

## NOTES

### **Time for a New Privilege: Allowing Unmarried Cohabiting Couples to Claim the Spousal Testimony Privilege**

*“Social mores regarding cohabitation between unmarried parties have changed dramatically in recent years and living arrangements that were once criticized are now relatively common and accepted. ‘As an alternative to marriage, more couples are choosing to cohabit. These relationships may be of extended duration, sometimes lasting as long as many marriages. In many respects, these cohabitation relationships may be quite similar to conventional marriages; they may involve commingling of funds, joint purchases of property, and even the birth of children.’ With the prevalence of nonmarital relationships today, a considerable number of persons live together without benefit of the rules of law that govern property, financial, and other matters in a marital relationship.”*<sup>1</sup>

#### I. INTRODUCTION

The American court system recognizes marriage as one of the most highly regarded institutions.<sup>2</sup> More often than before, couples cohabit without getting married, either by choice or because the law affords them no other option.<sup>3</sup> As traditional stigmas against cohabitation lessen in contemporary

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1. Wilcox v. Trautz, 693 N.E.2d 141, 144-45 (Mass. 1998) (quoting Twila L. Perry, *Dissolution Planning in Family Law: A Critique of Current Analyses and a Look Toward the Future*, 24 FAM. L.Q. 77, 78 (1990)) (recognizing prevalence of unmarried cohabiting couples in society).

2. See, e.g., Maynard v. Hill, 125 U.S. 190, 205 (1988) (characterizing marriage as most important relationship); Zablocki v. Redhail, 434 U.S. 374 (1978) (recognizing fundamental importance of marriage); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (describing marriage as crucial to survival and existence); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (classifying marriage as central part of Due Process Clause); Feliciano v. Rosemar Silver Co., 514 N.E.2d 1095, 1096 (Mass. 1987) (regarding marriage as most important social institution and foundation of family).

3. See Elizabeth S. Scott, *The Public and Private Face of Family Law, Article, Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL. F. 225, 231 (2004) (arguing replacement of traditional family unit by other family forms). Compared to cohabitation, the institution of marriage is a less popular choice over the years. See *id.* Alternative family forms such as unmarried parents, single parents, and homosexual parents are becoming more prevalent. *Id.* at 225; see also Fitzsimmons v. Mini Coach of Boston, Inc., 799 N.E.2d 1256, 1257 (Mass. 2003) (acknowledging acceptance and changes in social mores with regards to cohabitation). See *supra* notes 45, 118 and accompanying text (discussing why couples do not

society, courts are more apt to recognize new rights and protections for both heterosexual and homosexual unmarried couples.<sup>4</sup> Furthermore, domestic partnerships, civil unions, and marriage create significant opportunities for homosexual couples, a group traditionally denied all marital benefits.<sup>5</sup>

Courts have not yet extended the spousal privilege regarding adverse testimony and confidential communications to these nontraditional couples.<sup>6</sup> Traditionally, only a husband and wife claimed this privilege.<sup>7</sup> Recently, states such as Vermont and Massachusetts made the marital privilege available to same-sex couples in civil unions or marriages.<sup>8</sup> Yet, courts continually deny the privilege to unmarried cohabitating couples, both heterosexual and homosexual.<sup>9</sup> Courts commonly agree that such couples are not entitled to the benefit of the spousal privilege without taking on the responsibilities and duties of marriage.<sup>10</sup> The justification for this broad application fails to consider the vast number of homosexual couples who do not marry because state law prohibits it, rather than because they want to avoid the responsibilities of the institution.<sup>11</sup>

This Note sets forth a proposal suggesting courts extend the spousal

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marry).

4. See *infra* note 59 (discussing specific instances of judicial recognition of rights for cohabitating couples).

5. See CAL. FAM. CODE § 297 (West 2004) (creating domestic partnerships in California); VT. STAT. ANN. tit. 15, § 1202 (2002) (defining eligibility for entering into civil union); *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 948-49 (Mass. 2003) (holding ban against gay marriage violates Massachusetts Constitution).

6. See *United States v. Acker*, 52 F.3d 509, 514-15 (4th Cir. 1995) (denying communication privilege to defendant's cohabitant of twenty-five years); *United States v. White*, 545 F.2d 1129, 1130 (8th Cir. 1976) (rejecting defendant and common-law wife's privilege claim in state that does not recognize common-law marriage).

7. See *Trammel v. United States*, 445 U.S. 40, 44 (1980) (explaining common law's prohibition of wife's ability to testify against husband). Courts applied the common-law rule regarding spousal testimony based on two theories: a husband could not testify against himself and a husband and wife were the same being because the wife had no separate legal existence. *Id.* Courts, therefore, considered a wife's testimony the same as a husband's testimony against himself and did not permit it. *Id.*

8. See MASS. GEN. LAWS ch. 233, § 20 (2000) (defining spousal testimony privilege); VT. STAT. ANN. tit. 12, § 1605 (2002) (defining spousal testimony privilege); VT. STAT. ANN. tit. 15, § 1201 (2002) (mandating civil unions subject to spouse's responsibilities and receive same benefits and protections); see also *supra* note 5 and accompanying text (affording marital privileges to homosexual couples married or in civil unions).

9. See *supra* note 6 and accompanying text (refusing extension of spousal privilege to unmarried couples).

10. See *Holguin v. Flores*, 18 Cal. Rptr. 3d 749, 759 (Cal. Ct. App. 2004) (asserting eligible couples who do not marry evidence lack of commitment); *Feliciano v. Rosemar Silver Co.*, 514 N.E.2d 1095, 1096 (Mass. 1987) (noting values of marriage lost if courts grant rights to unmarried couples).

11. See Jennifer R. Brannen, *Unmarried With Privileges? Extending the Evidentiary Privilege to Same-Sex Couples*, 17 REV. LITIG. 311, 318-19 (1998) (suggesting reason for privilege based on promoting monogamy). The main purpose behind the privilege is to maintain marital harmony. *Id.* Brannen suggests that if society defines marital harmony by monogamy and a stable relationship, then there is no reason why courts cannot apply the privilege to unmarried couples who meet the definition by taking on the responsibilities and duties of marriage. *Id.*

privilege to nontraditional couples, as determined on a case-by-case basis.<sup>12</sup> Part II examines the history of the marital privilege, its flexibility with regards to a constantly changing society, and how courts historically denied the privilege to unmarried cohabitating couples.<sup>13</sup> An exploration of changes in the institution of marriage itself suggests that the privilege's theory that the government should protect marriage at all costs is no longer relevant.<sup>14</sup> Finally, Part II examines how, despite the recognition of gay marriage and civil unions in select states, laws such as The Defense of Marriage Act (DOMA) still impede the application of the privilege to homosexual couples, to whom courts should already guarantee the right.<sup>15</sup>

Part III of this Note analyzes how changing attitudes towards cohabitation indicate courts' potential willingness to extend more privileges and benefits to unmarried couples as a way of protecting these new family units.<sup>16</sup> Part III also examines the remaining impediments to the privilege's extension and how these barriers lead to uncertainty regarding benefits courts should extend to such couples.<sup>17</sup> While the courts continue to deny the spousal testimony privilege to unmarried cohabitating couples, a shift in societal focus on these relationships, rather than the institution of marriage alone, suggests the spousal testimony privilege may also be applied to such couples.<sup>18</sup>

## II. HISTORY

### A. *The Spousal Privilege*

#### 1. *The Spousal Privilege Under Common Law*

The general theory behind evidence is that the public is entitled to know all

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12. See *infra* Part III (suggesting why and how courts should expand spousal privilege to nontraditional couples); see also Scott, *supra* note 3, at 232-33 (noting opinions regarding extending privileges to unmarried couples). The argument that some unmarried couples function as a family supports extending the privilege to these relationships. *Id.*

13. See *infra* Part II.A (describing the marital privilege under common law and federal law); *supra* note 7 (describing common law application of privilege); see also FED. R. EVID. 501 (defining federal rule applicable to adverse testimony and testimony regarding confidential communications between spouses).

14. See *infra* Part II.B (discussing recent changes in institution of marriage); see also Trammel v. United States, 445 U.S. 40, 48 (1980) (noting law's tendency to follow certain concepts even after experience suggests need for change).

