effect upon the child (see Ellman et al. 1998: 634–37). Gay and lesbian cohabitants may still face problems relating to both custody and visitation, though (ibid.; see also Weisberg & Appleton 2002: 856).

Different issues are raised when a cohabiting couple decides to have children of their own, especially if the couple is of the same sex. Because rights concerning children depend largely upon biology, no problem is posed for cohabiting heterosexuals who decide to have children; rights to custody and visitation will parallel those afforded to married parents unless one of the partners has abandoned his or her relationship to the child (cf. *Stanley v Illinois* 1972 with *Quilloin v Walcott* 1978 and *Lehr v Robertson* 1983). Serious problems may arise for gay and lesbian parents, however, because of their inability to have children who are biologically related to both members of the cohabiting couple. For example, a cohabitant in the position of stepparent to his or her partner's child from a previous relationship does not have the rights of a stepparent who is married to the child's natural

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parent and thus must struggle to obtain visitation rights upon dissolution of the relationship, although stepparents in married relationships are increasingly afforded this right (Chambers 1996: 463–65).

More severe problems arise when gay or lesbian couples decide to have a child of their own and accomplish this either by having a lesbian partner artificially inseminated or a gay partner enter into a surrogacy agreement with a third party. Each of these arrangements is fraught with shoals. In most states, the nonbiological mother of her lesbian partner's child will be regarded as a legal stranger to that child, even though she has raised it as her own and is known as mother to it; upon dissolution, she may be denied both custody and visitation (see, e.g., *Alison D. v Virginia M.* 1991; *Nancy S. v Michele G.* 1991). Although a few state courts have begun to recognize *de facto* or quasi-parental status in these circumstances (see, e.g., *E.N.O. v L.M.M.* 1999; *V.C. v M.J.B.* 2000; *In re Guardianship of Olivia J.* 2000; Dalton 2003: 316–19), most courts still refuse to recognize a functional, or *de facto*, definition of parenthood. Moreover, while the child of a married woman produced by artificial insemination with the consent of her husband will automatically be presumed to be that of her husband and listed as such on the birth certificate, artificial insemination may confer rights upon the biological father of a lesbian couple's child (Chambers 1996: 467–68). Sperm donors have asserted rights against lesbian mothers with some success (see, e.g., *Thomas S. v Robin Y.* 1994). Moreover, gay males seeking to have a child that is biologically related to at least one of them may face many problems enforcing surrogacy contracts and cutting off the rights of the surrogate mother to custody and visitation (see, e.g., *In the Matter of Baby M* 1988).

Many same-sex couples choose to adopt their children, and this route is now possible in most states. Only Florida has a longstanding statutory ban on adoption by homosexuals, although it permits them to serve as foster parents; this prohibition was recently upheld against an equal protection challenge in federal court (*Lofton v Kearney* 2004). Mississippi and Utah have recently added prohibitions against adoption by homosexuals to their law, while New Hampshire dropped a similar prohibition in 1999 (Miss Code § 93-17-3 [2003]; Utah Code Ann § 78-30-2 [2002]; NH Rev Stat § 170-B: 4 [1999]; see also Cooper 2004). However, co-parent adoption, which would protect the rights of both partners to their child, is unavailable in about half the states. A 2002 survey of state adoption laws showed that second-parent adoptions had been approved by courts in twenty-four states and the District of Columbia (although the right to do so is only really secure in the handful of states with affirmative supreme court rulings on the issue), while twenty-six states have explicitly disapproved the practice (Lambda Legal 2002). Moreover, second-parent adoption procedures are costly, intrusive and risky; and a successful outcome results in a family in which the co-parents are legal strangers to one another, while most family benefits depend upon spousal status (Dalton 2001: 211–15).

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This brief summary simply points to some of the recurring problems that may threaten cohabitants' rights to their children, and here the main distinction is the sexual orientation of the cohabiting parents. Although recent developments—for example, the increased approval of co-parent adoption by gay and lesbian parents—have improved the situation to some extent, severe problems remain which may threaten the security of the parent-child relationship of gay and lesbian couples. Some but not all of these problems are relieved by entering into domestic partnerships or civil unions in states where they are available.

III. CONCLUSIONS

As is clear from this discussion, the law concerning cohabitants' rights in the United States varies immensely from state to state and by sexual orientation; it is also rapidly changing in many respects. There is now a substantial history of attempts by the courts to protect vulnerable parties in cohabiting relationships. The case law of common-law marriage and the equitable doctrines used to address injustices resulting from cohabitants' dependence upon one another show that many courts have been uneasy with those injustices and determined to remedy them for a long time. It was only during the late 1970s and 1980s, however, that this unease led to the development of cohabitants' rights cases. The first of these extended rights based upon contract, express or implied. This approach offered some help to vulnerable parties at the end of cohabiting relationships but has proved inadequate, as courts have insisted upon finding express contracts and have refused to imply contracts in the absence of direct evidence of agreement. The state of Washington's meretricious relationship doctrine is better in this respect, looking first for the characteristics of a relationship of interdependence and then imposing property distribution remedies upon cohabitants at the end of their relationships even if they are unwilling. Developed by the courts to protect heterosexual cohabitants, both California's contract approach and Washington's meretricious relationship scheme were then extended to same-sex couples in the case law. Neither approach, however, addresses rights against third parties, whether it be the state or an employer or a tortfeasor, which are often more valuable than rights *inter se*.

