

# MARRIAGE EQUALITY? FIRST, JUSTIFY MARRIAGE (IF YOU CAN)

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## I. INTRODUCTION

Just in reading the title of this Article, some readers may be puzzled. First, what is an article about marriage equality doing in a symposium about health law? Second (and here I flatter myself to imagine that the reader is familiar with my work), why does the title seem to question marriage equality, when I have argued ceaselessly in favor of it?<sup>1</sup> The answers to these questions turn out to be related, as shown below.

With recent positive developments in Connecticut,<sup>2</sup> Vermont,<sup>3</sup> Iowa,<sup>4</sup> and New York,<sup>5</sup> mixed success in California,<sup>6</sup>

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1. See John G. Culhane, *Marriage, Tort, and Private Ordering: Rhetoric and Reality in LGBT Rights*, 84 CHI.-KENT L. REV. (forthcoming 2009); John G. Culhane, *Beyond Rights and Morality: The Overlooked Public Health Argument for Same-Sex Marriage*, 17 LAW & SEXUALITY 7 (2008); John G. Culhane, *The Heterosexual Agenda*, 13 WIDENER L.J. 759 (2004); John G. Culhane, Commentary, *Same-Sex Marriage: The Depth of the Opposition and the Importance of Victory*, 3 J. GAY & LESBIAN MED. ASS'N 103 (1999); John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119 (1999).

2. In *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008), the Connecticut Supreme Court ruled that excluding same-sex couples from marriage violated the state's constitution, and ordered the issuance of marriage licenses. The first such marriages were performed in the state late in 2008. Lisa W. Foderaro, *Same-Sex Couples Marry in Connecticut*, S.F. CHRON., Nov. 13, 2008, at A2.

3. On April 7, 2009, the Vermont legislature overrode the Governor's veto of a marriage equality bill, thereby ensuring that same-sex marriages in that state will begin soon. Abby Goodnough & Abahad O'Connor, *Vermont Legislature Makes Same-Sex Marriage Legal*, N.Y. TIMES, Apr. 7, 2009, at A1.

4. On April 3, 2009, the Iowa Supreme Court handed down its decision in *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009), concluding that denying marriage licenses to same-sex couples offended the state's constitutional guarantee of equality. Same-sex marriages were expected to begin by the end of that same month.

5. With pro-marriage equality advocate David Patterson the governor of New York, the state recently began recognizing the validity of same-sex marriages performed in other states. See *C.M. v. C.C.*, 867 N.Y.S.2d 884 (N.Y. 2008); *Martinez v. County of Monroe*, 50 A.D.3d 189 (N.Y. App. Div. 2008). Moreover, many believe that the state's chances of passing a full marriage equality bill increased greatly as a result of the 2008 election, in which the Democrats captured a majority of the state senate for the first time in many years. Danny Hakim, *Democrats Reach Pact to Lead the Senate*, N.Y. TIMES, Jan. 7, 2009, at A23.

6. The situation in California can charitably be described as confusing. As of 2008, the state allowed same-sex couples to register as domestic partners with virtually all of the legal

and setbacks in Arizona<sup>7</sup> and Florida,<sup>8</sup> the marriage equality movement remains in the center of political, legal, and social debate in the United States. Proponents, including me, have argued that granting the right to marry to same-sex couples is compelled as a matter of simple fairness and equality, while opponents have continued to make a host of related—but unconvincing—arguments about the intrinsic meaning of marriage and how this will be lost or compromised if marriage equality takes hold.<sup>9</sup> But below this turbulent surface, courts called upon to solve real problems confronting same-sex couples have expressly or impliedly recognized that a much deeper problem exists: the vast and often unexamined privileging of marriage over other forms of family and other kinds of relationships. Legal scholars, too, have questioned mar-

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benefits of marriage, but the California Supreme Court ruled that denying full marriage equality violated state constitutional commitments to fundamental rights and equality. *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008). Opponents of marriage equality succeeded in gathering enough signatures for a ballot amendment (Proposition 8) changing the constitution to declare that marriage means the union of man and a woman, and that amendment narrowly passed on November 4, 2008. *Same-Sex Marriage Outlawed Yet Again In Calif.* (Nat'l Pub. Radio radio broadcast Nov. 5, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=96661239>. By that time, however, many thousands of same-sex couples had already obtained marriage licenses. David J. Jefferson, *Will My Marriage Last?*, NEWSWEEK, Oct. 30, 2008, available at <http://www.newsweek.com/id/166518>. The status of those marriages, as well as the validity of the ballot initiative, are currently before the California Supreme Court. See California Courts, Proposition 8 Supreme Court Filings, <http://www.courtinfo.ca.gov/courts/supreme/highprofile/prop8.htm> (last visited Mar. 21, 2009). Meanwhile, the campaign over Proposition 8 did not end after the vote. Protests, sometimes angry confrontations, and grassroots organizing with the goal of repealing the initiative have captured much public attention. See Ari B. Bloomekatz, Joanna Lin & Raja Abdulrahim, *Thongs Protest Across the State*, L.A. TIMES, Nov. 9, 2008, at B1.

7. On November 4, 2008, Arizona voters approved a change to the state's constitution, banning same-sex marriages. *Az Voters OK Ban on Gay Marriage, Reject Payday Loan Reform*, TUCSONCITIZEN.COM, Nov. 5, 2008, <http://www.tucsoncitizen.com/ss/fromcomments/101723.php> (last visited May 21, 2009). An earlier, more broadly worded initiative that would have banned other unions was defeated in 2006. David Crary, *Same-Sex Marriage Ban Rejected in Arizona in Historic First*, ADVOCATE.COM, Nov. 9, 2006, [http://www.advocate.com/news\\_detail\\_ektid39285.asp](http://www.advocate.com/news_detail_ektid39285.asp) (last visited May 21, 2009).

8. On November 4, 2008, Florida voters banned not only same-sex marriages but other unions. Jay Hamburg, *Florida Bans Same-Sex Marriage*, ORLANDO SENTINEL.COM, Nov. 6, 2008, <http://www.orlandosentinel.com/news/local/state/orl-amend20608nov06,0,2112219.story> (last visited May 21, 2009). The law could have an effect on many kinds of efforts to arrange financial support between elderly couples, of whom there is hardly a shortage in the Sunshine State. See OFFICE OF ECONOMIC & DEMOGRAPHIC RESEARCH, THE FLORIDA LEGISLATURE, FLORIDA DEMOGRAPHIC SUMMARY 1 (2008), available at <http://edr.state.fl.us/population/popsmary.pdf> (stating 17.6% of Florida's population was sixty-five and older as of April 1, 2000).

9. See, e.g., Culhane, *The Heterosexual Agenda*, *supra* note 1, at 782-92.

riage—sometimes by focusing on the privileges that attach to it, but sometimes more broadly, by questioning the status itself. These unavoidable questions reveal that the controversy over same-sex marriage is but the most visible part of a much larger set of issues about equality and social justice.

Once the questions on the table are broadened in this way, the connection to issues of health and policy emerge clearly. What public health and policy goals are we trying to further with laws recognizing and subsidizing marriage? How do the signals sent by privileging marriage advance or compromise those goals? Is there a continued justification for marriage, and, if so, ought we consider changing its prerogatives in ways that will further the public good? What might those ways be, and how will (or could) we know whether we have succeeded?