15. See *infra* Part II.C (describing laws limiting homosexual couples' access to marital privilege); see also 28 U.S.C. § 1738C (2000) (granting states' authority not to recognize gay marriages from another state).

16. See *infra* Parts II.A-B (discussing why and how to expand marital privilege to cohabitating couples); *supra* note 12 and accompanying text (arguing cohabitating couples function like married couples).

17. See *infra* Part III.C (suggesting how courts should extend privilege to unmarried cohabitating couples); see also 28 U.S.C. § 1738C (2000) (using DOMA to deny marital benefits from certain couples).

18. See *infra* note 28 and accompanying text (explaining purpose behind privilege and its fact-based application).

the proof against a defendant.<sup>19</sup> Courts developed privileges at common law to offset the introduction of all evidence.<sup>20</sup> The spousal privilege under common law relied on the theory that husband and wife were incompetent witnesses against each other.<sup>21</sup> The rule incorporated two theories.<sup>22</sup> The first was that a husband could not testify against himself.<sup>23</sup> The second theory stated that husband and wife were the same person because a wife possessed no separate legal identity.<sup>24</sup> As a result of the law, courts considered a wife testifying against her husband the same as a husband testifying against himself, an act that the Fifth Amendment protects.<sup>25</sup> The common-law theory for the spousal privilege changed after the law finally recognized women's own legal identities.<sup>26</sup> Justification for the spousal privilege then shifted towards keeping peace within the family and preserving the marital relationship.<sup>27</sup>

## 2. *The Spousal Privilege Under Federal Law*

Congress adopted the spousal privilege into federal law to continue "the evolutionary development of testimonial privileges in federal criminal trials."<sup>28</sup> Federal Rule of Evidence 501 (FRE 501) states, "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."<sup>29</sup> The Judicial

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19. See *Trammel v. United States*, 445 U.S. 40, 44 (1980) (explaining importance of evidence).

20. See *id.* (accepting privileges as public goods which transcend discoverability of all evidence).

21. See *id.* at 44 (explaining former theory of wife's legal inseparability from husband).

22. See *id.* (explaining development of privilege at common law).

23. *Trammel*, 445 U.S. at 44 (describing common-law restrictions on testimony).

24. *Id.* at 44 (explaining husband and wife share one legal identity).

25. See *id.* (detailing common-law reasons why wife could not testify against husband); see also U.S. CONST. amend. V (guaranteeing right against self-incrimination).

26. *Id.* at 52 (acknowledging wife no longer considered husband's property).

27. See *Wolfe v. United States*, 291 U.S. 7, 14 (1934) (regarding confidences as fundamental to preserving marital relationship); see also Bruce I. McDaniel, Annotation, *Marital Privilege Under Rule 501 of Federal Rules of Evidence*, 46 A.L.R. FED. 735, 745 (2005) (explaining court's analysis for justifying privilege). The spousal privilege's modern justification is to foster harmony and protect the sanctity of marriage. McDaniel, *supra*, at 747. Courts weigh the need for truth against the importance of the marital relationship and examine whether it is actually possible to serve the spousal privilege's purpose in light of the factual situation. *Id.* at 747-48. *But see* *Trammel v. United States*, 445 U.S. 40, 45 (1980) (questioning whether spousal privilege creates unjustifiable obstruction to truth). The adverse testimony privilege is unlike the other privileges because all others only protect communications, such as with a priest, attorney, or physician. *Id.* at 45.

28. See *Trammel*, 445 U.S. at 47 (opining Congress intended courts to develop privileges on case-by-case basis); see also McDaniel, *supra* note 27, at 745-46 (explaining privilege only applicable in criminal cases under federal rule). Federal Rule of Evidence 501 (FRE 501) preserves the spousal privilege only when life and liberty are at stake. McDaniel, *supra* note 27, at 745. In criminal cases, the privilege preserves the marriage, which may in turn help the defendant spouse during his or her rehabilitation. See *id.* at 746. *But see* *United States v. Cameron*, 556 F.2d 752, 756 (5th Cir. 1977) (denying marital privilege between spouses when marriage unviable and reconciliation unlikely).

29. FED. R. EVID. 501.

Conference Advisory Committee on Rules of Evidence originally drafted a proposal defining nine specific privileges, including the spousal testimony privilege.<sup>30</sup> The proposal sought to codify the adverse testimony privilege and eliminate the confidential communications privilege.<sup>31</sup> By adopting FRE 501 over this proposal, Congress manifested its intent that courts develop privileges based on the facts of specific cases.<sup>32</sup>

The spousal privilege protects against adverse testimony and testimony regarding confidential communications made during the marriage.<sup>33</sup> Before allowing the privilege, many courts determine whether the application serves its purpose and whether that purpose outweighs the harm that withholding the evidence causes.<sup>34</sup> The adverse testimony privilege prevents a party from forcing one spouse to testify against the other.<sup>35</sup> In order for a spouse to claim the adverse testimony privilege, the marriage must be valid at the time of trial and the testifying spouse must decide whether to testify.<sup>36</sup> The non-testifying spouse cannot claim the privilege to prevent the adverse testimony because if one spouse willingly testifies, the court considers the marriage beyond saving, rendering the privilege void of its purpose.<sup>37</sup>

The confidential communications privilege prevents one spouse from testifying about private communications with the other spouse.<sup>38</sup> Courts protect these confidential communications even if the parties terminate the marriage before trial.<sup>39</sup> To ensure spouses have the ability to communicate

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30. *Trammel*, 445 U.S. at 47 (describing congressional proposal defining specific privileges under federal law).

31. *See id.* at 47 (explaining function of proposal).

32. S. REP. NO. 93-1277, at 7058-59 (1974) (rejecting proposal recognizing nine defined privileges). The proposed privileges were husband and wife, required reports, lawyer and client, psychotherapist and patient, communications to clergymen, secrets of state, identity of an informer, political vote, and trade secrets. *Id.* at 7058. The Senate rejected these specific privileges because they modified or restricted existing common-law privileges. *Id.* at 7058; *see also* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 214, 120 Stat. 587, 617 (requesting research on benefits of amending application of FRE 501). The act instructs the Committee on Rules, Practice, Procedure, and Evidence of the Judicial Conference of the United States to study the benefits of amending FRE 501 so it does not apply to married couples when “a spouse is charged with a crime against—(1) a child of either spouse; or (2) a child under the custody or control of either spouse.” 120 Stat. at 617.

33. *See* McDaniel, *supra* note 27, at 739 (excluding two kinds of testimony under marital privilege).

34. *See* McDaniel, *supra* note 27, at 740 (explaining test allowing claim of marital privilege); *see also* *Wolfe v. United States*, 291 U.S. 7, 14 (1934) (noting importance of confidentiality for preserving marital relationship).

35. *See* McDaniel, *supra* note 27, at 739 (preventing negative impact on marriage by excluding adverse testimony).

36. *See* McDaniel, *supra* note 27, at 740 (stating requirements to invoke adverse testimony privilege).

37. *See* McDaniel, *supra* note 27, at 748 (recognizing who has right to claim privilege). Courts deny the privilege when there is no marital harmony left to protect. *See id.* at 748-49.

38. *See* McDaniel, *supra* note 27, at 739, 756 (introducing privilege protecting confidential communications and articulating requirements to invoke claim).

39. *See* McDaniel, *supra* note 27, at 756 (stating marriage need only exist at time of communication for privilege to attach).

with one another freely and openly, courts cannot admit testimony regarding communications the parties made during the marriage.<sup>40</sup> On the other hand, when a party makes the communication in the presence of a third party, it defeats the privilege because the court assumes the parties never intended the communication to be a private conversation.<sup>41</sup>

### 3. Denying the Spousal Privilege to Unmarried Cohabiting Couples

Courts deny spousal privilege claims by married couples because the courts can change privileges or create new privileges.<sup>42</sup> Despite a departure from the traditional marital relationship, as well as the courts' ability to change privileges, courts still deny unmarried cohabiting heterosexual and homosexual couples the spousal testimony privilege.<sup>43</sup> Courts base their denial of the spousal privilege to unmarried couples on the theory that the responsibilities of marriage do not bind cohabiting couples.<sup>44</sup> Courts follow this theory as a baseline rule despite the fact that it does not always properly account for the actual reasons why a couple has not married.<sup>45</sup>

State law prevents homosexual couples from marrying in every state except Massachusetts.<sup>46</sup> Courts most commonly use a state's interest in promoting procreation as justification for allowing only heterosexual couples to marry.<sup>47</sup>

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40. See *United States v. Westmoreland*, 312 F.3d 302, 306-07 (7th Cir. 2002) (noting society places high value on "uninhibited communication between spouses").

