Evidentiary Privileges for Cohabiting Parents: Protecting Children Inside and Outside of Marriage

Mark Glover
Louisiana State University Law Center

Repository Citation

This Article is brought to you for free and open access by the Law Reviews and Journals at DigitalCommons @ LSU Law Center. It has been accepted for inclusion in Louisiana Law Review by an authorized administrator of DigitalCommons @ LSU Law Center. For more information, please contact sarah.buras@law.lsu.edu.
Evidentiary Privileges for Cohabitating Parents: Protecting Children Inside and Outside of Marriage

Mark Glover*

INTRODUCTION

Unmarried cohabitants have long endured the stigma that accompanies a lifestyle that society deems immoral. Couples who choose to live together out of wedlock traditionally have been ostracized for “living in sin”\textsuperscript{1} and have been characterized as engaging in “deviant behavior.”\textsuperscript{2} Society’s traditional disapproval of this behavior was reflected in the laws of most states, which, prior to the 1960s, criminalized unmarried cohabitation.\textsuperscript{3} However, “[s]ocial mores regarding cohabitation between unmarried parties have changed dramatically in recent years.”\textsuperscript{4} The once depraved act of unmarried cohabitation has largely lost its moral disapproval.\textsuperscript{5}

Copyright 2010, by MARK GLOVER.

\* J.D., magna cum laude, Boston University School of Law, 2008.


3. See Fineman, supra note 2, at 276 (“Society’s long recognized preference for formal, ceremonial marriage was complemented by the threat of punishment for cohabitation.”); Margaret M. Mahoney, Forces Shaping the Law of Cohabitation for Opposite Sex Couples, 7 J.L. & FAM. STUD. 135, 141 (2005).


Paralleling this shift in society's attitude toward unmarried cohabitation, most states have repealed their anti-cohabitation statutes. Though a small number of states still have these laws on the books, prosecutors rarely enforce them. When unmarried couples are charged with criminal cohabitation, these statutes generally are not used to interfere with otherwise law abiding couples, but are invoked to intervene in extraordinary situations, such as "to force a violent cohabitor to leave the home, or to coerce an unmarried cohabiting father to pay child support."

Society's gradual acceptance of unmarried cohabitation has been accompanied by a dramatic increase in the number of Americans cohabiting outside of marriage. In 1960, approximately 440,000 unmarried American couples lived together. By 1990 that number had increased to 2.85 million, and at the beginning of the new millennium 4.9 million unmarried couples were cohabiting. This ten-fold increase in the number of cohabiting unmarried couples has raised the percentage of U.S. households composed of unmarried cohabitants to 4.5% in 2000, which is up from the 0.8% mark of 1960. Further increases in cohabitation rates are expected in the coming years.

The decline of societal condemnation and the near universal decriminalization by state legislatures have not brought about complete legal equality between marriage and unmarried cohabitation. Unmarried cohabitants do not enjoy many of the benefits bestowed upon married couples by courts and legislatures. The primary rationale for not "establishe
informal legal status for” unmarried cohabitants, which would provide accompanying legal benefits, is that doing so would “undermine marriage as a key social, cultural and legal institution, to the detriment of society.”

One area in which the law continues to treat unmarried cohabitants differently than married couples is the law of evidence. In certain circumstances, a spouse may refuse to testify against the other spouse or to reveal information concerning confidential marital communications at trial. However, in no jurisdiction are unmarried cohabitants afforded the same evidentiary privileges. Consider for example the trial of Richard Lane. Lane had lived together with his girlfriend, Faye, for six years when Faye was called to testify against Lane in his prosecution for first-degree murder. Despite the fact that the couple had two children together and had portrayed themselves to the public as husband and wife, the court did not allow Faye to invoke the marital privileges because the couple had never formally married. In part because of Faye’s testimony, Lane was convicted and sentenced to life imprisonment.

The murder trial of A.J. Moore provides a contrasting example. On the eve of trial, Moore married Susie Jones, the only eye-witness to the homicide. Though the matrimony was only hours old, the court ruled that the prosecution could not compel Jones to testify against her husband. The court explained:

It makes no difference at what time the relation of husband and wife begins . . . . When the marriage ceremony is performed, no matter what the motive was or may be, the witness thenceforward becomes the lawful wife of the defendant, and is prohibited . . . from testifying against her husband.