This brief Article raises and explores these questions in somewhat more detail than I have just done, but it provides few answers. The goal is mostly to foster dialogue that is only now beginning to take place, but that is vital because of competing claims and scarce resources. Put less abstractly, every decision to support marriage through tangible financial benefits (and, more controversially, through the secondary “signaling” effect those distributional choices entail) also involves a choice, on a grand distributional level, to withhold those benefits from others. Are such decisions justified?

The Article proceeds as follows. In Part II, I summarize the social science argument for marriage, and recognize and give voice to its dissidents. I also offer a few observations about how marriage equality would further the positive effects that social scientists have seen in opposite-sex marriages. At this point, the reader may or may not believe that continued state support for marriage is a good idea. Even for non-believers, however, the reality is that marriage will continue to be recognized and supported by the state for the foreseeable future. With that point taken as a given, many subsidiary questions remain, and the remainder of the Article addresses those.

Part III discusses the legal incidents of marriage and their justifications. One striking feature of the legal advantages of marriage is how little effort is expended in this important exercise of justification; an omission especially glaring in light of how marriage is so far privileged by federal, state, and local governments, as well as by private actors. This Part of the Ar-

ticle discusses a number of ways in which particular benefits attached to marriage might be justified, and then explores some of these to determine their necessity. I conclude that, for the most part, the law most justifiably recognizes the commitment of marriage in the default rules it sets for its dissolution.

In a brief Part IV, I move into more metaphysical territory, exploring the signaling function of marriage. What messages do we as a society send by attaching such legal and social importance and support to marriage? It turns out that such support sends both positive and negative signals because, by granting such status to marriage, society sends messages about other forms of relationships that may tend to coerce, marginalize, or exclude them. Is this a cost worth bearing, and, if so, why? Because that argument ultimately cannot be resolved definitively, the law should at least do a better job of valuing all families – not just ones that are grounded in a legal marriage. Seen in this way, the struggle for marriage equality is important not only in its own right, but also for its capacity to call attention to broader issues of access and inequality.

## II. SOCIAL SCIENCE ARGUMENTS FOR AND AGAINST MARRIAGE

In an earlier Article, I summarized the mainstream social science arguments for marriage, and these need not be recanvassed in detail here.<sup>10</sup> At the substantial risk of breathtaking oversimplification, the advantages that social scientists have ascribed to marriage relate to health and wealth. As to health: married couples live longer with fewer chronic physical and mental health problems than do unmarried, cohabitating couples.<sup>11</sup> Moreover, married couples do better than single or cohabitating couples in terms of income and the accumulation of wealth.<sup>12</sup> If true, these advantages have obvious benefits to

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10. Culhane, *Beyond Rights and Morality*, *supra* note 1, at 23-29. The discussion drew heavily on a book co-written by one of the most vocal opponents of marriage equality, Maggie Gallagher. *Id.* (citing LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE* (2000)). As noted in several places in the text of this Article, the evidence and arguments that the authors put forward have been challenged on many fronts. Nonetheless, they represent a good, mainstream articulation of the pro-marriage argument. My brief summary of the argument mostly refers to their work, which in turn relies on a body of social science literature. Readers interested in exploring the research further should seek out these original sources.

11. *Id.* at 24-25.

12. *Id.* at 25-27.

broader society. From the health perspective, those in better physical and mental health will impose less of a draw on public sources of support than others (and, as a secondary effect, would also seem likely to be good risks from an insurance perspective, thereby reducing overall premiums). Even more clearly, those with greater financial resources are less likely to rely on public welfare programs.

Moreover, the children of married couples do better, according to a substantial (but not uncontroverted) body of research, than children raised by unmarried, cohabitating couples.<sup>13</sup> Most obviously, the higher standard of living described above benefits not only the couple, but their children as well. Citing a mixture of studies comparing children of married couples to those in single parent or remarried homes, Linda Waite and Maggie Gallagher have concluded that the children with married parents are healthier (and have a lower incidence of infant mortality), better educated, less likely to be delinquent, and more likely to benefit from the “social capital” that comes from a greater degree of parental involvement.<sup>14</sup> Again, such advantages obviously spill over to the broader society, reducing the number of children that the state must support financially or through other social support services.

Finally, broader benefits are claimed for marriage too. In addition to the already-discussed reduction of social welfare costs that the mini-socialist family state creates; homes are safer because married men are less likely to commit acts of domestic violence than their single counterparts; children are likelier to receive good care-giving from their married parents; and married fathers are better support providers than single or divorced ones.<sup>15</sup>

Although the social science research summarized above is often treated by policy makers as irrefutable and beyond reasonable debate, in fact matters are less clear. As Anita Bernstein has pointed out, the comparison groups chosen are not the best; ideally, we would be comparing a world without marriage to one with it, and then seeing whether people otherwise similarly situated do better simply because of marriage

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13. *Id.* at 27-28.

14. *Id.*

15. *Id.* at 25-27.

itself.<sup>16</sup> (Of course, the issue is further complicated by the connection between marriage and the substantial legal, social, and financial advantages that come with it. Disaggregating these from something intrinsic about marriage is difficult.) But there is no such “Parallel World” without marriage, so in a sense we can never know whether marriage itself does something that nothing else could. It does seem likely, however, that some (or perhaps even most) of the positive effects that are thought to accrue from marriage would continue to be realized by stable couples in a world without marriage—because these two cohorts might be “Parallel Universe Counterparts.” Bernstein is led to conclude that the pro-marriage forces have an ideology to promote: “The project is propaganda, not reason or social science.”<sup>17</sup>

A less abstract way to raise the problem noted above is to ask whether those claiming benefits for marriage have adequately corrected for “selection bias”: the reality that those who can or choose to marry are on average better off in the first place (i.e., even without marriage) than those in single or cohabitating situations. While certain of these biases (perhaps those relating to income, for example) can be and have been to an extent corrected for, others may prove more difficult to correct for (such as social or personality limitations that are more difficult to quantify). As has been noted, not all single people are single by choice: in addition to those excluded from marriage because of discriminatory laws (historically, interracial couples; today, same-sex couples), some single people simply are unable to find a suitable partner with whom to enter into marriage.<sup>18</sup>

If marriage is a benefit to those in it as well as to society, the same could be expected to hold true for same-sex couples, at least to an extent. This possibility is acknowledged even by opponents of marriage equality.<sup>19</sup> Of course, most of this exercise is necessarily hypothetical, but the effort at demonstrating

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16. Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 140-41 (2003).

17. Anita Bernstein, *Afterword: Narrowing the Status of Marriage*, in MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS 233 (Anita Bernstein ed., 2006).

18. See *infra* notes 83-84 and accompanying text.

19. See WAITE & GALLAGHER, *supra* note 10, at 200. Gallagher opposes marriage equality while Waite favors it, but the two write that a same-sex couple would likely realize at least some of the benefits that they impute to marital status. *Id.*

health and wealth benefits has already begun. As just one example, two researchers looking at the new civil partnership status in Great Britain predict that the status will lead to better health outcomes inasmuch as stable same-sex relationships have already been shown to lead to better health, and the availability of legal recognition can be expected to increase the number of such stable pairings.<sup>20</sup> From a mental health perspective too, marriage equality would reduce the stress associated with a legal regime that currently enforces social exclusion and legal uncertainty about one partner's status, as well as a lack of recognized norms against which same-sex couples can gauge their commitment and mutual obligations.<sup>21</sup>

Extrapolations from available data have also been used in an effort to predict the likely income and wealth benefits that gay and lesbian couples would realize from marriage.<sup>22</sup> Because marital status enjoys substantial legal and financial privilege, some benefits are obvious (and are discussed in the next Part of this Article), but the focus here is on those benefits that might accrue just because of marriage itself. Income effects are hard to gauge because it is unknown whether or to what extent gay men would realize the "marriage premium" in earnings that heterosexual married men do, given that gay men earn substantially less than their straight counterparts (whether married or single).<sup>23</sup> However, the pooling of their incomes could itself have a beneficial effect. As for lesbians, who currently earn more than straight women,<sup>24</sup> the effect of marriage (especially given the role of income pooling, the extent to which cannot be predicted) is less clear. Wealth effects might include increased transfer of assets from extended family. Marital status would reduce the outsider status of gay couples and, in turn, make them "look" more like heterosexual couples, to whom such wealth transfers increase with mar-

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20. See Michael King & Annie Bartlett, *What Same Sex Civil Partnerships May Mean for Health*, 60 J. EPIDEMIOLOGY & CMTY. HEALTH 188, 189 (2006), available at <http://jech.com>.