41. See *Woffle v. United States*, 291 U.S. 7, 14 (1934) (holding communications between spouses not privileged when third party present).

42. See *Trammel v. United States*, 445 U.S. 40, 46 (1980) (noting courts open to changing privilege when reason and experience dictate). In *Trammel*, the Court altered the common-law rule that one spouse was unfit to testify against the other. *Id.* at 53. The Court based the change to the adverse testimony privilege on changes in society, which no longer considered women as property, and bestowed on them their own legal identity. *Id.* at 52; see also *Territory of Haw. v. Alford*, No. 2868, 1952 WL 7370, at \*4 (Hawaii Terr. July 2, 1952) (explaining courts not bound by privilege's traditional application when societal conditions change).

43. See *supra* note 3 and accompanying text (noting changing attitudes towards marriage institution).

44. See *supra* note 10 and accompanying text (equating lack of marriage to lack of commitment); cf. *Implied Agreements Are Difficult To Prove: Nonmarried Couples Must Think About Medical Care*, NAT'L L. J., Oct. 28, 2002, at B7 (pointing out European countries afforded many protections not granted to unmarried couples in United States).

45. See Joshua R. Rubenstein, *Planning For Unmarried Couples; Benefits and Techniques Are Available but They Are Not Always Obvious*, N.Y.L.J., Sept. 13, 2004, at 9 (noting property and other financial issues often prevent couples from marrying).

46. See *infra* note 118 and accompanying text (describing state laws outlawing gay marriage); see also *infra* Part II.B.3.b (discussing constitutional right of same-sex couples to marry in Massachusetts).

47. See *Morrison v. Sadler*, 821 N.E.2d 15, 25 (Ind. Ct. App. 2005) (recognizing state creates marriage institution to encourage procreation within legitimate and stable relationships); *Standhardt v. County of Maricopa*, 77 P.3d 451, 462-63 (Ariz. Ct. App. 2004) (recognizing state's reasonable interest in link between heterosexual marriage and procreation); see also Michael Foust, *Rulings Against 'Gay Marriage' Could Change Legal Landscape*, BAPTIST PRESS, August 22, 2006, available at <http://www.bpnews.net/bpnews.asp?ID=23832> (examining recent court decisions banning gay marriage). These decisions reinforce the argument that "marriage laws are tied to child-rearing—and not simply love between two people." Foust, *supra*. Chris Stovall, attorney with the Alliance Defense Fund, commented on these court decisions, noting that "there is a need to make sure that men and women, when they produce

The state's ban on same-sex marriage passes the rational basis test with regards to an individual's right to equal protection as long as the disparate treatment reasonably relates to an "inherent characteristic that distinguishes the unequally treated classes."<sup>48</sup> States argue that they possess a greater interest in extending the benefits of marriage to opposite-sex couples because they produce children naturally.<sup>49</sup> Marriage works as a state sanctioned relationship to discourage unplanned, out-of-wedlock births by opposite-sex couples.<sup>50</sup> On the other hand, a same-sex couple must usually consider assisted reproductive technology or adoption to have a child.<sup>51</sup> Undergoing these steps willingly indicates that same-sex couples already created a stable environment for the child, despite the court depriving them the protections of marriage.<sup>52</sup> Sanctioning same-sex marriage does not advance the state's interest in ensuring responsible procreation within committed relationships because the responsibility already exists with homosexual couples.<sup>53</sup>

Although heterosexual couples are legally free to marry, marriage's effect on an individual's entitlement to financial support may prevent a couple from doing so, especially for older couples.<sup>54</sup> For example, marriage may reduce or eliminate an individual's right to Social Security.<sup>55</sup> Also, an individual may receive a large alimony sum as part of a divorce settlement.<sup>56</sup> By remarrying,

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children, will raise them together in stable households. The focus is on children and on families, and [the family] being the basic building block of stable societies." *Id.*

48. See *Morrison*, 821 N.E.2d at 24 (arguing ability to procreate naturally distinguishes same-sex and opposite-sex couples).

49. *Id.* at 24-25 (stressing marriage's importance regarding unplanned births); see also *supra* note 53 and accompanying text (accepting state's reasonable interest in preventing unplanned pregnancies). But see *Morrison*, 821 N.E.2d at 36-37 (Friedlander, J., concurring) (disagreeing with majority's different treatment based on natural procreation). Justice Friedlander believes this reasoning is discriminatory in purpose and is concerned that states will use the majority's emphasis on natural procreation as a prerequisite for marriage in order to prevent sterile persons or women past child bearing years from marrying. *Id.*

50. See *id.* at 25 (majority opinion) (acknowledging pregnancies occur even if couple never plans on having children when they marry).

51. See *id.* at 24 (explaining significant time, effort, and expense associated with same-sex couples having children).

52. *Id.* (explaining why state's interest in homosexual marriage not as crucial as interest in heterosexual marriage).

53. See *Standhardt v. County of Maricopa*, 77 P.3d 451, 462-63 (Ariz. Ct. App. 2004) (arguing exclusion of homosexuals does not defeat reasonable link between heterosexual marriage and procreation). The court admits that children with same-sex parents could benefit from the stability of same-sex marriage, but then suggests that it is up to the legislature and not the courts to make the final determination. *Id.* at 463.

54. Robert J. Durst, *Ties That Bind Drafting Enforceable Cohabitation Agreements*, N.J.L.J. (Fam. L. Supp.), July 7, 1997, at S-13 (noting marriage alters financial arrangements).

55. *Id.* (explaining effect of marriage on Social Security benefits). Governments base benefits for an unemployed individual at the time of a divorce on the length of the marriage and age of the person. *Id.* By remarrying, that person risks reducing the amount because marriage changes the factors initially used to determine the benefits. *Id.*

56. Durst, *supra* note 54, at S-13 (noting termination of lengthy marriages increases amount and duration of alimony awards).

the individual loses that sum indefinitely.<sup>57</sup> Despite the theory that unmarried couples avoid the responsibilities of marriage, courts are creating new rights and privileges for these unconventional couples in other areas of the law.<sup>58</sup>

### B. Benefits for Unmarried Couples

#### 1. Creating New Rights and Benefits for Unmarried Couples in the Courts

##### a. Financial Support

In recent years, courts more willingly granted rights and protections to both unmarried heterosexual and homosexual cohabitating couples.<sup>59</sup> In *Marvin v. Marvin*,<sup>60</sup> the plaintiff claimed that she and the defendant had an oral agreement that they would combine their earnings and share any property acquired during their cohabitation while unmarried.<sup>61</sup> The plaintiff contended that this agreement entitled her to half of the property acquired during the relationship.<sup>62</sup> The court held that, based on contract theory, unmarried cohabitants could be liable for financial support.<sup>63</sup> Such contracts were valid so long as the consideration for the contract was not of a sexual nature.<sup>64</sup> In addition, an implied contract based on the conduct of the parties could exist in the absence of an express contract.<sup>65</sup> The court's holding thereby removed any

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57. Durst, *supra* note 54, at s-13 (explaining risk of losing alimony). Someone entitled to long-term alimony risks losing that financial support by remarrying, especially if the second relationship fails as well. *Id.*

58. *See infra* Part II.B (describing creation of new privileges and extension of rights usually reserved for married couples).

59. *See, e.g.,* Wilcox v. Trautz, 693 N.E.2d 141, 145 (Mass. 1998) (encouraging cohabitation agreements for unmarried couples for financial protection); Braschi v. Stahl Assocs. Co., 543 N.E.2d 49, 53-54 (N.Y. 1989) (including, within eviction laws' definition of family, homosexual couple with emotional and financial commitment); Yamauchi v. Dep't of Employment Sec., 638 P.2d 1253, 1256 (Wash. 1982) (recognizing domestic responsibilities in unmarried couples making them eligible for unemployment benefits).

60. 557 P.2d 106 (Cal. 1976).

61. *Id.* at 110 (describing couple's behavior indicating contract agreement). The plaintiff claimed she gave up her own career to act as caregiver to the defendant until they separated after seven years of cohabitation. *Id.*

62. *Id.* at 111 (asking court to impose constructive trust on property).

