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# Marriage, Cohabitation, and Same-Sex Marriage

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In this article, I explore some important limits to freedom imposed by family law and contribute to the recent debate about cohabitation and marriage. In particular, I consider a very heated topic at present internationally: Does the extension of marriage rights to homosexual cohabitants have any merit? To answer this question, I inquire into the relationship between marriage and cohabitation. Marriage represents a standard contract into which heterosexuals may opt, although increasingly they avoid doing so; homosexual couples, along with several other groups, such as nonintimate heterosexual cohabitants, are at present commonly prohibited from opting in. Following an examination of marriage as a special case of intimate cohabitation, I conclude at least in a qualified way that excluding homosexuals may be functional rather than discriminatory. I also consider the impact of changing marital law on heterosexuals. As Allen (2006) has pointed out, the nature of marriage is not accidental, but provides certain safeguards for the married, and the alteration of marital law to include new groups is likely to affect established groups. So the main question is whether marriage can be of practical use to same-sex couples. In the course of answering this question, I comment on the current international fashion of increasing the obligations of unmarried intimate cohabitants, which seems to be developing in parallel with the promotion of same-sex marriage and which also has implications for personal autonomy.

Some background information on international trends is helpful at the outset. Most U.S. states, including Connecticut and California, have attempted to declare

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unconstitutional the ban on homosexual marriage, which is reinforced federally by the Protection of Marriage Act. President George W. Bush has also suggested an amendment to the U.S. Constitution that would stipulate that marriage is a social status reserved for heterosexuals. Such an amendment would not imply, however, that weaker, domestic-partnership laws would be repealed. In Europe, most European Union (EU) states have or are contemplating laws that treat domestic partners more or less the same as married persons in key areas such as property rights and pensions. Some countries, notably the Netherlands, claim that such legal status constitutes a form of gay marriage.<sup>1</sup> Canada, however, not the EU, arguably has the distinction of being first to introduce same-sex marriage, following *Halpern v. Toronto City* (Ontario Appeal Court 276 [2003]), a successful challenge of the restriction of marriage to heterosexuals.<sup>2</sup> An issue that often surfaces in considering the international movement toward widening marriage is whether the restriction of within-marriage or postdissolution rights and obligations to one rigid form of marriage contract is oppressive or purposeful.<sup>3</sup> Because extension of marriage-like structures to homosexuals tends to go hand in hand with creation of marriage-like obligations between heterosexual unmarried intimate cohabitants, it is best to consider wider issues concerning cohabitation in thinking about gay marriage. Pressures to change marriage may also have arisen because traditional forms no longer fit well. If so, reformed, obligated cohabitation may become a new, dominant form of marriage. This possibility is consistent with the aims of the U.S. marriage-covenant movement, which seeks to preserve traditional hard-to-dissolve marriage for those who want it.

In asking whether any useful purpose *might* be served by extending marriage rights to homosexuals or by increasing the obligations between cohabitants more generally defined, we are contemplating a movement in the boundary of marriage law. This boundary has moved on previous occasions in many jurisdictions, notably in relation to consanguinity and the remarriage of divorcees. The boundary also clearly differs between jurisdictions: consider the difficulty internationally of recognizing polygamous marriages formed in Islamic jurisdictions.<sup>4</sup> In considering whether a boundary movement, in particular one that favors homosexuals, ought to be made,

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1. A domestic-partnership law passed by the U.K. Parliament in 2005 has been widely interpreted as establishing gay marriage, particularly in press coverage of high-profile cases such as Sir Elton John's. This interpretation is inaccurate because infidelity is not recognized as grounds for dissolution, and parental rights are not extended to nonnatural parents (and Sir Elton's partner is not the equivalent of Lady John). Domestic-partnership laws generally show such differences across the various jurisdictions.

2. The case refers to marriages contracted in 2001, which is taken by some to be the starting date of Canadian same-sex marriage; see Allen 2006. The Canadian Civil Marriage Act (2005) unequivocally established same-sex marriage.

3. See Jones 2006 for a spirited argument in favor of much greater flexibility in the form of the marriage contract.

4. The boundaries of all areas of law move over time. Examples include the movement of tort law regarding professional negligence or psychiatric injury of onlookers at accidents and the history of consideration and hard bargains in contract law.

we must consider the purpose of marriage more generally and the nature of unmarried intimate cohabitation.