21. See Gilbert Herdt & Robert Kertzner, *I Do, but I Can't: The Impact of Marriage Denial on the Mental Health and Sexual Citizenship of Lesbians and Gay Men in the United States*, 3 SEXUALITY RES. & SOC. POL'Y, Mar. 2006, at 35-37, 40-41.

22. Again, these issues were first explored in Culhane, *Beyond Rights and Morality*, *supra* note 1, at 31-32. Here I reference that Article, and invite the interested reader to find further discussion and citation to primary sources there.

23. *Id.* at 31.

24. *Id.* at 32.

riage.<sup>25</sup>

As is true of opposite-sex couples, the children of same-sex couples would be expected to benefit from the marriage of their parents, and, to a greater or lesser extent, in the same ways. In addition to the economic, health, and educational benefits mentioned in the context of heterosexual marriage, the children of same-sex couples would almost certainly benefit from the lifting of the stigma that their parents' relationships now carry.<sup>26</sup> This badge of inferiority is real, and has been justly criticized by courts and judges. As Justice Fairhurst of the Washington Supreme Court stated in his dissenting opinion in *Anderson v. King County*, "denial of the right to marry will certainly harm children of same-sex couples . . . . It is those children who actually do and will continue to suffer by denying their parents the right to marry."<sup>27</sup> Similarly, in *Goodridge v. Department of Public Health*, the Massachusetts Supreme Court criticized exclusion from marriage on the ground that "it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized."<sup>28</sup>

Are any of these purported benefits, whether to opposite-sex or same-sex couples, real? As noted above, it is impossible to state this conclusion with confidence. Accordingly, the unconvinced reader may conclude that the institution should simply be abolished. But marriage is not going anywhere, at least not for the foreseeable future. Consider the obstacles to making that happen—hurdles that are often ignored by those advocating its abolition.<sup>29</sup> The first and most important obstacle is that there is simply no substantial movement in favor of doing away with marriage at the moment. Such a movement, once it began, would likely proceed slowly and unevenly,

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25. *Id.*

26. *Id.* at 32-34.

27. 138 P.3d 963, 1018-19 (Wash. 2006) (Fairhurst, J., dissenting).

28. 798 N.E.2d 941, 963 (Mass. 2003) (internal quotations omitted).

29. I am aware that the failure to make the definitive case for marriage from a social science view is not the same thing as suggesting marriage should be abolished. The problems with marriage that might lead a reader to that conclusion are discussed in Parts III and IV. Among those seeking to abolish "marriage as we know it," probably the most well-known and influential is Martha Fineman. Her position is clearly spelled out in Martha Albertson Fineman, *The Meaning of Marriage*, in MARRIAGE PROPOSALS, *supra* note 17, at 29.

state-by-state.<sup>30</sup> Were this initiative ever to finally result in the abolition of marriage, there would arise questions about those marriages still in existence. In addition, the abolition of marriage would not cause the disappearance of numerous and complex legal and social issues involving the now-informal “family” and the couples and dependents who inhabit it. Thus, even those unconvinced about the continued state sanctioning of marriage should be interested in the tangle of questions that remain, and which this Article addresses: What prerogatives does marriage carry, and are they justified? What counts as justification, and against what costs must continued and substantial governmental privileging be weighted?

### III. JUSTIFYING THE LEGAL INCIDENTS OF MARRIAGE

As has been chronicled endlessly and in depth, marriage carries literally thousands of benefits. At the federal level, married couples enjoy numerous tax advantages,<sup>31</sup> Social Security protection,<sup>32</sup> the right to sponsor spouses under immigration law,<sup>33</sup> and many others. State laws confer additional tax advantages (such as exclusions from estate taxes and real estate transfer taxes),<sup>34</sup> preferences under the law of intestacy,<sup>35</sup> rights to sue for wrongful death<sup>36</sup> and personal injury to the spouse,<sup>37</sup> medical decision-making and visitation rights,<sup>38</sup> and

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30. Congress seems even less likely to take such an action, and its constitutional ability to get involved in the historically state-law function of marriage to this extent is open to question. The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (DOMA), passed in 1996, represents a rare (and thus far not constitutionally settled) Congressional foray into this area. DOMA defines marriage as the union of a man and a woman for federal purposes (no matter what individual state laws hold) and permits states to decline to recognize same-sex marriages from other states. *Id.* §§ 2, 3.

31. Cf. INTERNAL REVENUE SERVICE, PUBLICATION 501: EXEMPTIONS, STANDARD DEDUCTION, AND FILING INFORMATION 5 (2008) (discussing married filing status), available at <http://www.irs.gov/pub/irs-pdf/p501.pdf>.

32. 42 U.S.C. § 402(b), (c) (2000).

33. 8 U.S.C. § 1154(a)(1)(A)(ii), (iii) (2006).

34. See, e.g., WEST VIRGINIA STATE TAX DEPARTMENT, PUBLICATION TSD-393 1 (2006), available at <http://www.state.wv.us/taxrev/taxdoc/tsd393.pdf>.

35. See, e.g., MINN. STAT. ANN. § 524.2-103 (West 2002).

36. See 25A C.J.S. *Death* § 184 (2008) (explaining spouses have a right to recover damages for loss of society or companionship).

37. See, e.g., *Hopkins v. Blanco*, 320 A.2d 139 (Pa. 1974).

38. See, e.g., 20 PA. CONS. STAT. ANN. § 5461(d)(1)(i) (West Supp. 2008) (stating, in absence of designee, spouse and adult children from prior marriage are first choice for health care representative when a person is incapacitated).

a host of important other benefits and privileges. Local governments can also provide health benefits to their workers' spouses,<sup>39</sup> and relieve them of local tax burdens.<sup>40</sup> Private parties often take their cue from government, granting benefits based on marital status, importantly including health benefits.<sup>41</sup> Moreover, and perhaps most significantly, the state imposes a series of default rules upon the dissolution of marriage designed to protect the financial health of both parties.

Although some of these rights can be approximated by private contracts between the parties (most obviously, the dissolution default rules that can be replaced through prenuptial agreements), this process can be expensive. It may also require updating, and is subject to error. More importantly, from the point of view of social equality, contractual protections are as a practical matter unavailable to those with low incomes and poor education. Moreover, one cannot count on courts to enforce these contractually developed rights to the extent they would enforce rights between married parties.

Finally, as to certain rights (often those affecting third parties), there is simply no way for the same-sex couple to achieve parity. Examples include the right to sue in tort, and—less directly—the right to health benefits, which many public and private employers still restrict to the legal spouses of their employees. The filing of joint tax returns, which is also a great boon to many married couples (particularly where one spouse earns little or no income), is another substantial benefit that cannot be achieved without marriage.