63. *Id.* at 110 (holding courts should enforce express contracts between unmarried cohabitating partners). In the absence of a contract, courts can apply equitable remedies when the facts of the case support it. *Id.* The court recognized societal mores regarding cohabitation drastically changed and that it could not impose a standard on such couples based on abandoned morals. *Id.* at 122.

64. *Marvin*, 557 P.2d at 113 (explaining living without marriage and engaging in sexual activities does not automatically invalidate financial agreements). Courts hold such contracts unenforceable only when they explicitly rest on meretricious sexual services as consideration. *Id.* at 112.

65. *Id.* at 122 (recognizing enforceability of implied contract between parties); *see also* Durst, *supra* note 54, at S-13 (describing theory contracts used to define own rights and obligations during and after relationship). *But see* Rubenstein, *supra* note 45, at 9 (comparing support contracts and marriage contracts). State laws that automatically revoke liabilities between divorcing couples do not apply to unmarried couples who end their relationship. *Id.* These couples must revoke their support contracts to end their liability to one another. *Id.*

remaining judicial barriers to cohabitating couples' reasonable expectations regarding their own relationship.<sup>66</sup>

*b. Employee Benefits*

In *Yamauchi v. Department of Employment Security*,<sup>67</sup> the court ruled that an employee who voluntarily left work to move with her fiancé, and did so because of "marital status or domestic responsibility," was entitled to unemployment benefits.<sup>68</sup> Although the court stressed the fact that Yamauchi left work to get married, it also stated "persons in a nonmarried relationship would be clearly within the ambit of [the marital status] provision," regardless of whether they planned to marry in the future.<sup>69</sup> The test for eligibility shifted its focus from whether one was married to whether the employee's relationship with another actually caused her to give up her job.<sup>70</sup>

In *Alaska Civil Liberties Union v. Alaska*,<sup>71</sup> instead of challenging the Alaska Marriage Amendment defining marriage as between a man and a woman, the nine plaintiff couples argued that their employer's practice of withholding benefits from unmarried domestic partners violated the equal rights provision of the Alaska Constitution.<sup>72</sup> The court noted that the state constitution apparently treated both unmarried homosexual and heterosexual couples the same by only granting benefits to married couples.<sup>73</sup> The court did not agree that the treatment was equal though because the state constitution allowed opposite-sex couples to marry while it explicitly denied this opportunity to same-sex couples.<sup>74</sup> Recognizing that the benefit program discriminated against same-sex couples, the court held that the Alaska Constitution's Equal Protection Clause entitled an employee's domestic partner to the same benefits as an employee's spouse.<sup>75</sup>

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66. *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (encouraging courts to look to other remedies to protect parties' reasonable expectations).

67. 638 P.2d 1253 (Wash. 1982).

68. *Id.* at 1256 (interpreting eligibility for unemployment under state statute). The court adopted Yamauchi's interpretation of "marital status" as referring to someone who is single, married, or divorced instead of limiting it to only those who are married. *Id.* at 1254.

69. *Id.* at 1256 n.2 (inferring both heterosexual and homosexual unmarried couples able to claim employee benefits).

70. *Id.* at 1256 (stressing need for "causal nexus" between marital status and leaving employment). For Yamauchi, the causal nexus was that moving with her fiancé resulted in an impractical commute to work. *Id.*

71. 122 P.3d 781 (Alaska 2005).

72. *See id.* at 784 (describing plaintiffs' complaint against benefits program); *see also* ALASKA CONST. art. I, § 25 (stating "[t]o be valid . . . , a marriage may exist only between one man and one woman").

73. *Alaska Civil Liberties Union*, 122 P.3d at 784 (noting Alaska Constitution denies benefits to anyone not married, regardless of relationship).

74. *See id.* at 784 (recognizing opposite-sex couples can change marital status while same-sex couples cannot); *see also* ALASKA CONST. art. I, § 25 (describing provision banning gay marriage).

75. *Alaska Civil Liberties Union*, 122 P.3d at 786-87 (holding amendment preventing same-sex marriage not applicable to benefits for employee's domestic partner). The court defined "domestic partners" as couples living together in a long-term, interdependent relationship. *Id.* at 784 n.5.

c. *Protection From Eviction*

Under New York rent control laws, courts granted same-sex couples the right to be recognized as “family.”<sup>76</sup> The state regulation prevented landlords from evicting a deceased tenant’s surviving spouse or a member of the deceased tenant’s family who lived with the tenant.<sup>77</sup> The court reasoned that the “reality of family life” should protect against sudden eviction.<sup>78</sup> This reality included two lifetime partners in a long term relationship with emotional and financial commitment.<sup>79</sup> In its decision, the court looked beyond the existence or nonexistence of a marriage certificate to other factors to determine if a couple was a family.<sup>80</sup>

d. *Protection from Domestic Violence*

States like Kentucky and Ohio recognized that the domestic violence protections that states give to married couples also extend to unmarried heterosexual and homosexual couples.<sup>81</sup> *Ireland v. Davis*<sup>82</sup> addressed the issue of whether the Kentucky state domestic violence statute afforded same-sex couples the same protections as married couples.<sup>83</sup> The state’s definition of “member of an unmarried couple,” included any person who lives with or formally lived with another person during a personal relationship.<sup>84</sup> Deciding that the statutory language was unambiguous, the court stated it neither

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76. See *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 55 (N.Y. 1989) (stating “objective examination” of parties’ relationship determines whether noneviction protections apply). The case involved two men, Braschi and Blanchard, who cohabitated together until Blanchard’s death in 1986. *Id.* at 50. After Blanchard’s death, the defendant attempted to evict Braschi because he was not a tenant on record. *Id.* at 51.

77. *Id.* at 50 (interpreting terms of eviction statute). Defining “family” as those individuals treating the apartment as their family home allows the legislature to prevent dislocation. *Id.* at 54.

78. *Id.* at 53 (recognizing unrelated cohabitants as family unit). Braschi and Blanchard lived in the apartment together for ten years. *Id.* at 55. Their families knew of their relationship and treated them like a couple. *Id.* The men shared all financial obligations including rent and had joint credit cards, savings accounts, and checking accounts. *Id.* Finally, Braschi’s received all his mail at the apartment and the address appeared on his driver’s license. *Id.* Examining these facts led the court to conclude that the men were “more than just roommates.” *Id.*

79. *Id.* at 54 (acknowledging individuals in homosexual relationship consider themselves family).

80. *Braschi*, 543 N.E.2d at 55 (explaining factors courts examine). Courts consider the length of the relationship, the emotional and financial commitment the parties make, and how much the parties rely on one another for “daily family services.” *Id.*

81. *Ireland v. Davis*, 957 S.W.2d 310, 312 (Ky. Ct. App. 1997) (explaining court’s holding); *State v. Rodgers*, 827 N.E.2d 872, 875-76 (Ohio 2005) (concluding domestic violence statute applies without marriage).

82. 957 S.W.2d 310 (Ky. Ct. App. 1997).

83. *Id.* at 311 (examining issue of case). Ireland and Davis were two men living together as a couple until Ireland filed a domestic violence petition alleging abuse. *Id.* Davis later violated the order by contacting Ireland and Ireland returned to court to enforce the order. *Id.* Rather than enforce the order, the court set aside the arrest warrant and dismissed the proceeding, claiming it lacked jurisdiction to enforce the domestic violence statute with regards to a same-sex couple. *Id.*

84. *Id.* (defining those covered under statute); see also *Rodgers*, 827 N.E.2d at 875-76 (explaining domestic violence statute still applicable without marriage).

expressly included nor excluded same-sex couples from its protections.<sup>85</sup>

The Ohio courts also focused more on couples meeting the definition of cohabitation rather than the definition of a formal marriage.<sup>86</sup> Statistics indicating that violence occurs during many kinds of personal relationships supported the interpretation.<sup>87</sup> Applying the domestic violence statute only to married couples would otherwise “eviscerate the efforts of the legislation to safeguard, regardless of gender, the rights of victims of domestic violence.”<sup>88</sup>

## 2. Domestic Partnerships for Homosexual Couples

Some courts recognize that cohabitating couples have domestic responsibilities even though they are not yet married.<sup>89</sup> For example, California created domestic partnership laws that required couples to take on the legal obligations and responsibilities typically associated with marriage.<sup>90</sup> States usually reserve domestic partnerships for homosexual couples because they cannot legally marry except in Massachusetts.<sup>91</sup> Nevertheless, problems

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85. *Ireland*, 957 S.W.2d at 312 (noting General Assembly amended statute in 1992 to include couples without children).