Here, I briefly examine first the current legal status of marriage, compared with unmarried cohabitation, using examples from common-law jurisdictions. I then pay considerable attention to what I call the “life-profile” theory of marriage (Cohen 1987, 2002), which suggests that traditional marriage protects economically vulnerable spouses, in particular childbearing women, from a form of exploitation. Does homosexual cohabitation require similar protection? Does such cohabitation somehow create dependency? More generally, what, if anything, is wrong with nonobligated cohabitation?

## The Contrasting Legal Position of Cohabitants and Spouses

Homosexual cohabitation is legally a special case of heterosexual cohabitation or even of nonintimate cohabitation. Whereas the family court, which has a degree of discretion in arranging property matters, traditionally governs the property rights and marital obligations of married couples, contract principles usually govern the property rights of intimate and nonintimate cohabitants. In the event of a marriage dissolution or a dispute concerning support obligations within the marriage, for example, a family court may exercise discretion in reallocating assets or in interpreting traditional rules governing marital obligations.<sup>5</sup> This status-driven, discretionary exercise of court powers is typically lacking in the governance of cohabitation relationships. Most common-law jurisdictions have a “hard case” decision, such as California’s *Marvin v. Marvin* (122 Cal. Rptr. 555 [App. 1981]), ruling that what happens to cohabitants depends crucially on what they have agreed.<sup>6</sup>

In the past, “common-law marriage” could be established by long cohabitation that creates a presumption that the parties had married. This possibility was abolished for the most part from the eighteenth century onward across the common-law jurisdictions, with only a few exceptions remaining (Montana, for example). This abolition was intended to encourage more clearly defined marriage, which was often considered at the time to be in the interests of women. The dominant decline of common-law marriage contributed to the legal separation of cohabitation and marriage.

Canada, Australia, and New Zealand have eroded the traditional position by

5. There is probably little left of the within-marriage support obligation, which has largely been replaced by mutual support obligations since the late twentieth century, but the power to reallocate assets on divorce regardless of technical ownership is very real and most noticeable in “equitable distribution” jurisdictions such as New York and Virginia in the United States, and for that matter in England. Even in “community property” states—for example, California—a rebuttable presumption of equal division of *marital* assets is just that, so the court retains ultimate discretion.

6. Cohabiting parties upon separation have the obligations toward each other upon which they previously agreed. See also *Marone v. Marone* (429 N.Y.S. 2d 592 [1980]), requiring express oral or written agreements, and *Posik v. Posik* (695 So.2d 759 [Fla. 1997]), applying *Marvin* to same-sex couples. A more recent case with *Marvin* characteristics and additional issues concerning business ownership is *Maglica v. Maglica* (78 Cal. Repr. 2d 101 [App. 1998]).

allowing some divorcelike settling up following cohabitant break up, and there is currently renewed interest in developing such an approach in the United States (see Ellman 2001, discussing proposals by the American Law Institute [ALI]) and the United Kingdom (Law Commission 2006). Both of the latter two countries seem to be contemplating the introduction of a form of “marriage lite” for currently unmarried intimate cohabitants. Such systems have existed for some time in continental European countries, usually as an opt-in for cohabitants. The ALI and the English Law Commission are considering the introduction of default obligations on separation from which parties would need to opt out, a status view of rights that contrasts with the current contractual position of cohabitants. The key feature of the extension would introduce the practices of a divorce court in settling up over property, rather than allowing property rights to stand where they have arisen by work, inheritance, purchase, resulting and implicit trusts, or proprietary estoppel.<sup>7</sup> The pressure for marriage-like obligations for heterosexual cohabitants in England explicitly developed during enactment of the civil-partnership law for homosexuals: questions were raised in Parliament concerning the possibility of “doing something” to protect economically weaker heterosexual cohabitants.

The ALI’s *Principles of the Law of Family Dissolution* (2001), which would effectively treat intimate cohabitation as a form of marriage, does not apply to homosexual cohabitants. Section 5, on former spouses, and section 6, on cohabitants, emphasize several status-linked ideas. Cohabitation is to be assessed according to the extent to which it approximates marriage; ancillary relief follows a formulaic approach, and there is a strong presumption of equal property division (described by Ellman [2000], the chief reporter, as an irrebuttable presumption in most cases). The ALI is clearly focusing on the creation of a form of “marriage lite” for heterosexuals, a return to court-governed common-law marriage, but without extension to same-sex couples and subject to opting out via cohabitation agreements.

