

The Flexible Family in Three Dimensions

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Introduction

One of the central questions facing American family law throughout the last quarter century, and continuing today, is how to respond to the “extraordinary growth in the rate of nonmarital cohabitation.”¹ Much of this cohabitation has involved partners of the opposite sex.² Some of it has involved partners of the same sex.³ Some of the couples have been young; some have been old; others have been at different points on the spectrum.⁴ In some instances, the partners live as a household of two. In other instances, the household comprises more than two: it may include children,⁵ parents, other relatives, non-relatives, or any combination. Moreover, cohabitation need not include partners in the conventional romantic sense. Two or more adults can, and often do, live together and share lives of deep mutual care and concern without romantic attachment.

The rise in all of these forms of nonmarital cohabitation has challenged the predominant paradigm of American family law, which focuses on marriage. To what extent should there be room in our law for a family outside marriage—in other words, for what

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1. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 31 (2002).

2. In 2000, there were 5,475,768 unmarried-partner households in the United States—4,881,377 (89.1%) of which consisted of opposite-sex partners. TAVIA SIMMONS & MARTIN O’CONNELL, U.S. DEPT OF COMMERCE, CENSUS 2000 SPECIAL REPORT: MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000 2 tbl.1 (2003), <http://www.census.gov/prod/2003pubs/censr-5.pdf>. For a discussion of potential problems with Census data on same-sex, unmarried-partner couples, see Dan Black et al., *The Measurement of Same-Sex Unmarried Partner Couples in the 2000 Census* (Cal. Ctr. for Population Research, Working Paper No. 23, 2007), available at <http://papers.ccpr.ucla.edu/papers/PWP-CCPR-2007-023/PWP-CCPR-2007-023.pdf>.

3. Of the 5,475,768 unmarried-partner households in the United States in 2000, 594,391 (10.9%) consisted of same-sex partners. SIMMONS & O’CONNELL, *supra* note 2, at 2 tbl.1.

4. For data on average ages of cohabitants, see *id.* at 14 tbl.6.

5. For data on the percentage of unmarried-partner households with children younger than eighteen years, see *id.* at 9 tbl.4.

might be termed the “flexible family”? To what extent should our law help to organize and support the flexible family? This Symposium on “Family Values: Law and the Modern American Family” invites us to consider these questions.

By way of answer, this Essay advances three normative claims. First, nonmarital cohabitation should be more fully recognized and supported by American law. Second, given the mobility of our population from one state to another, the legal structures that recognize and support the flexible family should be portable across state lines for parties who change their state of domicile. Third, American law not only should address the bilateral, or two-dimensional, rights and obligations of unmarried cohabitants to each other,⁶ but also should do more to protect the flexible family against third parties—hence, in all three dimensions.

I take these normative claims in order.

I. Recognition and Support

I begin with the claim that American law should do more to recognize and support nonmarital cohabitation.⁷ As a descriptive matter, it is fair to say that American law has expressed, at best, ambivalence about nonmarital cohabitation, even when it tries to mimic marriage. The landmark “palimony” decision in *Marvin v. Marvin*⁸ is well known for establishing that plaintiff Michelle Triola could maintain a cause of action for breach of a contract of support against defendant Lee Marvin⁹ with whom she had agreed to live.¹⁰ What is less well-remembered is that, after the case was remanded for trial, Triola was unable to prove the contract’s existence.¹¹ She was awarded damages on an unspecified equitable

6. Cf. AM. LAW INST., *supra* note 1, at 32 (“Chapter 6 is limited to the following question: What are the economic rights and responsibilities of the parties to each other at the termination of their nonmarital cohabitation? Chapter 6 [on domestic partners] does not create any rights against the government or third parties.” (footnotes omitted)).

7. This section of the Essay draws on LAWRENCE W. WAGGONER, GREGORY S. ALEXANDER, MARY LOUISE FELLOWS & THOMAS P. GALLANIS, *FAMILY PROPERTY LAW: WILLS, TRUSTS, AND FUTURE INTERESTS* (4th ed. 2006).

8. 557 P.2d 106 (Cal. 1976), *appealed after remand*, 176 Cal. Rptr. 555 (Cal. Dist. Ct. App. 1981).

9. *Id.* at 122–23.

10. *Id.* at 110.

11. *Marvin*, 176 Cal. Rptr. at 557.

theory, but the award was rejected on appeal.¹² She received nothing.¹³

The legal principle of *Marvin*—that a domestic contract between nonmarital cohabitants can in theory be enforced, even when the contract is neither express nor in writing—was accepted in some states,¹⁴ and was sometimes even extended from opposite-sex to same-sex couples.¹⁵ But the *Marvin* principle was rejected in many states. Some of these states required an express contract, whether oral or written.¹⁶ Other states went further, insisting on a contract in writing.¹⁷ And still other states rejected the very idea that a quasi-marital contract between unmarried cohabitants, whether of opposite sexes or the same sex, could be enforced at all.¹⁸

If the recognition of the rights of unmarried cohabitants as a matter of contract has been difficult, so too has the recognition of their rights as a matter of status. There is, of course, the doctrine of common-law marriage, currently recognized in ten states and in the District of Columbia.¹⁹ There is also the doctrine of the putative spouse, recognized in some states.²⁰ These doctrines are far from universal and, in any event, apply only to opposite-sex couples.²¹ The doctrines of common-law marriage and the putative

12. *Id.* at 559.