86. *Rodgers*, 827 N.E.2d at 876 (articulating factors of cohabitation). The court notes cohabitation includes sharing financial or familial responsibility and consortium. *Id.* The court also stressed the need for consistency in the parties’ behavior. *Id.*; see also *State v. Cobb*, 795 N.E.2d 73, 75 (Ohio Ct. App. 2003) (evidencing no cohabitation when couples avoid sharing family responsibilities); *Middletown v. Walker*, 669 N.E.2d 69, 70 (Ohio Ct. App. 1995) (finding no cohabitation when couple maintains separate residences).

87. *State v. Rodgers*, 827 N.E.2d 872, 875-76 (Ohio 2005) (noting court’s desire to curb violence in all personal relationships, regardless of parties’ sex). The Marriage Amendment only required that courts do not consider cohabitation substantially equivalent to marriage. *Id.* at 880. Although the defendant and victim were not married, the law did not require the courts to ignore every relationship that was not a marriage. *Id.* But see *infra* note 118 (detailing destructive effect on domestic violence laws for cohabitating couples when states redefine marriage).

88. See *State v. Hadinger*, 573 N.E.2d 1191, 1193 (Ohio Ct. App. 1991) (illustrating courts’ willingness to recognize domestic relationships between homosexual couples). The court applied the domestic violence statute to a situation where one woman bit the hand of the woman she lived with in a spousal relationship. *Id.* at 1191.

89. See *Reep v. Comm’r of Dept. of Employment & Training*, 593 N.E.2d 1297, 1300 (Mass. 1992) (recognizing right of nonmarital partner to prove reasons for leaving employment as urgent and necessary); *Yamauchi v. Dep’t of Employment Sec.*, 638 P.2d 1253, 1256 (Wash. 1982) (holding woman entitled to unemployment benefits when leaving work to move with fiancé).

90. See *S.D. Myers, Inc. v. City of San Francisco*, 253 F.3d 461, 465 (9th Cir. 2001) (recognizing array of rights granted to couples in domestic partnerships). The *Myers* court acknowledged bereavement leave, memberships, family medical leave, moving expenses, pensions, and health benefits as marital benefits available to couples in domestic partnerships. *Id.* at 465; see also *Holguin v. Flores*, 18 Cal. Rptr. 3d 749, 752 (Cal. Ct. App. 2004) (allowing domestic partners to make medical decisions for one another and to get sick leave)

91. See CAL. FAM. CODE § 299 (West 2006) (creating domestic partnerships in California); *Standhardt v. Super. Ct. ex. rel. County of Maricopa*, 77 P.3d 451, 463 n.17 (Ariz. Ct. App. 2003) (detailing government response to inequities for same-sex couples); *Holguin*, 18 Cal. Rptr. 3d at 751 (affording rights to unmarried couples entering into domestic partnerships). Washington, Oregon, Hawaii, New York, and Connecticut offer state employees domestic partnership benefits. *Standhardt*, 77 P.3d at 463 n.17. In Arizona, the cities of Phoenix and Tucson also offer employee benefits. *Id.* Furthermore, Tucson adopted its own Domestic Partnership ordinance ensuring city businesses offered hospital visitations and family discounts for homosexual

with domestic partnerships include the fact that usually only the local municipality can grant the benefits and protections associated with the partnerships.<sup>92</sup> Commentators argue that the creation of domestic partnerships themselves points to the outdated justification for the different treatment of married and unmarried couples.<sup>93</sup> Two states recently took the first step in altering the different treatment of married and unmarried couples by allowing homosexual couples to enter into civil unions or marriage.<sup>94</sup>

### 3. *Civil Unions and Gay Marriage*

#### a. *Civil Unions in Vermont*

Vermont was the first state to allow civil unions between homosexual couples.<sup>95</sup> In *Baker v. State*,<sup>96</sup> the court held constitutional the obligation to extend to homosexual couples the same common benefits, protections, and security it afforded to heterosexual couples.<sup>97</sup> The state statute regarding the spousal privilege reads as follows:

Husband and wife shall be competent witnesses for or against each other in all cases . . . except that neither shall be allowed to testify against the other as to a statement . . . nor shall either be allowed in any case to testify as to a matter which, in the opinion of the court, would lead to a violation of marital confidence.<sup>98</sup>

The *Baker* court specifically stated that the spousal testimony privilege extended to homosexual couples in civil unions.<sup>99</sup> Yet, limitations that do not

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couples. *Id.* The California Domestic Partner Rights and Responsibilities Act applies to same-sex couples and to couples, both heterosexual or homosexual, where one partner is sixty-two years or older and eligible for certain benefits. *Holguin*, 18 Cal. Rptr. 3d at 751.

92. See Brannen, *supra* note 11, at 336 (pointing out weakness of domestic partnerships when no state or federal benefits involved).

93. Brannen, *supra* note 11, at 336-37 (arguing creation of domestic partnerships indicates unmarried and married relationships serve same social functions). Brannen suggests that if a couple lives together, shares the same basic living expenses, and meets the qualifications of a domestic partnership ordinance in a state that does not allow domestic partnerships, the court should extend the same marital privileges that it afforded in a state that has domestic partnerships. *Id.* at 339-40.

94. VT. STAT. ANN. tit. 15, § 1201-07 (2002) (creating civil unions for same-sex couples); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003) (holding courts cannot deny same-sex couples right to marry).

95. See VT. STAT. ANN. tit. 15, § 1201-07 (2002) (granting benefits of marriage to homosexual couples).

96. 744 A.2d 864 (Vt. 1999).

97. *Id.* at 886 (holding no reasonable basis to exclude same-sex couples from civil marriage license's benefits); see also Liz Seaton, *The Debate Over the Denial of Marriage Rights and Benefits to Same-Sex Couples and Their Children*, 4 MARGINS 127, 159 n.44 (2004) (explaining *Baker* court's holding to allow marriage or civil equivalent because law violated benefits clause).

98. VT. STAT. ANN. tit. 12, § 1605 (2003) (defining protection of confidential communications).

99. See *Baker*, 744 A.2d at 883-84 (recognizing prevention of same-sex marriage prevented couples from invoking spousal testimony privilege).

exist for married couples still remain for couples in civil unions.<sup>100</sup> For example, couples who enter into civil unions risk losing the benefits of the union if and when they leave the enforcing state, whereas all states enforce benefits for married heterosexual couples.<sup>101</sup>

*b. Gay Marriage in Massachusetts*

In the landmark case of *Goodridge v. Department of Public Health*,<sup>102</sup> Massachusetts became the first state to grant homosexual couples the right to marry.<sup>103</sup> In 2001, seven same-sex couples attempted to obtain a marriage license from their local clerk.<sup>104</sup> The city clerk denied each couple a license because Massachusetts did not recognize same-sex marriage.<sup>105</sup> The Supreme Judicial Court held that refusing the licenses denied the couples the same social and legal protections afforded to married couples, violating their state constitutional rights.<sup>106</sup> The court redefined the common-law definition of marriage to mean “the voluntary union of two persons as spouses, to the exclusion of others.”<sup>107</sup>

The *Goodridge* decision afforded all homosexual couples married in

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100. *Compare* *Burns v. Burns*, 560 S.E.2d 47, 49 (Ga. Ct. App. 2002) (holding Georgia not required to recognize civil unions from other states), *with* *People v. Schmidt*, 579 N.W.2d 431, 434 (Mich. Ct. App. 1998) (recognizing common-law marriage in state where common-law marriage not allowed); *see also* *Toth v. Toth*, 212 N.W.2d 812, 813 (Mich. Ct. App. 1973) (explaining court’s recognition of marriages from other states). Unlike civil unions, other states recognize common-law marriages outside of the states that established them based on the theory that a marriage valid in the state where the parties contract it is valid everywhere else. *Toth*, 212 N.W.2d at 813.