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39. See OFFICE OF THE STATE COMPTROLLER, STATE OF CONNECTICUT, COMPTROLLER'S MEMORANDUM NO. 2000-13 § III(B) (2000), available at <http://www.osc.state.ct.us/memoarchives3/2000memos/200013.htm>.

40. See Town of North Haven, Connecticut, Tax Relief Programs, Questions and Answers for the Homeowners and Additional Veteran Credits, <http://www.town.north-haven.ct.us/TownHallDepts/TaxReliefPrograms.asp> (last visited Mar. 21, 2009).

41. Because of their prevalence in the workplace and their frequent connection in that context to marital status, one might argue that health benefits are indeed a benefit of marriage. See *Nat'l Pride at Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524, 539 n.18 (Mich. 2008) ("Reasonable people doubtlessly can disagree regarding whether health-insurance benefits are or are not a benefit of marriage. On the one hand, one can argue that health-insurance benefits are not a benefit of marriage because they arise out of the employer-employee relationship rather than the marital relationship, as demonstrated by the fact that not all married couples have health-insurance benefits. On the other hand, one can argue that they are a benefit of marriage, as demonstrated by the fact that a significant number of people obtain such benefits from their spouses' employers while they would be unable to obtain such benefits if they were not married. Resolution of this disagreement depends, in part, on whether the term 'benefit of marriage' implies an *exclusive* benefit or merely a *typical* benefit.").

Is this state of affairs justified? Assuming that marriage is an institution that society wishes to recognize and support, are the benefits justified? All of them? It seems that, at minimum, we should be able to defend a given benefit of marriage, always bearing in mind that we are for now begging the deeper question of whether marriage is justified in some larger sense. The discussion that follows raises the justification issue in several discrete contexts.

*First, does the benefit encourage people to marry in the first place?* It is difficult to think of a benefit that directly furthers this goal on a broad scale. While some might marry for tax reasons, this is likely a small percentage and only invites return to the broader questions of distributional fairness (especially if it turns out that those inclined to marry for this reason are already financially well-situated). One might even argue that any benefit that encourages marriage is misguided because it threatens to create a union for reasons that have little to do with whether the couple can succeed as a married pair.

An exception to this rule might be state-supported pre-marriage counseling, which some states even require for those below a certain age.<sup>42</sup> Although this is not, strictly speaking, a benefit of marriage (as it is realized before the marriage begins), it is associated with marriage and may be likely to lead to better outcomes. One should note, however, that such counseling inevitably results in some planned marriages not taking place, as the counseling sobers the couple to the legal, social, and emotional obligations of the institution and to the consequences of dissolution.

The foregoing observations suggest a deep difficulty with encouraging people to get married through direct subsidy. A sufficiently attractive financial incentive may indeed foster marriage, but perhaps not marriages that are likely to succeed. In other words, providing financial benefits may have the perverse effect of encouraging the *wrong* marriages.<sup>43</sup>

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42. See, e.g., CAL. FAM. CODE § 304 (West Supp. 2009).

43. In this context, mention must be made of the so-called Welfare Reform Act (technically, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996), the relevant codification of which appears at 42 U.S.C. § 603 (Supp. 2B 2008), amended by American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 2101, 123 Stat. 115, 446-49 (2009). The statute sets forth the kinds of programs geared towards "marriage promotion" that can qualify for federal funds:

[T]he term "healthy marriage promotion activities" means the following:

In short, I am skeptical that marriage benefits encourage people to marry, or at least that they do so in cases in which the couple's marriage is otherwise desirable from a societal perspective. Their true societal value seems to lie elsewhere. This brings us to the second justification for marriage benefits: *Does the benefit in question support existing marriages?* Surveys and studies consistently show that one of the biggest sources of stress for couples is financial worries,<sup>44</sup> so government policy that acts to alleviate domestic economic problems might be justified on that basis. Tax policy, including the ability to file a joint return and to avoid certain transfer taxes *inter se*, seems especially relevant here. A bit further afield, allowing one

(I) Public advertising campaigns on the value of marriage and the skills needed to increase marital stability and health.

(II) Education in high schools on the value of marriage, relationship skills, and budgeting.

(III) Marriage education, marriage skills, and relationship skills programs, that may include parenting skills, financial management, conflict resolution, and job and career advancement, for non-married pregnant women and non-married expectant fathers.

(IV) Pre-marital education and marriage skills training for engaged couples and for couples or individuals interested in marriage.

(V) Marriage enhancement and marriage skills training programs for married couples.

(VI) Divorce reduction programs that teach relationship skills.

(VII) Marriage mentoring programs which use married couples as role models and mentors in at-risk communities.

(VIII) Programs to reduce the disincentives to marriage in means-tested aid programs, if offered in conjunction with any activity described in this subparagraph.

*Id.* § 603(a)(2)(A)(iii).

From this list of acceptable initiatives, one can see that none of these directly "pay" people to marry. Subsection (VIII) comes the closest, but it's hard to disagree, as a general matter, with removing *disincentives* to marry. I do not find the items on the list troublesome if considered in isolation; if marriage is a social policy we want to foster, many of the "activities" set forth might be expected to help people understand the difficulties of marriage and to provide skills to help them succeed. But this approach leaves unanswered deeper questions about the wisdom and justice of substituting "marriage promotion" for more comprehensive treatment of social and economic problems. See generally DANIEL T. LICHTER, PROGRESSIVE POLICY INST., MARRIAGE AS PUBLIC POLICY (2001), available at [http://ppionline.org/documents/marriage\\_lichter.pdf](http://ppionline.org/documents/marriage_lichter.pdf).

In 2002, the U.S. Department of Health and Human Services issued a report discussing the states' efforts in "marriage promotion," finding that they had done relatively little. See KAREN N. GARDINER ET AL., UNITED STATES DEP'T OF HEALTH & HUMAN SERVS., STATE POLICIES TO PROMOTE MARRIAGE: FINAL REPORT § H (2002), available at <http://aspe.hhs.gov/hsp/marriage02f/report.htm>.

44. See Divorce Guide, *The 10 Most Common Causes of Divorce*, DIVORCEGUIDE.COM, <http://www.divorceguide.com/free-divorce-advice/marriage-and-separation-advice/the-10-most-common-causes-of-divorce.html> (last visited Mar. 24, 2009).

spouse to recover in tort for the loss of consortium resulting from physical injury to the other can provide both compensation for services rendered and, more typically today, payment for the society and sexual intimacy that serious injury to one spouse causes to the couple's relational interest.<sup>45</sup> Perhaps the compensation provides a balm that helps keep some otherwise sound marriages together.