16. Mahoney, supra note 3, at 166.
17. See infra Part II.A.
18. 25 CHARLES ALAN WRIGHT & KENNETH W. GrahAm, JR., FEDERAL PRACTICE AND PROCEDURE § 5574 (1989) (“Courts have been less [than] enthusiastic about extending the marital privileges to non-marital relationships; the idea has been rejected by every court that has considered it.”).
20. Id. at 760.
21. Id.
22. Id. at 758.
24. Id. at 497.
25. Id. at 498 (finding fault with the trial court for allowing the wife to testify at trial).
26. Id.
This Article argues that the law should continue to expand the benefits available to couples living together out of wedlock so that both of the aforementioned couples would be protected by evidentiary privileges. Specifically, the Article proposes a new evidentiary privilege that would protect unmarried, cohabiting parents. Under this proposal, an unmarried couple would enjoy the benefits of the marital privileges if they share a home with their child. This cohabiting-parent privilege would further the policies of family preservation and child protection, both of which are principal policy justifications of the marital privileges. Furthermore, providing cohabiting parents evidentiary privileges is less susceptible to the traditional criticism of expanded legal benefits for unmarried cohabitants because the cohabiting-parent privilege would not reduce a couple’s incentive to marry.

This Article proceeds in four parts. Part I describes the traditional legal treatment of unmarried cohabitation and the recent recognition of limited legal benefits for unmarried couples. Part II explains the evidentiary privileges available to married couples and explores the rationales for providing marriage the benefit of these privileges. Part III then argues in favor of a new privilege for unmarried, cohabiting parents. Finally, Part IV compares this proposal for a cohabiting-parent privilege to recent proposals for evidentiary privileges that would apply to all unmarried cohabitants.

I. LEGAL CONSEQUENCES OF UNMARRIED COHABITATION

A. The Traditional Legal Treatment of Unmarried Cohabitants

Traditionally, unmarried cohabitants not only faced moral condemnation from the public, but also encountered legal disapproval from the courts. Even after most states repealed their anti-cohabitation statutes, unmarried couples living together possessed “a ‘negative status’ in the law.”

27. See infra Part III.
relationship, and therefore the contract between [the parties], [as]
immoral and illegal."\(^{29}\)

Not only does the law generally treat relationships between
unmarried cohabitants differently than relationships between other
unmarried persons, but it also treats unmarried cohabitants
differently than married couples. Unlike the relationship between
married partners, "the relationship of unmarried cohabitants is not,
as a general rule, recognized as a legally significant family status.
As a result no benefits or obligations, either between the partners
or vis-à-vis third parties and the government, attach to the
relationship."\(^{30}\) In contrast, the law confers benefits upon the
marital relationship in many contexts, including taxation,
inheritance, tort law, criminal law, social welfare, adoption, and
child custody.\(^{31}\)

B. Recent Recognition of Limited Legal Consequences of
Unmarried Cohabitation

Though the law has been resistant to confer the consequences
of marriage upon unmarried cohabitants, over the course of the
past thirty years, courts in a few states have gradually extended
some legal benefits to non-marital relationships. Areas in which
courts have extended legal consequences to unmarried cohabitation
include property rights, domestic violence, and housing
discrimination.

1. Property Rights

The case of *Marvin v. Marvin* involved a seven-year
relationship during which the cohabiting parties never married.\(^{32}\)
When the relationship ended, the defendant forced the plaintiff to

\(^{29}\) *Id.* See J. Thomas Oldham & David S. Caudill, *A Reconnaissance of
Public Policy Restrictions Upon Enforcement of Contracts Between
Cohabitants*, 18 *FAM. L.Q.* 93, 106 (1984) ("Because of the perceived
immorality of these relationships, even express contracts between cohabitants
were not enforced."); Reppy, *supra* note 28, at 1678–80; see, e.g., Wallace v.
Rappleye, 103 Ill. 229, 249 (Ill. 1882) ("An agreement in consideration of future
illicit cohabitation between the parties is void . . . .").

\(^{30}\) Mahoney, *supra* note 3, at 158.

2003) ("The benefits accessible only by way of a marriage license are enormous,
touching nearly every aspect of life and death. The department states that
‘hundreds of statutes’ are related to marriage and to marital benefits."); see also
David L. Chambers, *What If? The Legal Consequences of Marriage and the
Legal Needs of Lesbian and Gay Male Couples*, 95 *MICH. L. REV.* 447, 447
(1996); Mahoney, *supra* note 3, at 159.

move out and refused to continue providing financial support. 33 The plaintiff sued for half of the property that the couple acquired over the course of the relationship, claiming that the parties "entered into an oral agreement" in which they agreed to "combine their efforts and earnings" while they lived together and also agreed to "share equally any and all property accumulated as a result of their efforts . . . ." 34