101. *See supra* notes 99-100 and accompanying text (describing different treatment in all states for married couples and couples in civil unions). *But see* U.S. CONST. art. IV, § 1 (establishing Full Faith and Credit Clause). Article IV of the United States Constitution states, “Full faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State.” *Id.*

102. 798 N.E.2d 941 (Mass. 2003).

103. *See id.* at 969 (holding courts can not deny same-sex couples right to marry); *Seaton, supra* note 97, at 135 (explaining *Goodridge* holding). The *Goodridge* court held that denying same-sex couples the right to marriage violated individual liberty and equality under the Massachusetts Constitution. *Seaton, supra* note 97, at 135. *But see* Pam Belluck, *Massachusetts Court Limits Same-Sex Marriages*, N.Y. TIMES, March 30, 2006 (reporting on Massachusetts Supreme Court decision to limit same-sex marriage to Massachusetts residents only). The court relied on a 1913 statute that prohibited non-residents from marrying in Massachusetts if the marriage was void in their own state. *Id.* The court stressed that non-resident same-sex couples with no intention of living in Massachusetts do not share the same right to “secure a marriage license” that their home state otherwise denied to them. *Id.* Massachusetts Governor Mitt Romney agreed with the decision, stating, “[i]t would have been wrong for this court to impose it’s [sic] same sex ruling on the other 49 states of America.” *Id.* Justice Marshall’s concurring opinion suggested that same-sex couples who “reside in states where they are not expressly prohibited from marrying by statute” should be allowed to present evidence to rebut the presumption that their home state prohibited their marriage. *Cote-Whitacre v. Dep’t. of Pub. Health*, 844 N.E.2d 623, 658 (Mass. 2006).

104. *Goodridge*, 798 N.E.2d at 949 (explaining facts of case).

105. *Id.* at 949-50 (describing Massachusetts marriage law at time of case).

106. *Id.* at 969 (concluding current treatment of homosexual couples violated Massachusetts Constitution). Barring state citizens from the protections, obligations, and benefits of civil marriage solely for choosing to marry someone of the same sex violated the state constitution. *Id.* at 969.

107. *Id.* at 969 (declaring new definition promotes “stable, exclusive relationships”).

Massachusetts the same rights and benefits granted to heterosexual couples, including the spousal testimony privilege.<sup>108</sup>

After *Goodridge*, the Massachusetts Senate requested the Supreme Judicial Court's opinion on a bill that prohibited same-sex marriage, but allowed civil unions with all the benefits of marriage.<sup>109</sup> These benefits included evidentiary rights, property rights, and veterans' benefits.<sup>110</sup> The bill, however, preserved the traditional and historical meaning of civil marriage by labeling the two unions with different terms.<sup>111</sup> Chief Justice Marshall, along with Justices Greaney, Ireland, and Cowen, rejected the proposed bill for violating the same rights that *Goodridge* sought to remedy.<sup>112</sup> The justices concluded that the bill contravened the equal protection and due process requirements of the Massachusetts Declaration of Rights.<sup>113</sup> Preventing homosexual couples from marrying relegated them to a lesser status than heterosexual couples.<sup>114</sup>

### C. *The Defense of Marriage Act*

#### 1. *Federal Law*

Despite the movement granting homosexual couples marital rights typically reserved for heterosexual couples, the federal government's Defense of Marriage Act (DOMA) crippled the application of these rights.<sup>115</sup> Federal law now defines "marriage" and "spouse" to exclude same-sex couples.<sup>116</sup> The new

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108. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 956 (Mass. 2003) (recognizing evidentiary rights exclusive benefit of marriage); see also MASS. GEN. LAWS ch. 233, § 20 (2005) (preventing couples in civil and criminal cases from testifying to private conversations).

109. See Opinions of the Justices to the Senate, 802 N.E.2d 565, 566 (Mass. 2004) [hereinafter Opinions of the Justices] (considering constitutionality of proposed bill).

110. *Id.* at 568 (describing bill's listing of "nonexclusive list of legal benefits").

111. *Id.* at 569 (acknowledging legislature's desire to preserve traditional civil marriage definition).

112. See *infra* note 113 and accompanying text (divulging reasons why court rejected proposed bill).

113. Opinions of the Justices, 802 N.E.2d at 569-72 (rejecting bill for according lesser status to same-sex unions). The justices also rejected the argument that there is a rational basis for distinguishing same-sex relationships from traditional heterosexual civil marriage because the federal government and all other states do not recognize same-sex marriage. *Id.* at 571. The four justices were primarily concerned with protecting people under the Massachusetts Declaration of Rights and not with how their interpretation will conflict with other jurisdictions. *Id.* at 571.

114. *Id.* at 570 (stating "spouse" status carries numerous significant social advantages). Marriage fulfills the human yearning for security, safety, and connection. *Id.* at 567. By denying a person's choice of partner, society excludes that person from the "full range of the human experience." *Id.* (quoting *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 957 (Mass. 2003)); see also Cheryl Wetzstein, *Gay 'Marriage' First Couple Splits up in Massachusetts: Landmark Pair Has a Daughter*, WASH. TIMES, July 22, 2006, at A1 (announcing separation of Hillary and Julie Goodridge). Shannon Minter, the spokesman for the National Center for Lesbian Rights in San Francisco, points out the benefits of having the protection of marriage because "[the couple] and their daughter will have all the security and clear rules that married couples benefit from when they do divorce." Wetzstein, *supra*, at A1.

115. See Defense of Marriage Act, 28 U.S.C. § 1738C (2000) (granting states right not to recognize relationships other state treats as marriage).

116. 1 U.S.C. § 7 (2000) (defining marriage as union between one man and one woman). The statute

definition means the federal government is not obligated to recognize gay marriage, despite the marriage's legality in the contracting state.<sup>117</sup>

DOMA also allows states to create their own laws denying married homosexual couples the rights, responsibilities, and benefits of marriage.<sup>118</sup> This means that even though a married homosexual couple is entitled to invoke the spousal testimony privilege in Massachusetts, any other state or federal court can prevent them from doing so in their jurisdiction.<sup>119</sup> DOMA directly conflicts with two previously followed theories regarding the spousal testimony privilege.<sup>120</sup> First, DOMA conflicts with the theory that the validity of a marriage depends on state law.<sup>121</sup> Second, it conflicts with the theory that determining whether a marriage deserves to be protected is irrelevant.<sup>122</sup> DOMA, therefore, limits the availability of the spousal privilege to married homosexual couples by restricting the privilege's application to only the state court allowing the union.<sup>123</sup>

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defines "spouse" as a person of the opposite-sex. *Id.*

117. See Seaton, *supra* note 97, at 146 (discussing federal government's attempt at denying recognition of homosexual marriage before state allows it). *But see* Toth v. Toth, 212 N.W.2d 812, 813 (Mich. Ct. App. 1973) (stating states consider marriage valid where originally contracted).

118. 28 U.S.C. § 1738C (allowing states to deny recognition of otherwise valid same-sex marriages); see, e.g., ALASKA STAT. § 25.05.011 (2004); ARIZ. REV. STAT. ANN. § 25-101 (2000); ARK. CODE ANN. § 9-11-109 (2002); DEL. CODE ANN. tit. 13, § 101 (1999); GA. CODE ANN. § 19-3-3.1 (2004); HAW. REV. STAT. § 572-1 (2005); IDAHO CODE ANN. § 32-201 (2006); 750 ILL. COMP. STAT. 5/212 (1999); KAN. STAT. ANN. § 23-101 (1995); MISS. CODE ANN. § 93-1-1 (1999); MO. REV. STAT. § 451.022 (2003); OKLA. STAT. tit. 43, § 3 (2001); S.C. CODE ANN. § 20-1-15 (1976); S.D. CODIFIED LAWS § 25-1-1 (1999); TENN. CODE ANN. § 36-3-113 (2005); UTAH CODE ANN. § 30-1-2 (1998) (prohibiting marriage between persons of same sex); see also Natalie Hayes, *Amendment Would Strengthen Arizona's Gay Marriage Ban Proposition Would Also Affect Unmarried Heterosexual Couples*, AUS WEB DEVIL, Aug. 28, 2006 (discussing proposed amendment to Arizona Constitution). The amendment defines marriage as between a man and a woman and prevents unmarried persons from "receiving any legal status that resembles that of married couples." Hayes, *supra*. Although meant to prevent gay marriage, if passed, the amendment stands to affect almost 106,000 heterosexual domestic partnerships compared to only 12,000 homosexual domestic partnerships. *Id.* One of its most drastic effects is on domestic violence laws. *Id.* "If an unmarried couple that lives together is not legally recognized by the state, the law would prevent them from being charged with domestic violence." *Id.*; Linda J. Lacey & Marianne Blair, *Symposium Forward: Coping with the Aftermath of Victory*, 40 TULSA L. REV. 371, 377 (2005) (explaining amendment to Oklahoma Constitution banning recognition of same-sex marriages in other states). The article suggests that such provisions could work to block any legal devices meant to grant rights to cohabitating couples living in committed relationships, regardless of their sex. Lacey, *supra*, at 377-78.