Note, though, that there is no intrinsic reason that the term "relational interest" used in the tort context above must be limited to a formal, spousal relationship. Along similar lines, one might ask whether the right to file taxes jointly should be determined more by financial reality—in particular, sharing of economic expenses and living in the same household—than by the legal relation of marriage. Then there is the additional, and unavoidable, issue of whether tax policy that favors married couples can be justified by broader distributive principles.<sup>46</sup> If, for example, it turns out that allowing joint tax fil-

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45. The right to recover in tort may not seem a "government conferred benefit," and it is in fact quite different from the other prerogatives of marriage discussed in the text. But by creating either common law rules that restrict recovery to married couples in loss of consortium cases or statutory restrictions on the class of eligible plaintiffs under wrongful death law, courts and legislatures do subsidize marriage over other intimate relationships. A few courts have begun to reject the limitation in loss of consortium cases, grounding the right to recovery on the factual, as opposed to legal, status of a couple's relationship. See, e.g., *Lozoya v. Sanchez*, 66 P.3d 948, 955-57 (N.M. 2003) (allowing recovery to woman for injury to her male partner of more than thirty years), *overruled in part on other grounds by*, *Heath v. LaMariana Apts.*, 180 P.3d 664 (N.M. 2008). Wrongful death laws are a higher hurdle, given the statutory language, but even here some progression in the case law has been evident. Compare *Langan v. St. Vincent's Hosp. of N.Y.*, 802 N.Y.S.2d 476, 477-80 (N.Y. App. Div. 2005) (surviving member of same-sex couple was not "spouse" under New York law despite the couple's Vermont civil union), with *Solomon v. District of Columbia*, 21 Fam. L. Rep. (BNA) 1316 (D.C. Super. Ct. 1995) (deciding that surviving member of same-sex couple could recover in a wrongful death action under law of intestacy). See generally John G. Culhane, *Even More Wrongful Death: Statutes Divorced from Reality*, 32 FORDHAM URB. L.J. 171 (2005) (discussing wrongful death statutes and how they affect same-sex couples).

46. By contrast, the tort case does not raise these same distributional issues, as the compensation from one private plaintiff to another represents an instance of corrective, not distributive, justice. See John G. Culhane, *Tort, Compensation, and Two Kinds of Justice*, 55 RUTGERS L. REV. 1027, 1063-91 (2003). Yet the question remains about the wisdom of restricting recovery to spouses. The argument for doing so has to do with the expectations of support that marriage encourages and to an extent enforces. On average, such expectations might be lower absent the commitment that marriage creates and then (in a host of legal and more subtle social ways) supports. Whether that difference creates a persuasive argument for a bright-line rule of no recovery for unmarried cohabitants (rather than a presumption in favor of married couples) is another matter. Some courts have begun to take the position that it does not. See, e.g., *Graves v. Estabrook*, 818 A.2d 1255, 1261-62 (N.H. 2003) (negligent infliction of emotional distress); *Dunphy v. Gregor*, 642 A.2d 372, 376 (N.J. 1994) (same); *Lozoya*, 66 P.3d at 955 (loss of consortium).

ings to the wealthy is a regressive policy, that should be decisive against allowing it in such cases, unless a powerful (and unlikely) case could be made that without this benefit a couple would not remain together *and* the cost of marriage dissolutions of this type outweighs the overall benefit. Similar arguments about means-testing and overall fairness could be applied to Social Security death benefits that spouses enjoy, exemption from estate and certain transfer taxes, and a host of other financial benefits.

Are there other ways that the state justifiably supports existing marriages? Immigration law is an obvious example. Under federal law, marriage to a citizen of the United States exempts an alien from the quota restrictions of the Immigration and Nationality Act.<sup>47</sup> Here is a case with perhaps the best claim to justification; spouses that cannot live together are likely to divorce. Moreover, restricting the right-to-sponsor law to legally married spouses might be justified from administrative and financial perspectives (too time-consuming and difficult to undertake a case-by-case analysis of whether a citizen should be able to sponsor someone with whom he or she is cohabitating). It must be mentioned, however, that from a formal equality point of view, the exclusion of same-sex couples from marriage is particularly hard to defend in this instance. Stopping short of marriage equality, federal legislation has been sponsored that would amend this state of affairs to extend the exemption to same-sex "spouses" under certain conditions.<sup>48</sup> Such an extension would be welcome, but would inevitably undercut the argument for restricting the exemption to formally married spouses: If same-sex couples need not be formally married to take advantage of it, why should this be required for opposite-sex couples?

On balance, then, a by-no-means comprehensive consideration of benefits and privileges that (either intentionally or not) help existing marriages survive in the face of adversity suggests that at least a few of these might be to an extent justified. In this regard, the effort to support existing marriages through privilege seems at least somewhat more defensible than policy designed to incentivize getting into marriage in the first place. Admittedly, there is some artificiality to this distinction—

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47. 8 U.S.C. § 1151(a)(1), (b)(2)(A)(i) (2006).

48. Uniting American Families Act of 2007, H.R. 2221, 110th Cong. (2007).

because any benefit in support of existing marriages will also encourage the creation of at least some marriages—but it is still helpful to disaggregate the various ways in which the privileging of marriage might be argued to sustain and strengthen the institution.

*A third way that marriage's prerogatives might be justified would be to the extent that they support dependent children.* Beginning by repeating the caveat that our topic here is the benefits and privileges of marriage, rather than any benefits thought to flow intrinsically from the status itself, I largely agree with the provocative statement made by Professor Nancy Polikoff: "When a law's purpose is to protect children, marriage is never an appropriate dividing line."<sup>49</sup> Indeed, tying benefits to marriage severs the government's direct connection to the child and thereby risks attenuating or even defeating the purpose of child protection. Two examples from an earlier era make the point, and indirectly suggest that rules based on formal legal status are in decline for good reason.

Until quite recently, laws greatly penalized illegitimacy. Louisiana's wrongful death law prevented mothers from recovering for the death of their illegitimate children, and visited an identical exclusion on such children in cases where their mothers had died.<sup>50</sup> In a pair of cases decided on the same day in 1968, the United States Supreme Court ruled out both of these laws, focusing on the facts of the relationship, rather than the by-then increasingly disfavored status of illegitimacy. In *Levy v. Louisiana*, the Court raised all of the right questions about the line the state had drawn:

The rights asserted here involve the intimate, familial relationship between a child and his own mother. When the child's claim of damage for loss of his mother is in issue, why . . . should the tortfeasors go free merely because the child is illegitimate? Why should the illegitimate child be denied rights merely because of his birth out of wedlock? [L]egitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These chil-

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49. NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE* 126 (2008).

50. To be precise, the statutes did not make these exclusions by literal terms, but they had been interpreted by the Louisiana Court of Appeal to restrict the term "child" to "legitimate child." See *Levy v. Louisiana*, 391 U.S. 68, 69 (1968).

dren, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would.<sup>51</sup>

In another case involving a state illegitimacy statute, the Supreme Court recognized the absurdity, from a child welfare standpoint, of a law that effectively presumed a surviving father of an illegitimate child unfit to continue caring for that child (no matter how long or under what circumstances the child had lived with the father), and thus removed such children from the father's home.<sup>52</sup> The case, decided in 1972, broke with centuries of law holding that children born outside of wedlock were not legally the father's children. For present purposes it is significant because it recognized, in effect, that deciding children's fates based on whether their parents are married can in some cases have a detrimental effect on those children. Put differently, marriage is not the right place to draw the line of parental fitness.

Indeed, cases in which the courts have continued to accord marriage privileged status cement the point that doing so can result in harm to children, albeit not always as a direct or intended result of the law. In *Califano v. Boles*, the Supreme Court narrowly rejected a challenge to a provision of the Social Security Act that denied a woman benefits from the death of her wage-earning ex-partner (not legal spouse), while granting benefits to the couple's child.<sup>53</sup> Although the Social Security Act marks an improvement from society's long-standing disdain for illegitimacy by recognizing the child's right to benefits, by tying spousal benefits to legal marriage the law indirectly but obviously has a negative impact on the child. The Court rejected this impact on the child as "incidental and, to a large degree, speculative."<sup>54</sup> But if the law had focused on the child's welfare more comprehensively, it might well have of-

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51. *Id.* at 71-72.

52. *Stanley v. Illinois*, 405 U.S. 645 (1972).