13. *Id.* Michelle Triola died on October 30, 2009. Anahad O'Connor, *Michelle Triola Marvin, of Landmark Palimony Suit, Dies at 76*, N.Y. TIMES, Oct. 31, 2009, at A22.

14. *Marvin*, 557 P.2d at 113–14.

15. See *Whorton v. Dillingham*, 248 Cal. Rptr. 405 (Cal. Ct. App. 1988).

16. See, e.g., *Levar v. Elkins*, 604 P.2d 602 (Alaska 1980); *Dominguez v. Cruz*, 617 P.2d 1322 (N.M. Ct. App. 1980); *Morone v. Morone*, 413 N.E.2d 1154 (N.Y. 1980).

17. E.g., MINN. STAT. §§ 513.075–513.076 (2008); TEX. BUS. & COM. CODE ANN. § 26.01(b)(3) (Vernon 2007).

18. See, e.g., *Rehak v. Mathis*, 238 S.E.2d 81 (Ga. 1977). In at least one state, it is a criminal offense for a man and a woman to cohabit without being married to each other. See MISS. CODE ANN. § 97-29-1 (2006).

19. THOMAS P. GALLANIS, FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS (5th ed. forthcoming 2011). The states recognizing common-law marriage are Alabama, Colorado, Iowa, Kansas, Montana, Oklahoma, Rhode Island, South Carolina, Texas, and Utah. *Id.*

20. For discussion, see Christopher Blakesley, *The Putative Marriage Doctrine*, 60 TUL. L. REV. 1, 13–18 (1985). See also MODEL MARRIAGE AND DIVORCE ACT § 209 (1973).

21. A potential exception may be Iowa, which recognizes common-law marriage and same-sex marriage. IOWA ADMIN. CODE r. 701-73.25 (2009); see also *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (holding unconstitutional a state statute that limited civil marriage to a union between a man and a woman, but not addressing whether the state would or should extend common-law marriage to same-sex couples).

spouse aside, neither the case law nor the statutes of most states provide much recognition or protection for unmarried cohabitants as a matter of status.

The reluctance to analogize between cohabitation and the historically protected status of marriage can be seen in one of the earliest cases involving the right of a same-sex partner to be treated as enjoying the same status as a legal spouse: the 1989 New York case of *Braschi v. Stahl Associates Co.*²² The New York Court of Appeals held that the surviving gay partner of a deceased tenant was entitled to the same statutory rent and eviction protections given to the “surviving spouse . . . or some other member of the deceased tenant’s *family*.”²³ The key word was “family.” A partner could be considered “family” as in *Braschi*; however, the subsequent case of *In re Cooper*²⁴ made it clear that the partner could not fit within the definition of, or have a status analogous to, a “spouse.”²⁵

During the 1990s, the national discussion on the status of unmarried cohabitants focused heavily, though not exclusively,²⁶ on the rights of same-sex partners and whether they would be granted access to marriage. Prominent events in the 1990s include the Hawaii Supreme Court’s 1993 decision in *Baehr v. Lewin*,²⁷ the signing of the federal Defense of Marriage Act in 1996,²⁸ the Vermont Supreme Court’s 1999 decision in *Baker v. Vermont*,²⁹ and the California domestic partnership legislation that came into force on January 1, 2000.³⁰

The focus on same-sex couples continued through the first decade of the current century. Same-sex marriage was a

22. 543 N.E.2d 49 (N.Y. 1989).

23. *Id.* at 52.

24. 592 N.Y.S.2d 797 (N.Y. App. Div. 1993).

25. *Id.* at 798–99.

26. *See, e.g., Connell v. Francisco*, 898 P.2d 831 (Wash. 1995) (en banc) (using the “meretricious relationship” doctrine to hold that opposite-sex partners have some of the rights of married couples upon dissolution of the partnership); *Goode v. Goode*, 396 S.E.2d 430 (W. Va. 1990) (holding that, even in the absence of a common-law marriage, a woman could obtain equitable division of property on the dissolution of her nonmarital opposite-sex partnership).

27. 852 P.2d 44 (Haw. 1993) (holding that the state’s prohibition of same-sex marriage amounted to discrimination on the basis of sex under the state constitution).

28. 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

29. 744 A.2d 864 (Vt. 1999) (holding that Vermont’s existing prohibitions on same-sex marriage violated the state constitution and ordering the legislature to either permit same-sex marriage or implement an alternative legal mechanism ensuring similar rights).