119. See *supra* notes 99-100 and accompanying text (describing denial of marital privileges in some courts and allowance in others).

120. See *infra* notes 121-122 and accompanying text (recognizing DOMA's effect on marital benefits).

121. See McDaniel, *supra* note 27, at 740 (requiring states to recognize existence of marriage before parties can claim privilege).

122. See Brannen, *supra* note 11, at 326 (arguing only important consideration whether party legally entitled to assert privilege). Brannen argues that when courts determine some marriages are more worthy than others, the spousal privilege becomes subject to whatever that court decides is best for society. *Id.* at 323-24.

123. See *infra* Part II.C.2 (explaining disruptive effects of DOMA on gay marriage and marital privileges).

## 2. *State Applications of DOMA*

DOMA allows states to disregard the validity of any foreign civil union or marriage contradictory to the sovereign state's public policy regarding marriage.<sup>124</sup> For instance, in *Rosengarten v. Downes*,<sup>125</sup> Connecticut's ban against same-sex marriage supported the court's interpretation that it is against public policy for the state to dissolve civil unions.<sup>126</sup> The court held that it lacked proper subject matter jurisdiction to dissolve a civil union that the state of Vermont granted because Connecticut did not recognize civil unions as a family form under its law.<sup>127</sup>

Even when both the state that contracted the civil union and the state where the parties seek to dissolve it allow civil unions, DOMA allows each state to limit what benefits they will actually recognize with regards to the union.<sup>128</sup> New Jersey allows domestic partnerships and even recognizes certain out-of-state same-sex relationships, but the law does not require it to extend the same benefits to same-sex couples as the law in the state that sanctioned their relationship does.<sup>129</sup>

### III. ANALYSIS

#### A. *The Need for Expanding the Spousal Testimony Privilege*

The spousal privilege developed at common law in response to the definition

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124. See *supra* note 118 and accompanying text (describing numerous state laws requiring marriage to be between men and women only).

125. 802 A.2d 170 (Conn. App. Ct. 2002).

126. See *id.* at 184 (granting jurisdiction to dissolve marriages only). The relevant state statute grants the courts jurisdiction over all issues concerning children and family. *Id.* at 172. The plaintiff, who entered into a civil union in Vermont but filed for dissolution in Connecticut, argued unsuccessfully that the state statute defines the dissolution of a civil union as a "matter relating to family relations." *Id.* at 172. The court reasoned that Connecticut does not define civil unions as a family matter under its law. *Id.* at 177.

127. *Id.* at 179 (rejecting argument in favor of same-sex union dissolution for public policy reasons). Connecticut has not adopted its own DOMA because the state believes its legislative history already defines marriage as between a man and a woman. *Id.* at 182. In fact, Connecticut's legislature failed to enact two suggested bills that authorized same-sex marriage or civil unions. *Id.* at 179 n.6. The court interpreted this failure to act as proof of public policy against recognizing and dissolving civil unions. *Id.* at 179.

128. See *Henefeld v. Township of Montclair*, 22 N.J. Tax 166, 187 (N.J. Tax Ct. 2005) (extending fewer benefits to citizens in domestic partnerships than Vermont).

129. See *id.* (extending fewer marital rights to homosexual couples in New Jersey than in Vermont). The couple in *Henefeld* married in Canada and joined in civil union in Vermont before New Jersey allowed them to form a domestic partnership. *Id.* at 172-73. *Henefeld* argued that the "comity of nations" theory created an obligation that considerations of international duty and convenience support when the laws of the foreign nation are consistent with New Jersey laws. *Id.* at 178. The court refused to recognize the couple's Canadian marriage because same-sex marriage is inconsistent with New Jersey public policy. *Id.* at 184. New Jersey also did not recognize the couple's Vermont civil union because while Vermont civil unions entitled couples to the same benefits as married couples, the New Jersey Domestic Partnership Act mainly extended benefits regarding property rights and financial rights. *Id.* at 187.

of marriage as it existed at that time.<sup>130</sup> The privilege already changed once, as social thought regarding the woman's identity in marriage evolved.<sup>131</sup> Currently, the marital relationship is changing again, but the spousal privilege is not evolving with it.<sup>132</sup> Marriage is no longer the only recognized family unit and cohabitation does not carry the same stigma as it did in the past.<sup>133</sup> Homosexual couples, though denied the right to marry in all but one state, are also becoming a recognized family form.<sup>134</sup>

Privileges remain flexible amidst a changing society.<sup>135</sup> Besides the ability to create new privileges, courts possess the power to deny the application of a privilege when it does not serve its purpose.<sup>136</sup> The present purpose for the spousal privilege is keeping peace within the family and preserving the marital relationship.<sup>137</sup> By automatically excluding cohabitating couples from its reach, the privilege now assumes these couples are not a "family."<sup>138</sup> This refusal sends the message that their relationships, unlike relationships between heterosexuals who can procreate naturally, are not worth protecting.<sup>139</sup>

Nevertheless, courts protect these relationships in other areas of the law.<sup>140</sup> Courts recognize that cohabitating couples are entitled to financial support from one another if the relationship dissolves.<sup>141</sup> In addition, Washington state law requires employers to offer cohabitating couples many of the same benefits they give to employees' spouses.<sup>142</sup> Also, New York rent control law prohibits landlords from evicting the surviving partner of a cohabitating couple or refusing to rent to an unmarried couple.<sup>143</sup> Finally, some courts are beginning

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130. See *supra* notes 23-25 and accompanying text (explaining common-law prohibition on husband or wife testifying against each other).

131. See *supra* note 26 (describing recognition of wife's legal identity separate from husband's).

132. See *supra* note 3 and accompanying text (recognizing changes to marital relationship). Family forms consisting of unmarried parents, single parents and homosexual parents are growing as marriage becomes less popular. See Scott, *supra* note 3, at 225.

133. See *supra* note 3 and accompanying text (describing changing morals regarding cohabitation).

134. See *supra* note 3 and accompanying text (detailing growth in number of homosexual couples cohabitating).

135. See *supra* note 30-32 and accompanying text (indicating Congress rejected proposal for more privileges to develop).

136. See *supra* note 42 and accompanying text (altering common-law privilege regarding wife's ability to testify against husband).

137. See *supra* note 27 and accompanying text (explaining reasons for spousal privilege).

138. See *supra* note 6 (describing cases where courts refuse privilege to unmarried cohabitating couples).

139. See *supra* note 49 and accompanying text (arguing importance of protecting those who naturally procreate).

140. See *supra* note 59 and accompanying text (creating financial and domestic benefits for unmarried cohabitating couples).

141. See *supra* notes 61-66 and accompanying text (acknowledging importance of protecting financial interests of cohabitating couples).

142. See *supra* notes 68-70 and accompanying text (recognizing domestic responsibilities of cohabitating couples).

143. See *supra* notes 76-80 and accompanying text (identifying factors defining cohabitating couples as family).

to interpret domestic violence laws to protect individuals in non-marital relationships.<sup>144</sup>

These new legal developments weaken the primary justification for denying the spousal privilege to cohabitating couples.<sup>145</sup> Courts deny the privilege because the couples are avoiding the responsibilities of marriage; on the other hand, courts are beginning to recognize these other benefits for these couples, to which spouses are also entitled.<sup>146</sup>

Making marriage a prerequisite for the spousal privilege precludes couples who cannot marry from ever receiving the benefit.<sup>147</sup> Vermont and Massachusetts expressly extended the spousal privilege to same-sex couples entering into civil unions or marriage.<sup>148</sup> Although other states created domestic partnerships, these partnerships do not always include the same benefits to which married individuals are entitled.<sup>149</sup> For example, only the states that authorize domestic partnerships and civil unions recognize the arrangements.<sup>150</sup> A same-sex couple in a civil union in Vermont cannot claim the spousal privilege in any other state.<sup>151</sup> Furthermore, because of DOMA, federal law does not recognize any marital benefits for same-sex couples who join in civil unions or marriage.<sup>152</sup> The rights of same-sex couples and their families are vulnerable because the couples can only claim the privilege in certain courts.<sup>153</sup>

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144. See *supra* notes 81-88 and accompanying text (applying domestic violence statutes to unmarried couples).