Diverging from the traditional judicial treatment of agreements between unmarried cohabitants, the California Supreme Court held that "[t]he fact that a man and woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property, or expenses." 35 The only restriction the court placed on these agreements was that the contract could not be based upon "a consideration of meretricious sexual services." 36 Therefore, while the court recognized a contract between parties engaged in a non-marital sexual relationship, the court also indicated that it would not recognize a contract for non-marital sexual services. In addition to recognizing express contracts between unmarried cohabitants, the court affirmed the availability of other bases of recovery for unmarried cohabitants, including implied contracts, constructive trusts, resulting trusts, and unjust enrichment. 37

In the thirty years since Marvin was decided, nearly all states have adopted a similar approach to the treatment of agreements between unmarried cohabitants. 38 Although some states have adopted more restrictive approaches to recognizing contract rights between unmarried cohabitants, 39 only Illinois, Georgia, and Louisiana continue to maintain the traditional approach. 40

While the California Supreme Court recognized unmarried cohabitants' right to make agreements regarding property distribution, it did not recognize unmarried cohabitation as a legal

33. Id.
34. Id.
35. Id. at 113 ("Neither is such an agreement invalid merely because the parties may have contemplated the creation or continuation of a nonmarital relationship when they entered into it.").
36. Id.
37. Id. at 122.
38. See Mahoney, supra note 3, at 159.
status that confers property rights upon the parties. The state of Washington, though, has recognized unmarried cohabitation as a legal status with respect to property distribution. In Connell v. Francisco, the Washington Supreme Court held that the state’s property distribution scheme applies not only to divorce, but also to the dissolution of relationships between unmarried cohabitants. However, because cohabitants have chosen not to marry, the court held that the distribution scheme should apply only to property acquired during the relationship. The court reasoned that dividing property acquired before the commencement of the relationship “equates cohabitation with marriage; ignores the conscious decision by many couples not to marry; [and] confers benefits when few, if any, economic risks or legal obligations are assumed.” Additionally, not all relationships between unmarried cohabitants qualify for this newly expanded right of property distribution. Only those relationships that are “stable” and “marital-like” enjoy the benefit of Washington’s “assimilation” of unmarried cohabitants into the legal regime of marriage.

2. Domestic Violence

Early statutes regulating domestic violence “were often quite limited [in defining the persons protected]. They saw the problem of ‘domestic’ violence as essentially a problem of ‘marital,’ ‘family’ or ‘household’ violence, and some even limited relief to presently married partners...” Unmarried cohabitants likely were not protected under these early statutes because of the belief that unmarried victims would simply leave the abusive situation, and, therefore, domestic violence laws were not needed to protect unmarried women. However, beginning in the 1970s, the “battered women’s movement” began to shift the perception of

41. See Mahoney, supra note 3, at 160.
42. 898 P.2d 831, 836 (Wash. 1995) (en banc).
43. Id.
44. Id.
45. Id.
46. Id. at 834. “Relevant factors establishing [the requisite] relationship include, but are not limited to: continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties.” Id.
48. Mahoney, supra note 3, at 193 n.298 (quoting CLARE DALTON & ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND THE LAW 502 (2001)).
49. Id.
domestic violence from a familial concern to a problem based upon “gender subordination.”

State legislatures took notice of the need for protection of all victims of domestic violence, whether married or simply cohabiting with an unmarried partner, and today a majority of statutes authorize the prosecution of unmarried cohabitants for domestic violence. Thus, in most states “the straightforward policy consideration underlying domestic violence statutes is the prohibition of violence that occurs within all [types of] adult relationships,” regardless of whether the relationships involve married spouses or unmarried cohabitants.

3. Housing Discrimination

Both state and federal law provide protection against housing discrimination. The Federal Fair Housing Act, for example, prohibits landlords from “refus[ing] to sell or rent . . . a dwelling to any person because of race, color, religion, familial status, or national origin.” Despite the breadth of this federal legislation, no explicit safeguard is provided for unmarried cohabitants. Similarly, state statutes generally fail to explicitly protect unmarried cohabitants from the biases of landlords. Though most

50. Id. at 194–95.

The battered women’s movement defined battering within the larger framework of gender subordination. Domestic violence was linked to women’s inferior position within the family, discrimination within the workplace, wage inequity, lack of educational opportunities, the absence of social supports for mothering, and the lack of child care. Thus, the issue highlighted by women’s advocates and addressed by the state legislatures was defined by the plight of women who were unsafe in their homes, not by formal family status.

Id. at 194 (quoting ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 23 (2000)).