30. CAL. FAM. CODE §§ 297–297.5 (West 2004).

prominent issue in the 2004 presidential election³¹ and in the 2008 state election in California.³² Advances during the decade include the legalization of same-sex marriage in Massachusetts,³³ Connecticut,³⁴ Iowa,³⁵ Vermont,³⁶ New Hampshire,³⁷ the District of Columbia,³⁸ and (briefly) California,³⁹ and the recognition—using a status other than marriage—of same-sex partnerships in California,⁴⁰ the District of Columbia,⁴¹ New Hampshire,⁴² Nevada,⁴³ New Jersey,⁴⁴ Oregon,⁴⁵ and Washington.⁴⁶

In many cases, the statutory recognition of domestic partnerships within the United States either has been limited to same-sex couples⁴⁷ or has been extended only to those opposite-sex couples where at least one partner is elderly.⁴⁸ Only in rare

31. See Adam Nagourney, “Moral Values” Carried Bush, Rove Says, *N.Y. TIMES*, Nov. 10, 2004, at A20; see also James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, *N.Y. TIMES*, Nov. 4, 2004, at P4; David D. Kirkpatrick, *Marriage Between Gays Becomes Issue in Campaigns*, *N.Y. TIMES*, Oct. 30, 2004, at A16.

32. See Jesse McKinley, *Back to the Ramparts in California*, *N.Y. TIMES*, Nov. 2, 2008, at WK5.

33. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

34. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

35. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

36. See Abby Goodnough, *Rejecting Veto, Vermont Backs Gay Marriage*, *N.Y. TIMES*, Apr. 8, 2009, at A1.

37. See Abby Goodnough, *New Hampshire Approves Same-Sex Marriage*, *N.Y. TIMES*, June 4, 2009, at A19.

38. See Ian Urbina, *Nation’s Capital Approves Same-Sex Marriages*, *N.Y. TIMES*, Dec. 16, 2009, at A26.

39. See Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, *N.Y. TIMES*, Nov. 6, 2008, at A1.

40. CAL. FAM. CODE § 297 (West 2004).

41. Domestic Partnership Equality Amendment Act of 2006, D.C. Act 16-265, 53 D.C. Reg. 1035 (codified as amended in scattered sections of D.C. CODE), available at <http://www.dccouncil.washington.dc.us/images/00001/20060113145021.pdf>.

42. H.R. 437, 2007 Leg., 333d Sess. (N.H. 2007), available at <http://www.gencourt.state.nh.us/legislation/2007/HB0437.html>. No new civil unions may be established on or after January 1, 2011. N.H. REV. STAT. ANN. § 457-A:1 (2008).

43. S. 283, 2009 Leg., 75th Sess. (Nev. 2009), available at http://www.leg.state.nv.us/75th2009/Bills/SB/SB283_EN.pdf.

44. Act of Dec. 21, 2006, ch. 103, 2006 N.J. Laws 975, available at <http://www.state.nj.us/treasury/pensions/pdf/laws/chapt103.pdf>.

45. Oregon Family Fairness Act, H.R. 2007, 74th Leg. Sess. (Or. 2007).

46. Act of Dec. 2, 2009, ch. 521, 2009 Wash. Sess. Laws 3065.

47. See HAW. REV. STAT. § 572C-4(3) (1997) (noting that the parties must be “legally prohibited from marrying one another”); N.J. STAT. ANN. § 37:1-29 (West 2009); N.H. H.R. 437; Or. H.R. 2007 § 3(1).

48. In California and Washington, opposite-sex domestic partners may register if at least one of the partners is over the age of sixty-two. CAL. FAM. CODE § 297(b)(6)(B) (West 2004); WASH. REV. CODE § 26.60.030 (2007).

instances has there been an equality of recognition of the rights of same-sex and opposite-sex nonmarital partners.⁴⁹ Here I must mention an important instance of such equal recognition: the promulgation in 2002 of the *Principles of the Law of Family Dissolution* by the American Law Institute (ALI).⁵⁰ The chief reporter of the *Principles*, Professor Ira Mark Ellman, has summarized the ALI's approach to domestic partners as follows:

[The] treatment of domestic partners does not adopt the contractual approach most often associated with the California Supreme Court's decision in *Marvin v. Marvin*, but instead follows more recent trends that treat persons as having entered a relationship with legal significance when they live together and share a life together for a sufficient period of time. . . . Under the formulation adopted by the Institute, parties who live together with their common child, for the required minimum time period, are deemed domestic partners. The required time period is left for the adopting jurisdiction to choose, but the commentary suggests that a two-year period would be reasonable. Unrelated parties who do not have a common child are presumed to be domestic partners if they share a common household for a separately-established minimum period, the commentary suggesting a three-year period as a reasonable choice. . . . Parties may also be treated as domestic partners if one of them shows that they shared a common household and a life together for a 'significant period of time,' even if that time is less than the minimum periods set in the other provisions. Once parties are considered domestic partners, the dissolution of their relationship triggers property and compensatory payment . . . remedies that overlap almost entirely with those available at the dissolution of marriage.⁵¹

The *Principles* carries the reputational authority of the ALI, but it is not law. The prime statutory example in American law of equal recognition of same-sex and opposite-sex partnerships in a way that confers most or all of the state-based⁵² rights of marriage⁵³ on

49. See AM. LAW INST., *supra* note 1, § 6.02 cmt. a.

50. *Id.* § 6.02.