53. 443 U.S. 282 (1979).

54. *Id.* at 296. With relevance to the earlier discussion about the benefits directly afforded to spouses, the Court accepted a generic justification for differentiating between married and unmarried couples: "Congress could reasonably conclude that a woman who has never been married to the wage earner is far less likely to be dependent upon [him] at the time of his death." *Id.* at 289.

ferred greater compensation to the surviving woman who, after all, was going to continue raising, and supporting that child.

Even less likely to protect children is the military death benefit, which goes to surviving spouses, not to those who are actually raising the deceased military member's child(ren). In one prominently reported case, a military woman's spouse received the \$100,000 death benefit, while the woman's parents, who would be raising her son (from a previous relationship) received nothing.<sup>55</sup> This policy values marriage over children, at least in cases where the assumption that the surviving spouse is not the one who bears responsibility for raising the deceased service member's spouse.

Instructively, in the few instances in which the law recognizes reality rather than formal status, it better approaches a sensible result. A good example is the Family Medical Leave Act (FMLA), which allows time off (but not pay) for family members to care for each other in cases of illness, injury, or the parenting of infants. Of relevance here, the FMLA grants the right to care for sick children not only to "parents," but to anyone who stands *in loco parentis* to a child.<sup>56</sup> The regulations, in turn, define "*in loco parentis*" by reference to reality, granting the right to anyone who has "day-to-day responsibilities to care for and financially support a child."<sup>57</sup> The regulations then make explicit what the foregoing definition implies, stating that a "biological or legal relationship is not necessary."<sup>58</sup>

The point should by now be clear. With very few exceptions, it makes little sense to tie any benefit that is supposed to benefit a child to marriage.<sup>59</sup> Doing so substitutes efficiency

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55. Donna St. George, *The Forgotten Families: Grandparents Raising Slain Soldiers' Children are Denied a Government Benefit Intended to Sustain the Bereaved*, WASH. POST, Dec. 16, 2007, at A1.

56. 29 U.S.C. § 2611(12) (2008) ("[S]on or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child or a person standing in loco parentis . . .").

57. 29 C.F.R. § 825.122(c)(3) (2006).

58. *Id.*

59. One possible exception that may be worth further consideration is the presumption that a man whose wife bears a child is the father of that child. Often, the presumption is irrebuttable by the man who actually fathered the child (where that man is not the husband of the woman who bore the child). This scheme was upheld in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). A rebuttable presumption of paternity might be justified in such cases; if the goal is the best interest of the child, a good starting place for assessing that interest would be the stability often associated with an intact marriage (and family unit), especially when compared to the disruption that could emerge from allowing a third party (e.g., the potential biological father) to intrude on that unit. The irrebuttable presumption, however, is more difficult to jus-

for reality, and leaves out many that the law is presumably trying to serve. If the law wants to help children, it should do so directly, or at least without imposing marriage-related restrictions on the class of adults who can receive benefits designed to flow (at least in part) to children. The so-called marriage movement has gone seriously astray in encouraging marriage as a way to protect children, at least from a benefits perspective. The benefits piece, of course, is not the whole of their argument. It is also contended that marriage itself changes behavior in ways that are beneficial to the couple, their children, and the society. As mentioned earlier, these claims are contestable and, in any case, have not been demonstrated to the extent that their proponents claim.

One final set of legal rules that might justify marriage are those that *protect the interests and expectations of both spouses upon dissolution of the marriage*. Here, I think legal rules make the best case for positioning the formal, legal commitment that marriage entails over other less formal arrangements. Often, marriage involves a decision to divide labor in a way that best accommodates couples' mutual skills, interests, and goals. Historically, of course, this division has been socially and, to an (ever-decreasing) extent, legally compelled: the husband worked outside of the home, while the wife maintained the household and raised the children, if any (and there usually were). This division still casts a long shadow over the collective view of marriage; although married women are now in the workforce in great numbers, they are likelier to work part-time and to bear primary responsibility for both child-rearing and household duties.<sup>60</sup> Yet substantial progress towards true equality is in evidence, as legislation and decisional law promoting gender equality<sup>61</sup> has fostered greater *social* equality, with increasing numbers of opposite-sex couples defining their roles more fluidly and creatively.

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tify, as one can easily imagine cases where the child would be better served (and here I'm not referring to financial advantages) by recognizing the "outside" parent. Given the potential for family disruption that inspires the presumption, perhaps a workable compromise would be to require some kind of initial showing by the putative biological father before allowing proceedings to continue.

60. See Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral versus Gender-Equal*, 16 AM. U. J. GENDER SOC. POL'Y & L. 459, 475 (2008).

61. See generally *id.* (discussing advances and limitations of the Family Medical Leave Act); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004) (finding that stereotyping of women as caregivers can be evidence of gender discrimination).

To the extent that marriage is (or is becoming) a freely chosen partnership, one expectation of that union is that it will endure, or that, if it fails, the law will nonetheless protect the assumption of permanence. Accordingly, spouses can forego their own economic gain and other immediate goals in favor of the “greater good” of the marital unit. Historically, community property states best reflected these expectations by the rule that most property acquired by either spouse during the course of the marriage belongs to the couple as a “community,” and is therefore properly the subject of equitable division upon dissolution.<sup>62</sup> Even in the majority of states, the consequences of the “title rule,” under which each spouse owns whatever property is titled to him or her, have been greatly mitigated by the overwhelming change in legislative and case law requiring equitable distribution of marital property (here defined to include most of the property acquired by either spouse during the course of the marriage).<sup>63</sup> In *Ferguson v. Ferguson*, the Mississippi Supreme Court caused that state to become the last of the title states to move to an equitable distribution approach, noting that the title division approach systematically undervalues the contributions of the non-wage earning spouse.<sup>64</sup>

The logic of expectation, moreover, does not compel restricting the division to marital assets. Couples married for a long time often come to view all property, however and whenever acquired, as “theirs.” Recognition of this common reality has led the American Law Institute (ALI) to recommend that even separate property held by each spouse at the time of marriage be progressively “recharacterized” as marital property in marriages of long duration.<sup>65</sup> A few states have gone further, and simply toss all property, “belonging to either [spouse] or both however and whenever acquired,” into a great “hotchpot,” where it becomes fair game for equitable distribution.<sup>66</sup>

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62. Even among community property states, however, one finds a range of approaches to the issue of division of property at dissolution. In a few states, such as California, all community property is subject to “an invariable rule of equal division.” A.L.I., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* § 4.02 cmt. a (2002) [hereinafter “ALI PRINCIPLES”]. Other community property states use a more flexible equitable distribution method. *Id.*

63. *See id.*

64. 639 So. 2d 921, 926 (Miss. 1994) (en banc).

65. ALI PRINCIPLES, *supra* note 62, § 4.12.

66. For a recent listing of hotchpot states, see Elijah L. Milne, *Recharacterizing Separate Property at Divorce*, 84 U. DET. MERCY L. REV. 307, 312 n.44 (2007).