51. Id. at 193.


55. See id.

housing discrimination laws do not specifically enumerate unmarried cohabitants as a protected class, the Federal Fair Housing Act does protect against discrimination based upon "familial status,"57 and several states have enacted statutes prohibiting discrimination based upon "marital status."58

Although "familial status" and "marital status" could plausibly apply to one's status as an unmarried cohabitant, many courts have interpreted these provisions as permitting discrimination against cohabiting couples. Federal courts have ruled that unmarried cohabitants are not protected by the Federal Fair Housing Act's "familial status" provision because the statutory definition of "familial status" encompasses only domestic settings that include children,59 and the legislative history clearly expresses that the provision's focus is not on the marital status of the parties, but on the existence of a family.60 The vast majority of state courts have also refused to recognize unmarried cohabitation as a protected status under their state's "marital status" provisions.61 The Minnesota Supreme Court, for example, interpreted the state's "marital status" provision as prohibiting discrimination based upon an individual's status as either single or married.62 Consequently, this provision does not prohibit discrimination based upon a

---

59. The statutory definition states:
   "Familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with—
   (1) a parent or another person having legal custody of such individual or individuals; or
   (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.
   The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.
60. See H.R. REP. No. 100-711, at 23 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2184 (stating that the committee did not intend the term "familial status" to include marital status).
61. See Zasada, supra note 56, at 549.
62. State by Cooper v. French, 460 N.W.2d 2, 6–8 (Minn. 1990).
couple's conduct, such as cohabiting outside of marriage.\textsuperscript{63} This interpretation was reinforced by the state's disfavor of fornication as expressed by its criminalization of such behavior.\textsuperscript{64}

Despite the majority's refusal to protect unmarried cohabitants from housing discrimination, state courts in Alaska, California, and Massachusetts have interpreted their state's housing laws as providing such protection.\textsuperscript{65} While interpreting their "marital status" provisions, each court focused on the statute's plain meaning, rather than on the state's policy regarding fornication.\textsuperscript{66} As a result, these courts concluded that marital status includes one's status as an unmarried cohabitant.\textsuperscript{67}

Additionally, federal courts have interpreted two statutes other than the Federal Fair Housing Act as providing housing protection to unmarried cohabitants.\textsuperscript{68} First, the United States Housing Act of 1937 has been interpreted as providing protection against discrimination for all families seeking federal public housing, including unmarried cohabitants.\textsuperscript{69} Second, federal courts have also held that the Equal Credit Opportunity Act's protection against discrimination by credit lenders applies to unmarried cohabitants.\textsuperscript{70} Under this federal legislation, credit lenders may not discriminate against loan applicants based upon their "marital status."\textsuperscript{71} Therefore, while most state and federal housing discrimination laws

\textsuperscript{63} Id. Other states interpreting their housing discrimination law similarly include Maryland and Wisconsin. See Md. Comm'n on Human Relations v. Greenbelt Homes, Inc., 475 A.2d 1192, 1198 (Md. 1984); County of Dane v. Norman, 497 N.W.2d 714, 717–18 (Wis. 1993).

\textsuperscript{64} Cooper, 460 N.W.2d at 7–8.


\textsuperscript{66} See Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199, 1201 (Alaska 1989) (focusing on the "ordinary and common meaning" of the statute); Atkisson, 130 Cal. Rptr. at 381 (holding that the provision protects unmarried cohabitants "on its face"); Worcester Hous. Auth., 547 N.E.2d at 44 (finding that "the plain words of the provisions" are "unambiguous").

\textsuperscript{67} See Foreman, 779 P.2d at 1201; Atkisson, 130 Cal. Rptr. at 381; Worcester Hous. Auth., 547 N.E.2d at 45.


\textsuperscript{70} See Markham v. Colonial Mortgage Serv. Co., 605 F.2d 566, 569 (D.C. Cir. 1979).

do not protect unmarried cohabitants, a limited number of statutes provide unmarried cohabitation a protected status.

II. THE MARITAL PRIVILEGES

The primary goal of the law of evidence is to discover the truth in the furtherance of justice. As Justice Burger explained, "Testimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence.'" Although the law provides exclusionary rules and privileges in other contexts, the most well-known privileges are those founded on an existing relationship, such as the attorney-client, doctor-patient, and psychotherapist-patient relationships. The marital privileges are also relationship-based privileges, as husbands and wives enjoy two privileges as a result of their union. First, the spousal testimonial privilege allows spouses to refuse to testify against each other in criminal trials, and second, the marital communication privilege prevents spouses from testifying about confidential communications made between spouses during the marriage.