51. Ira Mark Ellman, Abstract of ALI FAMILY LAW REPORT (2000), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=241418.

52. See Memorandum from Barry R. Bedrick, Assoc. Gen. Counsel, Office of the Gen. Counsel, to the Honorable Henry J. Hyde, Chairman, Comm. on the Judiciary (Jan. 31, 1997).

53. Some statutes confer limited rights equally on same-sex and opposite-sex couples. See, e.g., ME. REV. STAT. ANN. tit. 22, § 2710 (2009) (providing some inheritance rights for same-sex and opposite-sex domestic partners who have registered with the state and who meet the statutory definition of "2 unmarried adults who are domiciled together under long-term arrangements that evidence a commitment to remain responsible indefinitely for each other's welfare"). Maine's legislation gives a surviving registered domestic partner the spousal share of the decedent's intestate estate, but it does not provide protection against intentional or unintentional disinheritance. *Id.* tit. 18-A, § 2-102. See also Colorado Designated

nonmarital partners is the domestic partnership legislation recently enacted in Nevada.⁵⁴ Under the Nevada legislation, two competent adults may register as domestic partners if the adults share a common residence, are not impermissibly related by blood, and are neither married nor a member of another domestic partnership. Once registered, the partners “have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties under law . . . as are granted to and imposed upon spouses.”⁵⁵

Legislatures outside the United States have been quicker to recognize and support opposite-sex and same-sex unmarried cohabitants alike, though this equality is still more the exception than the rule. In the majority of Western European countries, for example, domestic partnership legislation applies only to cohabitants of the same sex.⁵⁶ The exceptions, providing equal protections to same-sex and opposite-sex cohabitants, include Andorra, Belgium, Croatia, France, Hungary, Luxembourg, the Netherlands, and some of the Spanish autonomous communities.⁵⁷

Of particular interest are the statutes in the Netherlands and Belgium, which provide marriage equality *and* equal access to domestic partnership.⁵⁸ Both statutes are open to same-sex and opposite-sex couples.⁵⁹ Cohabitants can choose which status they wish, thereby tailoring to the individual case the appropriate level of legal recognition and protection.

Beneficiary Agreement Act, ch. 107, 2009 Colo. Sess. Laws 428 (addressing designated beneficiary agreements).

54. 2009 Nev. Stat. 393. In Washington, D.C., opposite-sex and same-sex domestic partners also enjoy many, if not all, of the state-based rights and responsibilities of marriage. Domestic Partnership Equality Amendment Act of 2006, D.C. Act 16-265, 53 D.C. Reg. 1035 (codified as amended in scattered sections of D.C. CODE), *available at* <http://www.dccouncil.washington.dc.us/images/00001/20060113145021.pdf>. It is hard to gauge the status of the law in Washington, D.C., because the process has been incremental and piecemeal.

55. 2009 Nev. Stat. 393, § 7.

56. Examples of Western European countries with domestic partnership legislation covering only same-sex couples include Denmark, Finland, Germany, Iceland, Sweden, Switzerland, and the United Kingdom. See ILGA Europe, *Marriage and Partnership Rights for Same-Sex Partners: Country-By-Country*, http://www.ilga-europe.org/europe/issues_themes/families/recognition_of_relationships/legislation_and_case_law/marriage_and_partnership_rights_for_same_sex_partners_country_by_country (last visited Mar. 17, 2010). See also LEGAL RECOGNITION OF SAME-SEX COUPLES IN EUROPE (Katharina Boele-Woelki & Angelika Fuchs eds., 2003).

57. See ILGA Europe, *supra* note 56. See also LEGAL RECOGNITION OF SAME-SEX COUPLES IN EUROPE, *supra* note 56.

58. See ILGA Europe, *supra* note 56.

59. *Id.*

This idea, of providing a menu of multiple options, has much to commend it. Within a set of defined categories,⁶⁰ partners could tailor the level of recognition and protection to their particular needs and wishes.⁶¹ Marriage could still be the highest and strongest relationship, with other forms of relationship recognition at other points on the spectrum.

More relationship options should be offered than are provided in current law. Even the European legislation can fail to capture the full picture of cohabitation, because some cohabitants share lives of deep mutual care and concern without being partners in the conventional romantic sense. Two elderly sisters, for example, could not register as partners in the Netherlands because they are impermissibly related.⁶² Relatives may register as cohabitants in Belgium, though the Belgian statute provides a lower level of rights and protections than the Dutch statute.⁶³

The flexibility I seek in the law is not entirely an innovation. In medieval and early modern Mediterranean Europe, there was a legal institution known in French as the *affraiment*—in modern French, *affrèment*—translated into English literally as “brotherment.”⁶⁴ The parties to a contract of *affrèment* pledged to have “one house, one hearth, and one purse.”⁶⁵ Recent archival research in southern France has discovered many instances of *affrèments*, sometimes between biological brothers, but sometimes between other pairs of relatives—for example, between brothers-in-law, or between first cousins.⁶⁶ There are also many

60. On the benefits of the *numerus clausus* principle in another context, see Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000).