In the United Kingdom, recent proposals to allow family courts to divide intimate cohabitants’ property on breakup of the relationship would apply to both heterosexual and homosexual couples (Law Commission 2006). The scheme also admits the possibility of informed opting out by means of a cohabitation agreement. Opting out would return the parties to a *Marvin*-like contracting status (the English hard case is *Burns*),<sup>8</sup> albeit one that the courts might still review in some circumstances. In the United Kingdom, as in the United States, the traditional emphasis on private-property rights has affected all cohabitants regardless of sexual preferences.

Cohabitants’ legal position has already been altered in recent years by changes in

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7. Resulting trusts preserve the money or money’s worth put into a joint property; implicit trusts may be discerned from things said and done, again creating property rights for the partner less obviously in ownership; and proprietary estoppel is a principle under which a court will not allow renegeing on promises having characteristics similar to those of contracts.

8. See *Burns v. Burns* ([1984] Ch.317; [1984] F.L.R. 216 C.A), in which an unmarried mother was not entitled to a share of her cohabitant’s property in the absence of agreements to the contrary.

the rules of organizations such as pension schemes and housing associations and by the civil and domestic-partnership laws introduced for “those who cannot marry,” mostly gays, in many jurisdictions in the United States and elsewhere. The new rules typically allow cohabitants, including same-sex couples, to capture some of the advantages flowing from pension schemes and inheritance laws. The recent changes support some private ordering, but they do not apply divorce court rules to dissolution, and they typically do not include cohabitants among protected persons under rules of inheritance.<sup>9</sup>

Note that heterosexuals are not forced to cohabit: if they do not wish to remain single, they simply choose a cohabitation status. Libertarian arguments have been advanced in favor of protecting the freedom to avoid marriage commitments (Dnes and Rowthorn 2002). These arguments maintain that people do not just “end up places,” but make constrained choices that reflect personal responsibility.<sup>10</sup> Homosexuals, in contrast, can either cohabit or live singly, but they cannot marry, although some have achieved an impressive degree of private ordering of living arrangements and dissolution obligations by copying contract structures from business practices.<sup>11</sup> If heterosexual and homosexual intimate cohabitants really face the same issues, a case might be made for extending the possibility of marriage to homosexuals, at least so that they can freely choose to cohabit or marry. Let us consider, then, the “marriage fit” for homosexuals: Is marriage likely to be of use to them?

### **Life Profiles and the Function of Marriage: “She Gave Him Her Best Years”**

The purpose of marriage, as a form of heavily obligated cohabitation, may well be to protect the economically weaker cohabitant from a form of exploitation that would reflect opportunistic behavior emanating from an asymmetry in the life cycle of men compared with women. This theory of marriage is associated with Cohen (1987, 2002), who has made an influential argument that, to avoid encouraging opportunistic divorce, the equivalent of contract (expectations) damages should be awarded to the fault-free party in a divorce. The theory regards the defining aspects of marriage as the rules governing divorce and postdissolution obligations.<sup>12</sup>

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9. The long-term partner of the late actor Nigel Hawthorne (*The Madness of King George; Yes Minister*) complained recently on BBC Radio that he not only had to cope with grief when the actor died, but also found difficulties in remaining housed owing to his tenuous position under inheritance laws.

10. An alternative view is that technical change, particularly relating to contraception, propelled women into accepting unmarried cohabitation as they competed for male companionship and support (Akerlof, Yellen, and Katz 1996).

11. Some homosexuals have apparently been forming partnerships under company law as a method of regulating the asset side of their relationships. This arrangement may be expensive compared with locking into a standard contract, such as marriage.

12. In modern family law, the enforcement of obligations *within* marriage (provision of support, for example) is becoming increasingly less important. Suits for spousal support are rarely brought.

Cohen is concerned that modern no-fault divorce gives poor support to women leaving or forced to leave traditional marriages. This concern is supported empirically by Allen's (1998) demonstration that the introduction of no-fault divorce, far from simply releasing a one-time bottleneck of unhappy spouses, encouraged divorce, thereby adversely affecting the interests of traditional wives.<sup>13</sup> Cohen's approach can also be applied in cases of less-traditional forms of marriage, provided a similar asymmetry exists. His argument is based on a life-profile theory of traditional marriage, characterized by an asymmetry in the timing of investments made by the man and the woman as he specializes in the labor market and she specializes in homemaking.