---

72. See Funk v. United States, 290 U.S. 371, 381 (1933) ("The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaption to the successful development of the truth."); Paul C. Giannelli, Understanding Evidence § 37.03 (2003) ("Most . . . evidence rules are designed to enhance the search for truth and thus the fact-finding process."); Anthony Parsio, Note, The Psychotherapist-Patient Privilege: The Perils of Recognizing a "Dangerous Patient" Exception in Criminal Trials, 41 New Eng. L. Rev. 623, 623 (2007).

73. See United States v. Nixon, 418 U.S. 683, 710 (1974) ("Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."); Christopher B. Mueller & Laird C. Kirkpatrick, Evidence Under the Rules: Text, Cases, and Problems 865 (3d ed. 1996) (explaining that evidentiary privileges' "effect in any given trial may be to impede the search for truth"); John W. Strong, McCormick on Evidence § 72 (5th ed. 1999) (explaining that the effect of privileges is "clearly inhibitive; rather than facilitating the illumination of truth, they shut out the light").


75. Giannelli, supra note 72, § 37.03 (explaining that the law provides privileges to "govern[] specified topics such as trade secrets or political votes").

76. See infra Part II.B.

77. See id.
A. The Spousal Testimonial Privilege

The origins of the spousal testimonial privilege date back centuries. "Writing in 1628, Lord Coke observed that 'it hath beene resolved by the Justices that a wife cannot be produced either against or for her husband.' At that time, the wife did not possess a privilege that could be exercised or waived. Instead, the law completely denied the wife the ability to testify in a case in which her husband was a defendant, which meant that the wife could not testify even if both spouses consented. This disqualification of the wife was based on the evidentiary rule that the defendant–husband could not testify on his own behalf. Because the wife possessed no separate legal existence apart from her husband, the court viewed her testimony as the equivalent of her husband’s testimony. Therefore, just as the law disqualified the defendant from testifying on his own behalf, the law also disqualified the defendant’s wife. The law has long since abandoned the doctrines of spousal unity and defendant disqualification, but the remnants of spousal disqualification are evident in the modern-day spousal testimonial privilege, which prevents the court from compelling spouses to testify against each other.

79. Trammel, 445 U.S. at 43–44 (quoting 1 E. COKE, A COMMENTARIE UPON LITTLETON 6b (1628)).
80. Id. at 44 (explaining that the “rule . . . evolved into one of privilege rather than one of absolute disqualification”).
82. Trammel, 445 U.S. at 44; Hawkins, 358 U.S. at 75.
83. Trammel, 445 U.S. at 44; Hawkins, 358 U.S. at 75.
84. Trammel, 445 U.S. at 44 (“[I]t followed that what was inadmissible from the lips of the defendant-husband was also inadmissible from his wife.”); Hawkins, 358 U.S. at 75 (“Since a defendant was barred as a witness in his own behalf because of interest, it was quite natural to bar his spouse in view of the prevailing legal fiction that husband and wife were one person.”).
The primary rationale for the spousal testimonial privilege is that preventing spouses from testifying against each other promotes marital harmony. Without the privilege, marriages could be damaged beyond repair if spouses were called to incriminate each other. As the Tennessee Supreme Court explained, “If [spouses were] permitted [to testify against each other], it would tend to destroy that bond of mutual confidence and unquestioning trust that is essential to the peace and happiness of the most sacred of all domestic relations.” The privilege, though, does not extend to all situations in which one spouse may be called to testify against her partner. First, the privilege applies only to criminal trials. The privilege’s rationale suggests that it should apply in civil as well as criminal cases because adverse spousal testimony can cause marital discord in either context. Nevertheless, most jurisdictions deny spouses the privilege in civil suits. Second, the potential testimony must be adverse to the defendant-spouse. Given the privilege’s purpose of protecting marriage from potential disruption, the privilege does not cover beneficial or neutral testimony because this testimony would pose no threat to the relationship.

An additional limitation is that only the witness-spouse may exercise the spousal testimonial privilege. Originally, both