Support payments, although now out of fashion with courts looking to use property division to decisively end the couples' need for contact (and eager to avoid having to deal with endless requests for enforcement, modification, and termination of such payments), are also structured with an eye towards protecting the spouses' expectations. New Jersey supplies a typically productive example here, allowing various, targeted forms of support designed to protect reasonable expectations that dissolution defeated. Specifically, one spouse who supported the other's education "anticipating participation in the fruits of the earning capacity generated by that education" can be reimbursed for doing so.<sup>67</sup> More difficult to quantify, but no less important, is so-called "rehabilitation alimony," designed to enable a spouse who has put a career on hold for the good of the marital unit. Such support "shall be awarded based upon a plan in which the payee shows the scope of rehabilitation, the steps to be taken, and the time frame, including a period of employment during which rehabilitation will occur . . . ."<sup>68</sup> The law also contemplates that such plans can be affected by unforeseen circumstances, and therefore permits modification.<sup>69</sup>

Of course, the default rules discussed above can be negated by prenuptial agreements, but perhaps the failure of these contracts to come into widespread use reflects an enduring view that marriages will survive and (one might even hope) a willingness to treat the other party equitably in the event of dissolution. Yet the law's acceptance of prenuptial agreements suggests the erosion of the *status* of marriage; if parties can contract around the default rules, why not simply allow the entire institution to be replaced by such mutual, *a la carte* understandings?

This undermining of status naturally leads into a discussion of the relationship between unmarried cohabitants, inviting consideration of the extent to which the dissolution of *these* relationships should trigger default legal protections. And here it becomes apparent that marriages and cohabitation agreements are, on average, different. With rare exceptions, marrying couples have an expectation of long-term commitment;

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67. N.J. STAT. ANN. § 2A:34-23(e) (West 2000).

68. *Id.* § 2A:34-23(d).

69. *See id.* § 2A:34-23(c).

cohabitating couples, by contrast, fall along a continuum ranging from the extremely short-term to monogamous relationships lasting many decades.

Deciding on protections to afford members of such couples after dissolution depends largely on one's view of how strongly the state should attempt to coerce parties into marrying. Certainly there is an argument that dissolution of marriage closes a cleaner, clearer circuit than the end of a non-marital relationship, and it seems to me defensible that the law offers correspondingly sturdier protections to those ending marriages. Until recently, that commitment to clarity combined with a strong societal disapproval of cohabitation without marriage, resulted in little protection for cohabitating couples.

Beginning in the 1970s, however, the law has signaled weakening of this sharp division. First came private ordering, with California's breakthrough in *Marvin v. Marvin*.<sup>70</sup> There, the court recognized the validity of express or implied private contracts, and endorsed a host of equitable remedies to protect the expectations of cohabitating parties upon dissolution.<sup>71</sup> Although this case had its judicial dissenters,<sup>72</sup> most of the momentum has been in the other direction—culminating, most recently, in the ALI's *Principles of the Law of Family Dissolution* ("*Principles*"), which devotes an entire chapter to suggested rules for first defining, and then allocating property between, domestic partners.<sup>73</sup> What are these rules, and are they wise?

Books, symposia, articles, and, probably, made-for-television movies have been devoted to analyzing, praising, and vilifying the ALI's approach.<sup>74</sup> For present purposes, I can restrict myself to a few points. First, the ALI calls upon the states to establish their own minimum time period during which a couple must cohabit in order to be considered "domestic partners" entitled to distribution of the partner-

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70. 557 P.2d 106, 110 (Cal. 1976).

71. *Id.*

72. For a notable contrary case, see *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979).

73. See ALI PRINCIPLES, *supra* note 62, §§ 6.01-.06 (2002).

74. For example, in 2001 a symposium on the ALI PRINCIPLES was held at Brigham Young University School of Law; the presentations were then published as more than a dozen articles under the collective title *Symposium on the ALI Principles of Family Dissolution*. 2001 BYU L. REV. 857, 857-1278. This volume alone contains substantial analysis, praise, and vilification of the ALI's approach. *Id.*

ship's assets upon dissolution.<sup>75</sup> But the *Principles* are also an invitation to judicial participation, as they provide that a person seeking to stake a claim to property can establish the domestic partnership even without meeting a time requirement by showing that the couple "share[d] a life together."<sup>76</sup> This determination, in turn, is made by looking at all circumstances, many of the most common of which are set forth in a long list. On that list are the very sorts of facts that suggest the interdependency that marriage assumes: intermingling of finances; "the extent to which [the] relationship fostered the parties' economic interdependence" (or one's party's dependence on the other); the assumption of specific roles and tasks within the relationship; the extent to which the relationship made changes in the parties' lives; the assumption of responsibility for children; and the usually undervalued but often vital "emotional or physical intimacy of the parties' relationship."<sup>77</sup> Once a couple is established as having been in a domestic partnership, the ALI's equitable distribution principles, otherwise applicable to dissolving marriages, operate almost identically.<sup>78</sup>

The ALI's approach is balanced. On the one hand, it recognizes that many couples in long-term, yet unmarried, relationships in fact have expectations that make unfair a blanket rule that prohibits property division upon dissolution. On the other, for couples in states that do not formally recognize domestic partnership status, it ends up supporting the state's policy in favor of marriage because a party wishing to invoke the dissolution principles' protection risks uncertainty. It seems unclear whether this approach ends up supporting marriage. The ALI argues that it does because "to the extent that some individuals avoid marriage in order to avoid responsibilities to a partner, this [approach] reduces the incentive to avoid marriage because it diminishes the effectiveness of that strategy."<sup>79</sup> That is one side of the argument, from a party who wishes to avoid the responsibilities; the other side,

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75. ALI PRINCIPLES, *supra* note 62, § 6.03(3) cmt. d.

76. *Id.* § 6.03(6), (7).

77. *Id.* § 6.03(7).

78. The qualification in the text is needed because of the ALI's decision not to subject property acquired before the domestic partnership began to the recharacterization it supports for long-term marriages. *Id.* § 6.04(3).

79. *Id.* § 6.02 cmt. b.

from the person who wishes to gain the responsibilities, is that marriage is less “necessary” in order to do so. How these balance out is nothing more than a guess.

In sum, it seems that the law (here defined to include something like the ALI approach) is moving towards a reasonable position on dissolution of relationships: marriages continue in a favored position that recognizes the interdependency and duration that most married couples want, but other long-term, committed relationships are protected to the extent that their lived reality mirrors that of married couples.

Whatever advantages are claimed to flow from the “essence” of a vital marriage, such that they justify state support, must also be considered in light of the positive and negative signals they send about marriage and other “states” by and in which people are related. To those signals this Article now turns.

#### IV. FOR BETTER AND/OR WORSE: MARRIAGE AND ITS SIGNALS

The substantial economic advantage that government confers on married couples is itself a powerful societal signal that the institution is preferred over other adult relationships, including cohabitation (whether chosen or forced, as in the case of same-sex couples), single status, more transient affiliations, and multiple-partner relationships. Even if these government-conferred advantages were substantially or completely withdrawn, though, we would expect married couples to benefit from continued societal privilege. At least for the foreseeable future, mainstream expectations would likely continue to favor marriage over its alternatives,<sup>80</sup> and (usually) religious celebrations of permanent commitment would continue to create the kind of public affirmation that keeps pressure on couples to conform. In other words, with or without government’s help, married couples will continue to receive powerful positive signals, while those in an unmarried state hear a

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80. Census data indicate that marriage is still a desirable state, although somewhat less so by African-Americans than generally: By age 70-79, 96.8% of all men and 95.1% of all women have been married at least once, while the corresponding numbers among blacks are 92.5% (men) and 91.6% (women). United States Census Bureau, Detailed Tables—Number, Timing and Duration of Marriages and Divorces: 2004, [http://www.census.gov/population/www/socdemo/marr-div/2004detailed\\_tables.html](http://www.census.gov/population/www/socdemo/marr-div/2004detailed_tables.html) (last visited Mar. 25, 2009).

counter-message. This observation situates any discussion about government's additional messaging through the privileging of marriage because once the signaling benefit entailed by official recognition is seen as *incremental*—though important<sup>81</sup>—the intertwined costs of benefits themselves and of the negative signals sent to those not married are considered against a contrasting landscape that is less vivid.