In the 1990s, the focus of cohabitants' rights shifted to gay and lesbian couples and their exclusion from marriage. This campaign has resulted in only one totally successful case thus far (Massachusetts) but has spawned many and varied domestic partnership schemes, ranging from the limited remedies contained in Hawaii's Reciprocal Beneficiaries Act, the early California domestic partnership law, and various local ordinances, on the one hand, to granting all the benefits and obligations of marriage in Vermont (and by 2005 in California), on the other. In Vermont, Massachusetts and California, same-sex couples are now well protected; and many assume, or

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hope, that New Jersey will follow California's example and expand the benefits available to domestic partners in that state.

The result of all this activity is a rather confusing legal situation, in which cohabitants' rights are based upon a mixture of remedies that not only vary from state to state but also result in intrastate legal regimes based on different legal theories and offering a patchwork of remedies from a variety of sources. An additional result is that same-sex couples are better protected in many areas than are heterosexual cohabitants.

The system as it now exists is clearly unstable. The various conflict of law problems described above import a built-in instability, as couples who have been granted either the status or incidents of marriage move from state to state. The exclusion of heterosexuals from benefits available to gays and lesbians is another source of instability. As gay cohabitants' rights originally developed out of those granted to heterosexuals, the reverse may also prove true. The inclusion of some heterosexuals within the protections granted by Hawaii, New Jersey and California now undermines the argument that "they can always get married" and may provide the basis for an equal protection challenge to the exclusion of heterosexuals in general.

Some argue that extension of rights to heterosexual cohabitants will provide incentives not to marry and thus do serious harm to the institution of marriage. It may be that more heterosexuals would cohabit instead of marrying if the status were given more benefits, but the number of cohabitants has been increasing rapidly over the last decades despite substantial financial disincentives. For whatever reasons, large numbers of people find the institution of marriage lacking, but they forge ties of reliance and interdependence outside its confines nonetheless. Census data reveal that at least 5.5 million individuals fall into this category, and 41 percent of them have children whose welfare is affected by failure to recognize their status.

A system of family law should acknowledge the families that actually exist, particularly in a country that ties so many of the welfare functions central to life and health to family or spousal status. There is now a growing acceptance of extending economic benefits to same-sex couples, even in the face of substantial resistance to allowing them entry into the religious and cultural tradition of marriage (*Harvard Law Review* 2003: 2001). Perhaps a similar acceptance of granting benefits to functional families headed by unmarried heterosexuals will develop as well. In short, the instability of the current legal situation opens the possibility of change in many respects.

The ideal situation may turn out to be something like that which obtains in the Netherlands, a multi-status system that allows both same- and opposite-sex couples either to marry or to register as domestic partners. Yet to satisfactorily perform the family law functions of protecting vulnerable dependent parties and privatizing the costs of welfare, it would still be necessary to impose certain obligations on unregistered long-term cohabitants, under a system similar to that suggested by the ALI, which mandates both

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property distribution and support upon dissolution of the relationship. If cohabitants are unwilling to undertake these responsibilities to one another, they will need to execute contracts to that effect. Although this situation would also be a "hybrid" in many respects, it would be less confusing than the one that now exists, where the law may provide, within the same state, a patchwork of inconsistent remedies to different groups.

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NOTES

1. Six states abolished common-law marriage between 1875 and 1917, and an additional sixteen have done so since 1920, primarily out of fears of fraudulent claims and to protect the institution of marriage (see Bowman 1997: 715 n. 24). The District of Columbia and ten states—Alabama, Colorado, Iowa, Kansas, Montana, Pennsylvania, Rhode Island, South Carolina, Texas and Utah—currently recognize common-law marriage (ibid.).
2. Despite its position on this issue, Georgia did recognize a contract partitioning property between two lesbians in *Crooke v Gilden* (1992).
3. There is some inconsistency in the application of the Illinois rule, however (see, e.g., *Spafford v Coats* 1983).
4. Nevada follows a similar approach (see Estin 2001: 1383, citing *Western States Construction, Inc. v Michoff* 1992 at 1224–25 and n. 17).
5. One study found that only about one-third of heterosexual committed partners had wills, though 60 percent of same-sex couples did (Robbennolt & Johnson 1999: 441).
6. The American Law Institute is a group of lawyers, judges and law professors who study various subject areas of the law and recommend reforms, often in the form of a model statute; its model laws depend upon subsequent adoption by state legislatures for authority.
7. The San Francisco City Attorney has also filed suit, maintaining that denial of marriage licenses to same-sex couples violates the state constitution's equal protection clause (Murphy 2004).
8. For examples of other types of hybrid regimes, see Reppy (2002: 286–90), who describes states where courts have found, based on express or implied contract, rights, such as standing to sue in tort, which no contract could impose, as well as states in which statutes or ordinances confer rights not available under the state's contract-based law of cohabitants' rights. Blumberg (2001: 1294) also describes states that follow contract rubric but make awards that cannot be justified under contract law.
9. California courts have followed similar reasoning in denying standing to sue for the wrongful death of a cohabitant, noting that to extend the action beyond the decedent's heirs would be the equivalent of bringing back common-law marriage (*Welch v State of California* 2000 at 433).

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10. In the Minnesota study, 26.7 percent of opposite-sex cohabitants and 71.1 percent of same-sex cohabitants designated their partners as surrogate health care decision makers (Robbennolt & Johnson 1999: 455 and n. 144).
11. Robbennolt & Johnson (426) describe a New Mexico statute that includes an "individual in a long-term relationship of indefinite duration . . . [who] has demonstrated an actual commitment to the patient similar to the commitment of a spouse and in which the individual and the patient consider themselves to be responsible for each other's well-being" and refer to Delaware and Maine statutes possibly allowing a cohabitant to serve as a surrogate but only if listed family members are unavailable. Arizona statute law prioritizes domestic partners below adult children of the patient (ibid.: 426 and n. 69).

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