88. Eldred, supra note 85, at 1320 (“[M]ost courts and commentators assume that the privilege only applies in federal criminal trials.”).
89. See id. at 1346 (suggesting “some extension of the privilege into the civil context,” specifically “a rule allowing spouses to assert the privilege when governmental actors are a party”).
90. R. Michael Cassidy, Reconsidering Spousal Privileges after Crawford, 33 AM. J. CRIM. L. 339, 365 (2006) (“Of the states that still recognize the adverse testimonial privilege, most apply it to criminal cases only.”).
91. In re Martenson, 779 F.2d 461, 463 (8th Cir. 1985) (“[T]he privilege is not a general one. It must be asserted as to particular questions. The privilege is not available unless the anticipated testimony ‘would in fact be adverse’ to the nonwitness spouse.” (quoting United States v. Smith, 742 F.2d 398, 401 (8th Cir. 1984))).
92. See United States v. Brown, 605 F.2d 389, 396 (8th Cir. 1979) (holding that the privilege does not apply when a spouse’s testimony is “related to objective facts having no per se effect” on the defendant-spouse and when “no injury to privilege-protected values,” such as the possibility of marital discord, occurs).
93. Trammel v. United States, 445 U.S. 40, 53 (1980) (“[W]e conclude that the existing rule should be modified so that the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying. This modification—vesting the privilege
spouses could exercise the privilege and prevent the court from compelling their testimony.94 The U.S. Supreme Court in Trammel v. U.S., however, limited the scope of the privilege so that only the witness-spouse can elect not to testify.95 The Court reasoned that if the witness-spouse is willing to testify, the relationship is already in disrepair, and the privilege would no longer serve its purpose of maintaining marital harmony.96 A final limitation of the spousal testimonial privilege is that ex-spouses are not protected.97 The privilege expires upon termination of the marriage because, after the couple divorces, no marital relationship exists for the privilege to preserve.98

B. The Marital Communication Privilege

The marital communication privilege was first recognized in the 1850s.99 Prior to that time, spouses were disqualified from testifying against each other, and the likelihood that marital communications would be admitted into evidence was small.100 Yet, when the spousal disqualification was eliminated, the law recognized the need for a marital communication privilege, a privilege that prevents the court from compelling evidence of confidential communications between husband and wife.101


\[\text{References}\]

94. \textit{Id.} at 46 ("Hawkins, then, left the federal privilege for adverse spousal testimony where it found it, continuing 'a rule which bars the testimony of one spouse against the other unless both consent.'" (quoting Hawkins v. United States, 358 U.S. 74, 78 (1958))).
95. \textit{Id.} at 53.
96. \textit{Id.} at 52–53.
97. Pereira v. United States, 347 U.S. 1, 6 (1954) ("[D]ivorce removes the bar of [the spousal testimonial privilege].").
100. \textit{See} Frost, \textit{supra} note 99, at 8.
101. For example, the Supreme Court eliminated the spousal disqualification in federal court in 1933, and one year later the Court explicitly adopted the marital communication privilege. \textit{See} Wolfe v. United States, 291 U.S. 7, 14 (1934) (expressly recognizing the marital communication privilege); Funk v. United States, 290 U.S. 371, 386–87 (1933) (eliminating spousal disqualification).
Like the spousal testimonial privilege, the marital communication privilege's rationale is founded on the desire to promote the marital relationship. Whereas the purpose of the spousal testimonial privilege is to protect marriages from the damage and discord that adverse testimony could bring to the relationship, the purpose of the marital communication privilege is to promote strong marital relationships by encouraging couples to share private information.102 "The need for communication between spouses has long been recognized as a prerequisite for a successful and lasting relationship."103 The marital communication privilege acknowledges this need and promotes healthy marriages by assuring that marital confidences are kept within the home.

The marital communication privilege, however, does not prevent all communications between spouses from being admitted into evidence. As the Supreme Court explained while affirming the privilege's place in federal courts, "Communications between the spouses, privately made, are generally assumed to have been intended to be confidential, and hence they are privileged."104 Nonetheless, a party seeking to introduce evidence of communications between a married couple may rebut this presumption by showing that the communication was made in the presence of a third party or by proving some other circumstance that indicates that the parties did not intend the communication to be confidential.105 If the husband and wife did not intend confidentiality, the purpose of the privilege is not served, and the communication should be admissible.

C. A Closer Look at the Purpose of the Marital Privileges

Both state and federal courts infrequently provide detailed explanations of the marital privileges' purpose. Usually they merely explain that the privileges foster and protect marriage.106

102. STRONG, supra note 73, § 86; Michael W. Mullane, Trammel v. United States: Bad History, Bad Policy, and Bad Law, 47 ME. L. REV. 105, 132 (1995).
103. Mullane, supra note 102, at 132; see Wolfe, 291 U.S. at 14 (describing "marital confidences" as "essential to the preservation of the marriage"); David W. Louisell, Confidentiality, Conformity and Confusion: Privileges in Federal Court Today, 31 Tul. L. Rev. 101, 113 (1956) ("A marriage without the right of complete privacy of communication would necessarily be an imperfect union.").
105. Pereira v. United States, 347 U.S. 1, 6 (1954) ("Although marital communications are presumed to be confidential, that presumption may be overcome by proof of facts showing that they were not intended to be private."); Wolfe, 291 U.S. at 14.
106. See, e.g., Hawkins v. United States, 358 U.S. 74, 79 (1958) ("[T]here is still a widespread belief, grounded on present conditions, that the law should not force or encourage testimony which might alienate husband and wife, or further
but rarely do courts delve further and articulate why the law should promote marital relationships. For example, in *Trammel*, the Supreme Court provided the simple explanation that "[t]he modern justification for th[e] privilege against adverse spousal testimony is its perceived role in fostering the harmony and sanctity of the marriage relationship."  