61. As I have written elsewhere, there are two principal methods that a legislative reform proposal might use to identify couples as being in a domestic partnership (or other status short of marriage): self-identification and statutory identification. See Thomas P. Gallanis, *Default Rules, Mandatory Rules, and the Movement for Same-Sex Equality*, 60 OHIO ST. L.J. 1513, 1525 (1999). The best approach uses both techniques; it “combines self-identification techniques [such as registering with a state agency] with a multiple-factor description [to enable the inclusion of couples despite a failure to register].” Thomas P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55, 84 (2004).

62. BURGERLIJK WETBOEK art. 1:41 (Neth.). See Wendy M. Schrama, *Registered Partnership in the Netherlands*, 13 INT’L J.L. POL’Y & FAM. 315, 319 (1999).

63. See LEGAL RECOGNITION OF SAME-SEX COUPLES IN EUROPE, *supra* note 56, at 231–43.

64. See Allan A. Tulchin, *Same-Sex Couples Creating Households in Old Regime France: The Uses of the Affrèment*, 79 J. MOD. HIST. 613, 614 (2007).

65. *Id.* at 614.

66. *Id.* at 618, 635–36, 625.

surviving contracts of *affrèment* between nonrelatives.⁶⁷ Some of these seem to have been motivated by deep regard and friendship, though there are a few that look very much like same-sex unions. The point to notice is that the *affrèment* “provided the legal foundation for non-nuclear households of many types.”⁶⁸ This kind of flexibility—adapted for the modern age—would be a welcome addition to our family law.

II. Portability

The second normative claim of this Essay is that, given the mobility of the U.S. population from one state to another, the legal structures that recognize and support the flexible family should be portable across state lines for parties who change their state of domicile.

The American family is on the move.⁶⁹ A recently-published study, based on data from the U.S. Census, shows that millions of Americans are moving across state lines each year, and the numbers are growing.⁷⁰ The percentage of Americans moving from one state to another “has risen every year this decade:” the percentage stood at 2.2 in 2003, 2.5 in 2005, and 2.7 in 2006.⁷¹ This 2.7 percent represents eight million Americans moving across state lines in just one year.⁷²

Most Americans who are married are able to take their family arrangements with them from state to state. The marriage of a man and a woman in one state will, in most circumstances, be valid and recognized as a marriage in every other state.⁷³

The same is not true of same-sex marriages, civil unions, domestic partnerships, or other similar designations.⁷⁴ These

67. *Id.* at 625–26.

68. *Id.* at 614.

69. This section of the Essay draws on Thomas P. Gallanis, *Frontiers of Succession*, 43 REAL PROP. TR. & EST. L.J. 419 (2008).

70. See Haya El Nasser & Paul Overberg, *Millions More Are Changing States*, USA TODAY, Nov. 30, 2007, at 1A.

71. *Id.*

72. *Id.*

73. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) (“A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.”).

74. For a chart identifying states offering some relationship recognition to same-sex couples, see NAT'L GAY & LESBIAN TASK FORCE, RELATIONSHIP RECOGNITION FOR SAME-SEX COUPLES IN THE U.S. 1 (2009), available at http://thetaskforce.org/downloads/reports/issue_maps/rel_recog_11_4_09.pdf.

arrangements are either not portable at all beyond the relevant state's borders or portable only to a limited number of destinations.⁷⁵ This lack of interstate recognition creates substantial difficulties for couples changing their domicile.

The policy reason offered for non-recognition of another state's marriage or domestic partnership is that the state does not want to legalize the marriage or partnership arrangement. But does interstate recognition require intrastate legalization? The Uniform Law Commission does not view it this way. Consider the following Legislative Note to Article II of the Uniform Probate Code:

States that do not recognize . . . relationships between unmarried individuals, or marriages between same-sex partners, are urged to consider whether to recognize the spousal-type rights that partners acquired under the law of another jurisdiction in which the relationship was formed Doing so would not be the equivalent of recognizing such relationships in this state but simply allowing those who move to . . . this state to retain the rights they previously acquired elsewhere.⁷⁶

This is precisely the point: our law should do more to ensure that the legal structures that recognize and support the flexible family are portable across state lines when there has been a change of domicile.

III. Three Dimensions

The third normative claim of this Essay is that American law not only should address the bilateral, or two-dimensional, rights and obligations of unmarried cohabitants to each other but also should protect the flexible family in all three dimensions, including against outsiders.