According to the life-profile theory, the woman traditionally invests in bearing and caring for children and in homemaking early in marriage and expects to remain with her husband, enjoying the family income and home over the long term. The husband, relatively free of domestic responsibilities, can build a career that will yield higher earnings later in the life cycle. Cohen observes that men remarry in middle age more readily than women and may be tempted to abandon older spouses without sharing the long-term returns of the marriage: in this regard, the life profiles show an asymmetry between the sexes.<sup>14</sup> In fact, the wife's early investments have seriously reduced her ability to form a new relationship: her childbearing years may be over, but she may still be encumbered by child-care responsibilities. The life-profile theory broadly implies that marriage may be a mechanism for protecting the woman's early marriage-specific investments over time in the face of possible later mistreatment by the male. Given the uncertainties about the precise impact of domestic responsibilities or the growth of market-derived family earnings and wealth, both man and woman may wish to defer ultimately to court governance of their marriage by adopting the standardized marriage contract. He wishes to signal commitment to maintain a valuable level of support for her, and she is encouraged to make early marriage-specific investments. Unsurprisingly, changes in divorce law wherein fault is ignored and the meeting of needs or the formulaic division of marital assets in community-property jurisdictions is substituted for support promises have been associated with marriage (Mechoulan 2006) and childbearing at a later age (Brinig and Crafton 1994). The postponement probably reflects greater caution by women, who may now "insure" themselves by developing labor-market skills before marrying.

The extension of marriage to same-sex couples would be warranted, according to the life-profile theory, if we could find evidence of similar life-profile asymmetry in homosexual relationships. Does one cohabitant give up a great deal early in the cohabitation in reliance on a promise by the other? Similarly, new laws turning most intimate cohabitation into a new form of common-law marriage might be justified by

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13. Binner and Dnes (2001) similarly show that no-fault divorce laws have had a permanent effect on divorce rates and did not simply release a bottleneck.

14. Higher remarriage rates for divorced men appear as a statistical regularity in most international family-law studies.

showing that cohabitation undermines important relationship-specific investments by a vulnerable “spouse.” Conversely, a finding that homosexuals, compared with heterosexuals, have very different life-cycle needs, as suggested by Allen (2006), would imply caution in extending marriage to them. Again, if heterosexual cohabitants choose their relationship in the full knowledge of marriage availability, then caution is implied in turning cohabitation into marriage: the individuals within a couple may be evenly matched, economically independent types who do not need long-term support obligations and therefore currently avoid them. There is a danger of indiscriminately outlawing all forms of unmarried intimate cohabitation in response to calls to extend marriage-like obligations, especially with opt-out rules that might tend to “force in” the parties in at least some cases.

Caution may also be warranted because extending marriage would also extend the problems of current marital law to the target beneficiaries. Marriages based on asymmetric relationship-specific investment patterns have been especially subject to opportunism since the introduction of no-fault divorce, which does not tie alimony and property division to fault. In traditional marriage, it is now possible for the man to tire of an older wife and scoot off to a new relationship without having to maintain the lifestyle he promised to provide for his wife if courts do not require the payment of expectations-based settlements. Divorce settlements based on meeting an ex-wife’s needs, as in equitable-distribution states, may effectively make divorce cheap and lead to such opportunism by men (Dnes 1998). The same is true of states requiring equal division of community property because a half share may not yield the promised lifestyle. There is some empirical support for the worry that legal changes of this sort have increased divorce rates.<sup>15</sup> Modern settlements may also make divorce too cheap from a woman’s perspective: for example, the wife may tire of the marriage and know that in a moderate-asset setting, a meeting of her “needs” will entail her retention of all of the assets, particularly as a parent with custody of minor children. The growing failure of divorce law to honor implied support promises or to recognize fault may imply that unmarried couples of whatever kind can protect themselves better by using private cohabitation agreements than by marrying. Ideally, we would not want a disaffected cohabitant to be able to move to a new relationship without first having compensated the losses of the abandoned cohabitant, and it is doubtful that current marital law requires this compensation of divorcing spouses.