To the extent that the state presents marriage as highly and justly privileged, then at least some of those incapable of marrying may find their lives undervalued or even stigmatized. Here, it will be important to zero in on specific groups to whom such negative signals are sent. Most clearly affected are those legally excluded from marriage: gay and lesbian couples who have found a suitable partner and wish to make the same kind of commitment (to say nothing of receiving the same benefits) as their opposite-sex counterparts. The negative signals in this context are clear, unmistakable, and devastating for many: studies show that anti-gay policies and rhetoric, including laws and arguments related to the denial of basic marriage equality, have serious mental health consequences for those in the LGBT community.<sup>82</sup> These costs must be considered in any responsible discussion of marriage policy, but they are often ignored by those who focus solely on the entirely speculative (and unlikely) costs that marriage equality would visit on the institution. As Jonathan Rauch has memorably stated: "A one-eyed utilitarian is a blind utilitarian."<sup>83</sup>

Although the negative signal sent to same-sex couples is the loudest,<sup>84</sup> others hear it as well. Once the discussion moves beyond legal exclusion, though, the signals become more diffuse and correspondingly hard to read. Some cohabitating

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81. By recognizing and supporting marriage in so many ways, government also performs an educational function that the discussion in the text should not be read to minimize.

82. See Herdt & Kertzner, *supra* note 21, at 35-37, 40-41.

83. JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* 69 (2004).

84. One might also argue, with some force, that those wishing to enter into legally sanctioned marriages with multiple partners also face legal exclusion. It is probably insufficient to respond by noting that these individuals at least have the right to marry *someone* because their complaint is that they cannot marry in the way that their religion (in some cases) promotes. This request for recognition is complex, and not substantially addressed in this Article. It is worth noting, though, that once the law moves beyond two people, accommodating the request for multiple marriages would involve substantial and difficult issues about benefits and obligations.

couples truly do not care about the “signals” of marriage; others likely do, but have practical or philosophical objections to marriage (including, for some, an unwillingness to marry as long as marriage equality is denied same-sex couples) that overwhelm their concern about “official messaging.” As for single people, again the cases will vary along a wide spectrum. For many senior citizens who are widowed, their single status may create practical problems but not feelings of inferiority, given the widespread social acceptance of those married and left widowed. For younger singles once married, the message is less clear and may be especially sensitive to personal predilection, confidence, political views, and a host of other hard-to-quantify (or even to name) variables. Those unable to find a suitable partner for marriage may feel themselves somehow “apart,” as well.

Cases of legal exclusion aside, why should we care about these negative signals? Here’s one reason: “[L]ike race and coverture, marital status functions to elevate some individuals and to subordinate others, based on their membership in groups that they did not choose to join.”<sup>85</sup> The race analogy, while potentially incendiary, powerfully makes the point. To the extent that *government* comprehensively endorsed the view that African-Americans (and others) were unequal to the white majority, the societal effects on everyone were real and profound. For the subordinated classes, they were also devastating. Marital status, especially in its fluid and contested state today, is less likely to be as fully subordinating to those outside of its warm embrace—but that does not mean the effects of governmental signaling are illusory. They are real. They should stand as backdrop to any consideration of benefits and of marriage equality, and should counsel respect in discussions of the lives of those who remain outside of marriage, whether by law, circumstance, or choice.

The question remains how policy-makers can balance support for marriage against the negative signals sent by privilege and exclusion. Here, I offer one example of a balanced approach that supports marriage while not undervaluing other lives of committed dedication. Personal injury cases not infrequently are accompanied by claims seeking damage for the

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85. Anita Bernstein, *Introduction: Questioning Marriage*, in MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS 12, 12-13 (Anita Bernstein ed., 2006).

loss of consortium. For reasons mostly grounded in history, such claims still have an element of the “service” lost to a spouse when the other spouse suffers personal injury, but today the tort typically centers on the loss of sexual intimacy and companionship (often called “society”).<sup>86</sup> As the above description of the tort suggests, however, claims have been available only to those in a legal marriage. Other relationships, even if evincing similar commitment and able to show similar harm (if allowed to show it), have almost universally been rejected.<sup>87</sup>

One reason for such rejection is pure expedience: limiting the tort to legal marriages creates a bright line that reduces the burden of fact-finding to courts and juries.<sup>88</sup> Bright lines, though, need at least some justification other than ease of administration because we might also draw a bright line at couples married longer than, say, five years. So why draw the line at marriage? This leads to the second reason for the exclusion of non-married couples: the state’s asserted interest in supporting and promoting the institution of marriage. But is this interest sufficient to support blanket exclusion of unmarried cohabitants, whether of the same or the opposite sex? Courts have little spoken of the negative signal thereby sent to people in such relationships, but such a signal is the natural obverse side of the promotion of marriage that courts trumpet.

Recently, New Mexico became the first state to achieve a result that reinforces the state’s support of marriage while muting the negative signal, by recognizing that those in other committed relationships should also be able to prevail, upon a showing of real injury. Thus, the marriage-promotion goal is served in a limited way that accommodates the needs of justice: Spouses have automatic standing to sue (but can only recover on a showing of actual injury). But others are not excluded. In *Lozoya v. Sanchez*, the New Mexico Supreme Court recognized that injury is not based on status, but on the

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86. For a lengthier discussion of the history, justifications, and criticism of this tort, see generally John G. Culhane, *A Clanging Silence: Same-Sex Couples and Tort Law*, 89 KY. L.J. 911 (2000-2001).

87. See *id.* at 949-53; see also Culhane, *supra* note 45, at 193-95.

88. *Lozoya v. Sanchez*, 66 P.3d 948, 954-55 (N.M. 2003) (discussing but rejecting “bright line” argument), *overruled in part on other grounds*, *Heath v. LaMariana Apts.*, 180 P.3d 664 (N.M. 2008).

strength of the relationship,<sup>89</sup> thereby underscoring the importance of the antisubordination imperative. Accordingly, unmarried consortium plaintiffs can recover if in sufficiently committed relationships. Among the signposts of such relationships are cohabitation, duration, and sharing of expenses and a “life together” (echoing the ALI *Principles* discussed earlier).<sup>90</sup>

The court’s approach is open to criticism for requiring the relationship to “mimic” marriage; indeed, the couple in the case had been together for decades, and did marry after the incident giving rise to the litigation.<sup>91</sup> But I think the judicial compromise reached in *Lozoya* is at least defensible. If consortium claims are to be grounded in lost intimacy (with strong implications, if not the requirement, of sexual relations), then some method of ascertaining strength of the couple’s bond is needed. The “simulacrum of marriage” approach is at least a movement away from status, and therefore in the right direction.

## V. CONCLUSION

The clamor over marriage equality presents both challenge and opportunity. Focusing on this vital but factually discrete issue of equality often occludes observation of many important questions about the wisdom and justice of marriage’s many benefits, privileges, and burdens. Yet the debate has also begun to shift attention to these hard issues: Which of marriages many benefits are justified, and to what extent? What are the costs of marriage to those excluded from it, either legally or by choice or circumstance? How might we tie benefits and burdens to facts rather than to status? And how do we celebrate and encourage commitment in a way that respects, values, and supports every citizen?

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89. *Id.* at 956-57.

90. *Id.* at 957.

91. *Id.* at 952.