Marriage offers a range of such three-dimensional legal protections for the spouses and their property. For present purposes, three examples will suffice. The first example is both the oldest and the most straightforward of the three: tenancy by the

75. Maryland and New York are rare examples of states willing to recognize same-sex marriages performed elsewhere. 95 Md. Op. Att'y Gen. 3 (2010) (providing the opinion of the Maryland Attorney General that same-sex marriages validly performed in other jurisdictions are recognized in Maryland); *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (N.Y. App. Div. 2008) (holding that New York must recognize a marriage contracted in Canada by a same-sex couple); see also Phred Dvorak, *Why Just One Wedding Isn't Enough for Some Gay Couples*, WALL ST. J., Oct. 30, 2008, at A1.

76. UNIF. PROBATE CODE art. II, prefatory note (2008).

entirety.⁷⁷ Available in twenty-four states and the District of Columbia,⁷⁸ tenancy by the entirety is a concurrent estate existing between husband and wife.⁷⁹ In the majority of jurisdictions recognizing tenancy by the entirety, the tenancy provides impenetrable asset protection: during the marriage, one spouse may not unilaterally pledge the property as collateral, nor may the property be reached by one spouse's creditors.⁸⁰ The purpose of this asset-protection feature was explained by the Hawaii Supreme Court in the leading case of *Sawada v. Endo*:⁸¹

When a family can afford to own real property, it becomes their single most important asset. Encumbered as it usually is by a first mortgage, the fact remains that so long as it remains whole during the joint lives of the spouses, it is always available in its entirety for the benefit and use of the entire family. Loans for education and other emergency expenses, for example, may be obtained on the security of the marital estate If we were to select between a public policy favoring the creditors of one of the spouses and one favoring the interests of the family unit, we would not hesitate to choose the latter.⁸²

To be sure, there are exceptions to the asset protection of a state-law tenancy by the entirety, particularly where interests of the federal government are at stake.⁸³ But exceptions aside, a married couple in a majority of the jurisdictions recognizing tenancy by the entirety can use the tenancy to shield resources for the protection of the family unit.⁸⁴ Unmarried cohabitants (other than parties to

77. For a recent discussion by a leading scholar, see John V. Orth, *In re Tenancy by the Entirety—Married Couples, Common Law Marriages, and Same-Sex Partners: Orth v. Orth*, 85 N.D. L. REV. 287 (2009).

78. See Fred Franke, *Asset Protection and Tenancy by the Entirety*, 34 ACTEC J. 210, 222–33 (2009). The twenty-four states are Alaska, Arkansas, Delaware, Florida, Hawaii, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Wyoming. *Id.* The tenancy was also available in Ohio from 1972 to 1985, and tenancies by the entirety created while the 1972 statute was effective will still be respected. *Id.* at 230. For a state-by-state analysis, see *id.* at 222–33.

79. *Id.* at 210.

80. *Id.* at 212. The jurisdictions in which tenancy by the entirety operates as a complete bar to the creditors of one spouse are Delaware, the District of Columbia, Florida, Hawaii, Indiana, Maryland, Michigan, Mississippi, Missouri, North Carolina, Pennsylvania, Vermont, Virginia, and Wyoming. *Id.* at 222–33.

81. 561 P.2d 1291 (Haw. 1977).

82. *Id.* at 1297.

83. See, e.g., *United States v. Craft*, 535 U.S. 274 (2002) (involving a federal tax lien pursuant to 26 U.S.C. § 6321); *United States v. 2525 Leroy Lane*, 910 F.2d 343 (6th Cir. 1990) (involving forfeiture of property used in drug offenses pursuant to 21 U.S.C. §§ 853, 881).

84. See *supra* note 80 and accompanying text.

a civil union in Vermont,⁸⁵ domestic partners in the District of Columbia,⁸⁶ or reciprocal beneficiaries in Hawaii⁸⁷) have no similar protection.⁸⁸

The second example concerns the provisions of federal and state tax law that favor married couples. There are many illustrations here, but let me offer three easy ones. First, the federal estate tax provides an unlimited marital deduction for property passing at death to the decedent's surviving spouse.⁸⁹ Second, the federal gift tax not only has a similarly unlimited marital deduction,⁹⁰ but also allows spouses to act together as donors, thereby doubling the gift tax annual exclusion.⁹¹ In calendar year 2010, an unmarried person can give \$13,000 per recipient free of tax, while a married person (with the spouse's consent) can double the tax-free gift to \$26,000. Third, the federal income tax treatment of spouses is dramatically different from the treatment of unmarried couples. Depending on the facts, there can be a "marriage penalty" or a "marriage bonus."⁹² For couples with only one wage-earner, there is definitely a "marriage bonus."⁹³

These illustrations come from the realm of federal taxation, but there are plenty of counterparts in state-level taxation that fail to treat spouses and unmarried cohabitants alike. A state-law problem needs only a state-law solution.