Current marital law is not necessarily a great thing. The legal regime affecting settlement allows marriages to end even when they can be reorganized with clear benefit to both parties, so that—in light of the Coase theorem (1960)—one might have expected bargaining to take care of the problems. This inefficiency occurs if

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15. The modern trend to introduce reliance (opportunity cost) or restitution (returning the value of domestic contributions) will also undercompensate, as I have explained previously (Dnes 1998). Think of the low opportunity cost of a waitress who marries a millionaire, or, in other words, the low market value of hosting and domestic management compared with a promised wealthy lifestyle.

under the legal rules one party holds enough of the benefits of the marriage to put that amount beyond bargaining, which otherwise would focus on factors such as transferring beneficial use of assets or altering the domestic division of labor. Such indivisibilities explain why parties may fail to bargain in the shadow of the divorce court to rearrange individual benefits and prevent divorce from occurring when the marriage produces a positive overall benefit (Zelder 1993; Brinig and Allen 2000). The disruption of stable marriages by changes in divorce law is consistent with empirical studies that find a significant, permanent shift in divorce rates after the introduction of no-fault divorce laws (Binner and Dnes 2001).<sup>16</sup>

Opportunistic divorce cannot happen in a (contract) regime based on expectations damages and fault-based divorce, with fault interpreted as breach of contract. In such a regime, the party wishing to leave would have to compensate the other for lost standard of living. The parties may agree to divorce because the change will increase one person's welfare and at least maintain the other's welfare. Alternatively, one party may force a divorce, but the law would require that party to maintain the value of promises made to the other party. Divorces would then be efficient, raising the parties' joint welfare. This reflection has caused several writers (e.g., Allen 1998; Parkman 2002) to argue in favor of what amounts to a specific-performance requirement in marriage—that is, a shift in regime wherein divorce is allowed, but only by consent. Such a regime may currently be easier to achieve through private ordering, in which agreements are modeled on business partnerships. Those individuals currently outside of marriage may not be in a bad position, provided they are aware of opportunities for private contracting over the division of assets. At any rate, in terms of the life-cycle model, extending the current marital law to homosexuals and others may merely extend the use of an imperfect system and does not necessarily improve on private ordering by cohabitants.

## **Cohabitation and the Life-Profile Model**

Homosexuals currently cannot marry in most jurisdictions and are obliged to cohabit or remain single. Let us consider cohabitation from the point of view of life cycles before drawing the argument together in relation to same-sex marriage: Is nonobligated cohabitation a bad thing outside of traditional patterns of relationship investments made by men and women? This discussion has two parts. First, what can we learn from cases where the relationship is heterosexual and less traditional? Second, what does this situation imply if the cohabitants are not of opposite sex?

The move away from marriage and toward cohabitation represents one of the most significant shifts in society since World War II. The trends between 1960 and

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16. Bargaining may sometimes be defeated by the presence of naturally occurring “indivisibilities” such as children (Zelder 1993). For the argument that divorce rates may not change following legal reform because of bargaining adjustments, see Peters 1986.

2000 are similar across North America and many European countries (Kiernan 2002). On average, first marriages fell from approximately 70 per 1,000 to 30 per 1,000 of the male population. The age at which first marriages occur has typically risen, with both men and women waiting an extra three years. Births outside of marriage have increased from 5 percent to 35 percent of all births. In addition, the proportion of cohabiting women between the ages of twenty and fifty has trebled.

A puzzling aspect of the substitution is that cohabitation is against the interests of many women. Marriage is potentially an effective mechanism for supporting long-term family investments, given even an approximate fit of the life-profile model. Without marriage, women can predict their own vulnerability to opportunistic behavior (some men may also be in such a position). It seems unlikely that changes in women's economic activity and in techniques of child rearing have reached a point at which the sexes no longer show any asymmetric interdependence over life profiles. Therefore, one would expect a man's willingness to offer marriage to remain an important signal for young women, producing a "separating equilibrium" that distinguishes committed from uncommitted life partners.<sup>17</sup>

Cohabitation has not generally been subjected to the same kind of settling-up regime as marriage in the event of dissolution. Until now, there has been no intervention by a family court with powers to reallocate assets between partners or to create maintenance obligations. Cohabiting parties must rely largely on natural hostages that emerge in the relationship to limit opportunism. Such hostages may be in the form of children with whom parents wish to maintain easy contact. Also, the search costs of finding a new partner or a social stigma attached to living alone may act to hold people together over a long period of time. In the case of marriage, the hostages will typically be bolstered by legal obligations between the former spouses to pay child and possibly spousal maintenance and to divide marital property.