145. See *supra* note 10 and accompanying text (discussing characterization of cohabitating couples as avoiding marital responsibilities); *supra* note 11 and accompanying text (questioning validity of purpose behind states denying privilege to unmarried cohabitants).

146. See *supra* note 10 and accompanying text (discussing courts belief unmarried cohabitating couples avoid responsibilities and duties of marriage); *supra* note 63 and accompanying text (allowing unmarried couples to contract with one another); *supra* note 69 and accompanying (recognizing domestic responsibilities for cohabitating couples); *supra* note 75 and accompanying text (granting employee benefits to domestic partners); *supra* notes 78-79 and accompanying text (defining cohabitating homosexual couple as family under state eviction laws).

147. See *supra* note 118 (outlining state statutes preventing same-sex marriage).

148. See *supra* notes 95-97 and accompanying text (discussing creation of civil unions for homosexual couples as constitutional equivalent to marriage); *supra* notes 106-108 and accompanying text (holding Massachusetts ban against gay marriage unconstitutional); see also *supra* note 113 and accompanying text (rejecting civil union as substitute for marriage).

149. See *supra* note 100 and accompanying text (examining different states' treatment of civil unions from foreign states).

150. See *supra* notes 91-92 and accompanying text (noting limited applicability of domestic partnerships).

151. See *supra* notes 128-129 and accompanying text (holding states with domestic partnerships need not recognize same benefits as other states).

152. See *supra* notes 115-117 (discussing application of DOMA and its effect on homosexual couples' rights).

153. See *supra* Part II.C.2 (discussing DOMA's negative effect on same-sex couples' rights); see also *supra* note 114 and accompanying text (excluding recognition of same-sex marriage relegates couples to lesser status).

### B. Criteria for New Spousal Testimony Privilege

Cohabiting couples should not be entitled to the spousal testimony privilege based solely on their living together.<sup>154</sup> The privilege is supposed to preserve household harmony and ensure open communication by the married couple.<sup>155</sup> Courts already recognize that there are some marital relationships that do not deserve this protection.<sup>156</sup> Two examples are marriages that are irretrievably broken by the time of trial, and marriages that couples entered into solely to claim the privilege.<sup>157</sup> There are many non-marital relationships that the privilege would protect in the same way as most marriages.<sup>158</sup> These relationships are between cohabiting couples who are emotionally and financially interdependent on one another.<sup>159</sup> The outside world considers them a committed couple or even a family, especially if they are raising children together.<sup>160</sup> Courts reject the “functional” family argument even though the argument developed in many other areas of law allowing cohabiting unmarried couples to function as a recognized family unit.<sup>161</sup> Extending the testimony privilege does not offend traditional marriage values any more than do the financial support, tax benefits, and property rights such couples already receive.<sup>162</sup>

### C. Remaining Barriers to the New Privilege

Creating the new privilege is easier said than done.<sup>163</sup> The first hurdle is for courts to recognize that marriage is not the only functional family form.<sup>164</sup> After recognizing the increasing number of cohabiting couples, courts must also acknowledge that these family units are worth protecting.<sup>165</sup> At present,

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154. See *supra* note 80 and accompanying text (suggesting factors courts use in determining seriousness of cohabiting relationship).

155. See *McDaniel*, *supra* note 27, at 748 (asserting purpose of privilege to “foster family peace” and to protect privacy interests of spouses).

156. See *McDaniel*, *supra* note 27, at 753-56 (outlining test courts apply before extending privilege, and exceptions to testimonial privilege).

157. See *supra* note 37 and accompanying text (finding privilege protects nothing when spouse willingly testifies).

158. See *supra* note 11 (suggesting possibility for cohabiting couples to meet definition of marital harmony).

159. See *supra* note 11 (defining marital harmony as monogamous and stable relationships).

160. See *supra* note 1 and accompanying text (arguing society considers couples families even when courts do not).

161. See *Scott*, *supra* note 3, at 231 (asserting law should protect “relationships that serve family functions”); *supra* note 59 (identifying cases granting certain marital rights to cohabiting couples).

162. See *supra* note 59 and accompanying text (citing opinions treating cohabiting couples similarly to married couples in certain areas).

163. See *supra* note 6 and accompanying text (recognizing courts consistently deny privilege to unmarried couples); see also *supra* note 2 and accompanying text (considering marriage foundation of family and most important social institution).

164. See *supra* note 3 and accompanying text (discussing other types of family forms).

165. See *supra* note 53 (acknowledging benefits for cohabiting couples also assist their children).

the courts seem more willing to protect the individuals in the relationship rather than the relationship itself.<sup>166</sup> As the popularity of cohabitation without marriage continues to grow in society, many of the protected aspects of marriage will be equally prevalent in relationships without marriage.<sup>167</sup> These changes make it difficult to claim that a party's incarceration, which the denial of the marital privilege may lead to, will cause less disruption for members of cohabitating couples who have lived and supported each other financially and emotionally for an extended number of years—and who perhaps have children together—than it would for a married couple.<sup>168</sup>

As long as courts require marriage in order to claim the spousal privilege, state and Federal DOMA laws keep the privilege from the reach of same-sex couples.<sup>169</sup> Even when a state that extends the spousal privilege to same-sex partners unionizes a couple, all other federal and state jurisdictions are unlikely to extend the same benefits.<sup>170</sup> Gender, rather than function, now defines marriage in most states.<sup>171</sup> Yet, the spousal privilege is meant to protect the functioning of the marital relationship, regardless of who the two people in the relationship are.<sup>172</sup> By narrowly construing the definition of marriage, the spousal privilege no longer fulfills to its potential its function of preserving harmony within a family.<sup>173</sup>

#### IV. CONCLUSION

Society is beginning to accept unmarried cohabitating couples as a functioning family form. The law is also making strides to create rules and responsibilities that protect the individuals in these relationships. These include employment and unemployment benefits for the couple, financial support if the relationship ends, and domestic violence law enforcement. Such benefits are also available to married couples, along with the spousal testimony privilege. The privilege supposedly protects the marital relationship, so courts strictly interpret it to exclude unmarried couples.

It is imprudent for courts to continue excluding cohabitating couples from the testimony privilege when they construe other areas of the law less stringently to include such individuals. The privilege's purpose is to protect marital harmony but cohabitating couples can benefit from the same protections

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166. *See supra* Part II.B (stressing benefits of individual protection for cohabitating couples).

167. *See supra* note 68 and accompanying text (recognizing unmarried partners' domestic responsibilities to each other).

168. *See supra* note 28 (explaining preservation of relationships assists defendant's rehabilitation).

169. *See supra* note 118 (defining marriage between man and woman thereby denying privilege to same-sex couples).

170. *See supra* note 115 and accompanying text (allowing states to disregard marriage laws of other states).

171. *Supra* note 118 and accompanying text (defining marriage under state law).

172. *See supra* note 122 and accompanying text (disagreeing with practice of courts considering whether some marriages worthier than others).

173. *See supra* note 11 (suggesting relationships promote marital harmony without being married).

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in their own relationships. Cohabiting couples are not just individuals that live together; often they are economically and emotionally interdependent, share household and living expenses, and raise children together. It is unreasonable to argue that testimony affects their lives any less than it does a married couple.

A new privilege for cohabiting couples has the potential to protect and preserve their relationship in the same manner that it protects married couples. Like married couples, the privilege should not be available to any cohabiting couple. When the courts determine that a marriage is beyond saving, they deny the privilege claim. It should be within a court's discretion to determine whether the privilege serves its purpose when applied to unmarried cohabiting couples. By focusing more on the nature of a couple's relationship and less on the institution of marriage, the testimony privilege would be available to more couples whose relationships serve the same function as marriage, even if the couple, by choice or because the law prevents it, is not married.

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