With respect to federal taxation, there are different approaches that could be taken to reduce or eliminate the disparate tax treatment between spouses and unmarried cohabitants. One approach, recently advocated by Professor Patricia Cain, would be for Congress to enact a federal definition of domestic partnership, and then apply the same rules to domestic partners so defined as are applied to spouses.⁹⁴ This federal definition would provide for the uniform treatment across all fifty states of unmarried cohabitants meeting the federal definition and would equalize their tax benefits and obligations

85. VT. STAT. ANN. tit. 15, § 1204(e)(1) (2002 & Supp. 2009).

86. D.C. CODE § 46-601(d) (2009).

87. HAW. REV. STAT. § 509-2 (2006).

88. See Franke, *supra* note 78, at 211 (discussing marriage as the "fifth unity" of tenancy by the entirety).

89. 26 U.S.C. § 2056(a) (2006).

90. *Id.* § 2523(a).

91. *Id.* §§ 2503(b), 2513(a).

92. See Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787, 789-90 (1997).

93. See *id.* at 788-89.

94. Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 851-55 (2008).

with those of spouses.⁹⁵ Another approach, suggested by the work of Professor Nancy Polikoff, would be to examine “the purposes of a law”⁹⁶—here, the Internal Revenue Code (Code)—to determine which provisions should be reformed to treat spouses akin to unmarried cohabitants (with the definition of the latter remaining the province of state law). A third approach would be to piggy-back on the state recognition of statuses short of marriage—for example, civil unions in New Jersey, domestic partnerships in California, and reciprocal beneficiaries in Hawaii—and then equalize the tax treatment of spouses and persons who meet those state definitions.⁹⁷ Each of these options has merit, though the third seems the most realistic. It does not depend on a congressional definition of domestic partnership, for such a definition is unlikely to happen; and even if it did, a mandatory federal definition might calcify the law in a way that would be unresponsive to ongoing developments. Recall that Justice Brandeis wisely spoke of the “laboratory” of the states.⁹⁸ Nor does the third approach require a provision-by-provision analysis of the Code. Instead, the third approach—using state law definitions, then equalizing the treatment—has the virtues of practicality and equality. The results would not be uniform across the nation, but the definition of family is traditionally, and rightly, a matter of state law.⁹⁹ A patchwork quilt of relationship recognition would be acceptable. Indeed, the status quo is a patchwork quilt of its own, just not sufficiently responsive to the needs of unmarried cohabitants.

So far, we have examined examples from the law of property and the law of taxation. The third example concerns the law of Medicaid.¹⁰⁰ The Medicaid program pays for medical expenses for the elderly, blind, and disabled.¹⁰¹ To qualify for Medicaid, the

95. *See id.* at 854–55.

96. NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 126 (2008).

97. *See Cain, supra* note 94, at 851 (discussing the possibility of extending the spousal treatment of “those couples whose relationships are recognized under state law” to same-sex couples).

98. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

99. *See Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001).

100. The use of the name “Medicaid” is not universal. In California, for example, Medicaid is called Medi-Cal. *See* Department of Health Care Services, Medi-Cal, <http://www.dhcs.ca.gov/services/medi-cal/Pages/default.aspx> (last visited Mar. 15, 2010).

101. *See* Social Security Online, Medicaid Information, <http://www.socialsecurity.gov/disabilityresearch/wi/medicaid.htm> (last visited Mar. 15, 2010).

applicant must have low income and few assets.¹⁰² Precisely how low and how few varies from state to state.¹⁰³ Medicaid was established by federal law,¹⁰⁴ but the funding and administration of the program are jointly federal and state.¹⁰⁵ This has resulted in variations in state benefits and in eligibility requirements. Still, one can speak in general terms.

There are many provisions of the Medicaid program that are designed to protect the spouse of the Medicaid applicant. For instance, an applicant who transfers assets to or for the benefit of the spouse will not be penalized under the so-called “look-back” rules that render ineligible an applicant who has transferred property for the benefit of a third party.¹⁰⁶ To take another example, consider the applicant who seeks Medicaid in order to afford to live in a nursing home, but has a spouse who does not need nursing care. The Medicaid program allows the spouse to keep the primary residence, which as long as it is occupied by the spouse is considered an exempt asset—hence not taken into account.¹⁰⁷ And beyond the house, the Medicaid program ensures that the spouse can keep some of the couple’s joint assets¹⁰⁸—and even some of the applicant’s income and resources.¹⁰⁹ The aim is to ensure that the spouse is not left homeless and in poverty. This concern for the spouse continues even after the Medicaid recipient’s death.¹¹⁰ Here I refer to the so-called “estate recovery” whereby the state can recover the cost of Medicaid from the estate of the deceased recipient.¹¹¹ If the surviving spouse is still residing in the couple’s home, the spouse is allowed to remain there for life, thereby postponing recovery.¹¹²

102. See Centers for Medicare & Medicaid Services, U.S. Department of Health & Human Services, Medicaid Eligibility: Overview, <http://www.cms.hhs.gov/MedicaidEligibility/> (last visited Mar. 15, 2010).

103. *Id.*

104. Congress passed the legislation that created Medicaid in 1965. Act of July 30, 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended at 42 U.S.C. §§ 1396, 1396a-v (2006)).

105. Social Security Online, *supra* note 101.

106. 42 U.S.C. §§ 1396p(c)(2)(A)(i), (c)(2)(B)(i) (2006). Also exempted are assets transferred by the applicant’s spouse to another, for the sole benefit of the spouse. *Id.* § 1396p(c)(2)(B)(ii).