Recent moves toward treating cohabitation as marriage have already led to legislation that imposes an obligation on all absent parents, regardless of marital status, to pay child support. Nonetheless, cohabitation would be rational if the parties wished to avoid, or perhaps in some jurisdictions simply to lessen, the legal obligations toward each other in the event of dissolution. If people think they are trying out partners (Lewis, Datta, and Sarre 1999), they are indeed avoiding marriage at that stage in their lives.

From a life-profile perspective, if evidence showed that women were making early investments in family life in the expectation of lifetime support (a traditional model) and that men were taking advantage of them by imposing cohabitation rather than marriage, a claim of exploitation would be warranted. Libertarians then might reasonably seek to outlaw cohabitation by effectively turning it into marriage or at least by removing the basis for doing harm, just as they support the prohibition of

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17. A women's equivalent: if divorce law did not support at-fault wives, women's signal would be their willingness to bear dissolution costs if they were uncommitted in the long run.

other frauds. Such reasoning might cause marriage-like obligations to be enforced when cohabitation approximated marriage (for example, after children were born within the union or after a period of time during which one party was economically dependent). The evidence, however, does not support the presence of exploitative cohabitation (Lewis, Datta, and Sarre 1999; Law Commission 2006); instead, it suggests shared expectations rather than one party's creation of an erroneous perception of common-law marriage. At best, one might claim that some people are misinformed about the likely outcome of cohabitation and about the life-profile problem. A basis might then exist for providing information and education, but hardly for the proposal emerging around the world to ban consensual nonobligated cohabitation.<sup>18</sup> A key issue here is that parties are free to avoid cohabitation: they can marry instead. Perhaps the terms of cohabitation have changed in favor of men following the reduction of pregnancy risk for unmarried women (Akerlof, Yellen, and Katz 1996), but, even so, this change does not imply that men are exploiting women.

### Same-Sex Cohabitation

Jurisdictions in Australia, New Zealand, the United Kingdom, the United States (in particular Hawaii and Vermont), and others outside the common-law world, such as Denmark and Belgium, have adopted domestic-partnership contracts with many of the obligations of marriage. California, Connecticut, and New York have recently attempted to legitimize marriage between homosexuals, and Canada has unequivocally extended marriage to gays. In the EU, much pressure to recognize same-sex unions has arisen from the incorporation into national law of Article 12 (the right to marry) and Article 8 (respect for privacy and family life) of the European Convention on Human Rights. Most domestic or civil partnerships, however, are not exact reflections of heterosexual marriage.<sup>19</sup>

The issues of property rights connected to same-sex unions are substantially the same as those in heterosexual unions, except that heterosexuals traditionally have had a choice about whether to marry, whereas homosexuals have had no choice but to cohabit. The growing debate over the extension of marriage or domestic partnerships casts some of the property-rights issues affecting traditional marriage partners into sharp relief. Does extending marriage rights to homosexuals serve any function?

The thrust of the life-profile theory of marriage is that the enforcement of long-term support promises protects specific investments by the economically vulnerable spouse, thereby creating confidence that the commitment is genuine. Marriage enables a man and a woman to plan their lives without turning a sexual asymmetry

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18. The argument for changing cohabitation obligations because people overestimate those obligations comes perilously close to an argument that the people should be different—one of the fallacies of nirvana economics identified by Demsetz (1969).

19. For example, adultery usually does not feature except in heterosexual marriage.

into a basis for eventual exploitation of the weaker party. On the basis of this reasoning, extending the status of marriage to homosexual partners makes sense only if the same life-profile problems affect heterosexuals. Given the same-sex nature of the relationships, such asymmetries are less likely to arise; indeed, at first sight, the life-profile approach does not appear to support same-sex marriage at all. Sunk investments are typically easier to quantify in the same-sex setting because most have to do with the investment of money or its worth in property as the two cohabitants continue to work outside the home. The Hawaiian approach of permitting domestic-partnership registration, really as a basis for defining pension and similar rights, and of allowing some settling upon dissolution can meet the functional needs of most homosexual cohabitants. The specific circumstances alluded to by those who seek to turn heterosexual cohabitation into a form of marriage—the development of family-based child-care responsibilities—are much less likely to be relevant for same-sex couples.

Consider the recent case of *Wayling v. Jones* ([1993] 69 P.&C.R. 179; [1995] 2 F.L.R. 1029). A homosexual cohabitant worked for many years in the expectation of eventually inheriting the hotel he helped to develop. In many ways, the case mirrors the canonical heterosexual life-profile case of the young woman who invests in a home and a family on the understanding of sharing the fruits of her husband's career development. There are differences, however, in that the expectation of inheritance in the cohabitants' case was dealt with adequately in *Wayling* by the application of normal proprietary estoppel principles—that is, by applying equity principles that would affect all persons, whether married or not—because the investment of time was linked directly to the growth of measurable accounts connected with the hotel. Contrast this measurability with the intangible nature of many outputs women produce in traditional heterosexual marriages: nurturing children, anchoring a family, providing biologically linked descendants. A more flexible approach, based on the family court, is needed for valuing the contributions women typically make in heterosexual marriages. Most same-sex unions seem to generate relatively equal partners or easily valued joint outputs from the association, in which case the family court is unlikely to be of value in settling up. The same low-value result from applying family law would apply to heterosexual couples if they are evenly matched in the labor market relative to domestic activities and if their assets can be appraised easily on market principles.

However, we cannot rule out for same-sex couples the life-profile asymmetry that creates concern in relation to heterosexual marriage simply because the specific investments typically made in same-sex unions are relatively quantifiable and register in standard laws (for example, concerning trusts). Some homosexual cohabitants, even if only a few, may create life-profile issues like those that affect heterosexuals. For example, two women might use artificial insemination, and one of them may then focus on providing domestic inputs to the marriage; or, in some jurisdictions, a male couple may be allowed to adopt children and follow a similar asymmetry. The family court would be a useful governance device for these couples in the event of separation. Legal options to marry or to cohabit would not force homosexuals into same-sex

marriage, but they would create opportunity for a person to insist on marriage to protect anticipated sunk investment if in that person's estimation such protection were desirable. Making marriage available resembles using a property rule to deal with conflicts over property rights (Ayres and Goldbart 2003). We do not know in advance whether a party will need the legal entitlement to make certain costs register with other parties, but in the right circumstances the entitlement will help to support an efficient arrangement between the parties.<sup>20</sup> A problem remains, however: extending marriage to gays may have a significant negative external effect on the majority heterosexual population. This spillover cannot be simply disregarded.

We cannot instantly dismiss homosexual marriage simply because very few homosexual cohabitants fit a pattern that suggests a need for marriage. That only a few people among such cohabitants suffer a form of exploitation does not make it desirable, from the perspective of individual welfare or ethics more generally defined, to ignore the problem. However, if homosexual marriage imposes major external costs on the wider population and if family-type sunk investments apply to only a few same-sex couples, we might well consider alternatives to marriage as mechanisms to protect vulnerable same-sex cohabitants. Such externalities do seem to exist, given the U.S. president's vociferous opposition to gay marriage. One solution, which protects the minority without offending the majority, is to extend the family court's governance to intimate cohabitants who may not legally marry, but whose lives have intertwined and created financial vulnerability along family lines. Such an extension occurs, for example, with civil partnership, where registration, restricted to people who cannot marry, allows the family court to govern a later separation.

If the majority population has come to tolerate homosexual unions, then extending marriage to homosexuals causes no harm. The couples are not forced to marry, but they may do so if they deem marital protection desirable or if they value the symbolism of marriage. One indicator of acceptability may be the growth of legally permissible adoption of children or the use of artificial insemination by same-sex couples, which seems to signal an implied consent to homosexuals to form families, which then logically require the family court's governance. Such easy acceptance does not seem to be typical at present, but alternatives to marriage can protect the long-term interests of most homosexual cohabitants.

## Cohabitants in General

Actions are now being taken around the world to increase the obligations of all intimate cohabitants, apparently in association with arguments for extending marriage rights to same-sex unions. My analysis so far suggests that creating a new form of

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20. A property rule refers to an approach such as enjoining a nuisance that effectively gives the victim a property right in stopping the nuisance, forcing the tortfeasor to obtain permission for the nuisance if it is to continue (probably by paying compensation for losses).

obligated intimate cohabitation in addition to traditional marriage brings forth a new legal form—“marriage lite”—that appears to be useful, especially if modern marriages are more egalitarian than traditional marriages were and therefore the more vulnerable spouse needs less protection.