107. *Id.* §§ 1382b(a)(1), 1396r-5(c)(5)(A).

108. *Id.* § 1396r-5(c).

109. *Id.* §§ 1396r-5(d), (f).

110. *Id.* § 1396p(b)(2) (“Any adjustment or recovery [from a Medicaid recipient’s estate] . . . may be made only after the death of the individual’s surviving spouse, if any . . .”).

111. *Id.* § 1396p(b).

112. *Id.* § 1396p(b)(2). Even after the death of the surviving spouse, the statute

The Federal Department of Health and Human Services has made its position clear that the extension of marriage to same-sex couples under state law does not make the couples “married” for purposes of the federal funds contributed to state Medicaid programs.¹¹³ This position derives from the federal definition of marriage in the Defense of Marriage Act (DOMA).¹¹⁴ Phrased precisely: the Department of Health and Human Services has informed the Commonwealth of Massachusetts that if the state determines that an applicant in a same-sex marriage is eligible for Medicaid but the applicant would not be eligible if single, then federal funds are not available toward the state’s expenditures on the applicant’s behalf.¹¹⁵ For this reason, among many others, the Commonwealth of Massachusetts has filed a lawsuit against the Department of Health and Human Services and other federal agencies.¹¹⁶

The extent to which, under DOMA, the protections typically given to the opposite-sex spouse of the Medicaid applicant can be extended to an unmarried partner—for example, in a civil union or other partnership short of marriage—remains unclear. A state can, of course, do as it wishes with state funds. But the stumbling block is that Medicaid is a federal-state partnership, and the federal financial participation is significant.¹¹⁷ The current law is regrettably unclear about whether DOMA prevents the use of federal funds when a state wishes to treat a Medicaid applicant in a civil union or with a domestic partner as if the applicant had a spouse.

provides some protections for children and siblings of the deceased Medicaid recipient. *Id.*

113. Letter from Charlotte S. Yeh, Reg’l Adm’r, Ctrs. for Medicare & Medicaid Servs., Dep’t of Health & Human Servs, to Kristen Reasoner Apgar, Gen. Counsel, Commonwealth of Mass. (May 28, 2004), *available at* http://www.lgbtbar.org/annual/CLE_materials/5B/HHSmedicaidDOMAletter.pdf (“In short, the DOMA does not give the Centers for Medicare & Medicaid Services . . . the discretion to recognize same-sex marriage for purposes of the Federal portion of Medicaid.”).

114. 1 U.S.C. § 7 (2006) (“[T]he word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”).

115. Letter from Charlotte S. Yeh to Kristen Reasoner Apgar, *supra* note 113, at 2.

116. *See* Complaint at 46–62, *Commonwealth v. U.S. Dep’t of Health and Human Servs.*, No. 1:09-CV-11156-JLT (D. Mass. July 8, 2009) (relating to the state’s Medicaid program, known as MassHealth). *See generally* Abby Goodnough, *State Suit Challenges U.S. Defense of Marriage Act*, N.Y. TIMES, July 9, 2009, at A20 (discussing the details of the lawsuit).

117. Complaint, *supra* note 116, at 60 (“The Commonwealth has estimated that the annual amount of [federal financial participation] that is unavailable due to DOMA is \$2.37 million.”).

This Essay's normative argument looks beyond the current law. Whether we are speaking about the use of only state funds or additionally federal funds, the right thing for states to do is to provide Medicaid protections for unmarried cohabitants, so that the cohabitant not applying for Medicaid can remain in the common residence and can continue to have appropriate resources and income.

Conclusion

This Essay advances three normative claims. First, nonmarital cohabitation should be more fully recognized and supported by American law. Second, given the mobility of our population from one state to another, the legal structures that recognize and support the flexible family should be portable across state lines for parties who change their state of domicile. Third, American law not only should address the bilateral rights and obligations of unmarried cohabitants to each other but also should protect the flexible family against third parties, such as creditors and taxing and welfare authorities.

Leo Tolstoy was quite wrong that “[h]appy families are all alike.”¹¹⁸ The households of unmarried cohabitants are formed for many different reasons. The law should recognize and protect the different kinds of family—not in an “infinite variety,”¹¹⁹ to borrow William Shakespeare’s phrase,¹²⁰ but much more flexibly than under the current regime, and in all three dimensions.

118. LEO TOLSTOY, *ANNA KARENINA* 3 (Leonard J. Kent & Nina Berberova eds., Constance Garnett trans., Modern Library paperback ed. 2000) (1877).

119. See *supra* note 60 and accompanying text.

120. “Age cannot wither her, nor custome stale / Her infinite variety . . .” WILLIAM SHAKESPEARE, *THE TRAGEDIE OF ANTHONIE, AND CLEOPATRA* act 2, sc. 2, ll. 235–36 (M.R. Ridley ed., Methuen & Co. Ltd. 1954) (1623).