There is, however, a worrying trend among those currently arguing for the extension of marriage-like rights to include obligated cohabitation. As noted earlier, the ALI (Ellman 2000) and the Law Commission in the United Kingdom (Law Commission 2006) want to establish systems from which people may opt out, with the court retaining the right to set aside any cohabitation contract that seems inappropriate given the facts at the time of separation. One encounters exceptionally feeble arguments against an opt-in system, which is in use in parts of continental Europe. Why would we expect people to opt into lighter marriage obligations if they are not opting into the existing form of marriage? Existing marriage may not provide the degree of protection desired, and therefore the availability of another opt-in system offers a further choice likely to make some people better off.<sup>21</sup>

Introducing an opt-in system of obligated cohabitation would add a useful layer of protection for spouses that might fit the modern world well and might even eventually become more popular than the current arrangements for marriage. It would be a move in the direction of extending the range of marital contracts, as advocated by Jones (2006). However, obligated cohabitation should be voluntary; an “opt-in” system makes it clear that the state is not even trying to “force in” anyone. Cohabitation contracts can then be viewed as prenuptial contracts are now: fine if entered into freely with sufficient information and if not manifestly inadequate, putting people on notice to negotiate honestly. The option of an additional type of heterosexual marriage or obligated cohabitation need not be limited to cohabitants with children, although they are most likely to benefit by adopting it.

## Conclusions

Marriage is useful in all cohabitation settings where asymmetry exists in life profiles, but only as an option for the parties themselves to choose. The range of cohabitation settings is extensive and includes same-sex cohabitation. Life-profile theory broadly implies sustaining a choice between informed nonobligated cohabitation and marriage. Adding a new form of obligated cohabitation, the “marriage lite” featured in much recent debate, may provide an alternative that helps spouses to feel confident about making long-term investments of time and effort in their relationships.

It may be possible to extend this logic into advocacy of homosexual marriage rights. However, life-profile asymmetries appear to be much less prevalent in homo-

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21. Such an opt-in system may also deflect some planned “marriage heavy” into “marriage lite” (“Isn’t this all we need, dearest?”) and encourage some single persons into “marriage lite” (“What a good idea—just what we need”).

sexual unions, which typically differ from a traditional husband-and-wife union in which there is a division of labor over time between domestic and labor-market activities. If homosexual marriage also creates a great deal of discomfort among the wider population, the small number of likely victims of opportunistic behavior among homosexual cohabitants suggests consideration of alternatives to marriage; that is, the problem may not be sufficiently substantial to warrant the wider harm that might result from resolving it through marriage. Perhaps homosexual couples who adopt children or who otherwise recognizably disadvantage one of the cohabitants can be advised to write enforceable dissolution agreements that will cover the weaker party's support in the event of dissolution. Absent such an agreement, divorce court jurisdiction can be extended to cohabitants who are not legally permitted to marry, as under civil-partnership laws. Much protection already exists where easily measured inputs into businesses are concerned, under standard laws of property and trusts in common-law jurisdictions.

Heterosexual and homosexual cohabitation do differ. It is much easier for women to discover that heterosexual marriage has required highly marriage-specific investments, principally related to years of dependency while giving birth, rearing children, and carrying the bulk of domestic responsibilities. This situation contrasts with the much more symmetric life profile of typical same-sex couples, a symmetry that provides a functional reason to worry less about protecting homosexuals with a form of marriage.

Finally, the mounting pressure for changing marriage laws around the world almost certainly shows that traditional marriage has become outdated. It is likely to become the preserve of the relatively few people who desire to signal an especially strong commitment. Thus, it should be kept clearly separated from the new forms of "marriage lite" that are likely to be established, one hopes as options, for the current population of nonobligated heterosexual intimate cohabitants.

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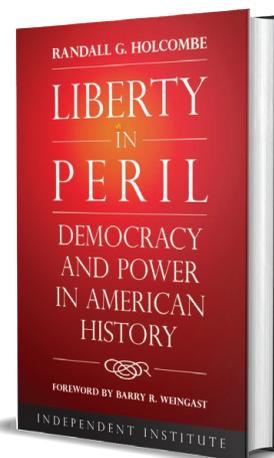
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