Inferior courts are also prone to brevity when expounding upon the marital privileges, as the Bankruptcy Court for the Southern District of New York merely explained that the marital communication privilege’s purpose "is to encourage domestic peace[] and the sanctity of the marital relation." 

By failing to articulate the importance of marriage, these explanations of the marital privileges suggest that marriage should be protected because of the inherent nature of the relationship. Indeed, occasionally courts have explicitly explained the marital privileges as protecting the sacrosanct institution of marriage. The Supreme Court of Arkansas, for instance, explained that "[t]he object of the [marital communication privilege] is to prevent husband or wife [from] impairing the sacredness of confidential communications between themselves." 

Likewise, the U.S. Supreme Court, while disqualifying a wife from testifying inflame existing domestic differences."); *Wolfe*, 291 U.S. at 14 ("The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails."); People v. Hamacher, 438 N.W.2d 43, 55–56 (Mich. 1989) ("The privilege to bar the testimony of a spouse is defended on the basis that it prevents marital discord . . . . The confidential communications privilege is said to inspire marital confidences. Over time, case law has blurred the justifications, and it is sometimes observed that the validity of both privileges rests on the utilitarian ground of promoting marital harmony."); State v. Antill, 197 N.E.2d 548, 551 (Ohio 1964) ("[T]o promote marital peace there is a privilege not to disclose in court confidential communications between husband and wife."); Curran v. Pasek, 886 P.2d 272, 276 (Wyo. 1994) ("[T]he primary purpose of the confidential marital communication privilege is to foster marital relationships . . . ."). 

109. Hammons v. State, 84 S.W. 718, 720 (Ark. 1905); see Walker v. Sanborn, 46 Me. 470, 472–73 (Me. 1859) (explaining that the marital communication privilege "treats all confidential communications . . . as sacred, and not to be divulged in testimony even after death," and that "[i]t regards such disclosures and such facts as sacred . . . which cannot be divulged but by express consent of the other party"); Spearman v. State, 152 S.W. 915, 925 (Tex. Crim. App. 1912) (Davidson, J., dissenting) ("It has been the policy underlying the very basic principle of our government, which is the marital relation, that these communications shall not be disclosed; that these sacred relations incurred by virtue of the marriage state shall remain inviolable and uncovered.").
adversely against her husband, stated that “[t]o break down or impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence.”

This view of the marital privileges as protecting the sacred institution of marriage comports with society’s natural aversion to interfering in the marital relationship. As one commentator explained, “All of us have a feeling of indelicacy and want of decorum in prying into the secrets of husband and wife. It is important to recognize that this is the real source of the [marital communication] privilege.” Similarly, others have elucidated that “there is a natural repugnance in every fair-minded person to compelling a wife or husband to be the means of the other’s condemnation, and to compelling the culprit to the humiliation of being condemned by the words of his intimate life-partner.”

Therefore, the inherent qualities of marriage and society’s reluctance to interfere in the marital relationship partially explain the purpose of the marital privileges. However, the sacredness of the relationship does not provide a full explanation of the importance that the law places on marriage.

Although cases specifically dealing with the marital privileges tend to provide unsatisfactory explanations of marriage’s privileged status, in recent years, the law’s interest in marriage has been explained in cases concerning the recognition of same-sex marriage. In this context, states defending their ban on same-sex unions and courts rendering judgments in cases challenging the traditional definition of marriage have explained the importance of

110. Stein v. Bowman, 38 U.S. 209, 223 (1839); see State v. Taylor, 515 P.2d 695, 703 (Mont. 1973) (explaining that the purpose of the spousal testimonial privilege is “the protection of the sanctity of marriage and the home”); Commonwealth v. McBurrows, 779 A.2d 509, 520–21 (Pa. Super. Ct. 2001) (explaining that the spousal testimonial privilege protects “the great principles which protect the sanctities of husband and wife” and prevents the “destruction of the best solace of human existence”).


112. JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2228, at 756 (2d ed. 1923) (emphasis omitted); see G-Fours, Inc. v. Miele, 496 F.2d 809, 812 (2d Cir. 1974) (describing “the natural repugnance to depriving a man of his liberty because of the compelled testimony of his spouse”); United States v. Leach, 22 C.M.R. 178, 190 (C.M.A. 1956) (explaining that a rationale “for granting a witness-spouse the privilege to refuse to testify is . . . the natural repugnancy to making the wife the instrument through which the husband is condemned”).
the marital relationship primarily as providing the best circumstances for procreation and childrearing. Washington’s ban on same-sex marriage faced one of the earliest challenges of a state’s definition of marriage as a union between a man and a woman. While upholding the state’s ban on same-sex marriage in *Singer v. Hara*, the Court of Appeals of Washington held that the state’s distinction between heterosexual and homosexual couples in granting marriage licenses was not based on discrimination, but was instead founded “upon the state’s recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children.” The court further explained that “[t]he fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race” and that “marriage is clearly related to the public interest in affording a favorable environment for the growth of children.” Since *Singer* was decided in 1974, courts and states have continually argued that marriage is the ideal setting for procreation and childrearing.

Even in Massachusetts, one of the few states to provide homosexual couples an opportunity to marry, the importance of marriage in the upbringing of children played a part in the decision of the Massachusetts Supreme Judicial Court to recognize same-sex marriage. The state presented the traditional rationale that “confining marriage to opposite-sex couples ensures that children are raised in the ‘optimal’ setting.” However, the court recognized that in today’s world many same-sex couples support

115. *Id.* at 1195.
116. *Id.*
117. *Id.* at 1197.
120. *Id.* at 962.
The court reasoned that “[e]xcluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of ‘a stable family structure in which children will be reared, educated, and socialized.’”

These same-sex marriage cases suggest that one of the law’s primary interests in protecting the institution of marriage is the growth and development of children. A closer look at some of the cases involving the marital privileges confirms that part of the policy behind the privileges is the benefit that the preservation of the marriage provides the children of the relationship. As far back as the eighteenth century, English courts explained that the marital privileges protect not only the marriage, but also the family. This distinction between fostering the marriage and protecting the family is also found in nineteenth-century American case law. For example, in a case concerning confidential marital communications, the Supreme Court of Florida explained that “[s]ociety has a deeply-rooted interest in the preservation of the peace of families, and in the maintenance of the sacred institution of marriage” and that the marital privileges are founded upon the “public policy that seeks to preserve inviolate the peace, good order, and limitless confidence between the heads of the family circle.” The court could have explained the privileges solely as protecting marriages, but it instead explicitly distinguished between the preservation of marriage and the protection of families.

Continuing into the twentieth century, the U.S. Supreme Court has explicitly explained that the privileges are designed to benefit not only the parties of the marriage, but also the children of the relationship. In *Hawkins v. United States*, the Court stated that “[t]he basic reason the law has refused to pit wife against husband . . . [is] a belief that such a policy was necessary to foster family peace, not

121. *Id.* at 963.
122. *Id.* at 964 (quoting Goodridge, 798 N.E.2d at 995 (Cordy, J., dissenting)).
123. Barker v. Dixie, (1736) 95 Eng. Rep. 171, 171 (K.B.) (“The reason why the law will not suffer a wife to be a witness for or against her husband is to preserve the peace of families.”); Sir John Fenwick’s Trial in the House of Commons, 13 How. St. Tr. 582 (1696) (“The actions of a wife cannot be evidence for nor against her husband [because of] the danger [that] might follow in cases of matrimony and families.”).
124. Mercer v. State, 24 So. 154, 157 (Fla. 1898); see McCormick v. State, 186 S.W. 95, 97 (Tenn. 1916) (“Sound public policy requires that neither the husband nor the wife shall be permitted to testify, in criminal cases, as to any matter coming to his or her knowledge by reason of the marital relation. The sacredness of the home and the peace of families can only be preserved and protected by enforcing this long-established rule of the common law.”).
only for the benefit of the husband [and] wife [but also for the] children.”125 Similarly, in *Trammel*, the Court explained that the marital privileges not only “affect marriage,” but also the “home, and [other] family relationships.”126 In sum, although the rationale for the law’s preservation of marriage through evidentiary privileges is unclear at times, case law pertaining not only to the marital privileges but also to the recognition of same-sex marriage suggests that a principal justification for this protection is the well being of the children of the relationship. As one commentator explained, the marital privileges protect marriage, but they “also benefit” the “children of married couples.”127

### III. Recognizing a Cohabiting-Parent Privilege

Safeguarding children from the harm of parental separation provides a major justification of the marital privileges’ protection of marriage. Marriage, however, is not the only context in which children develop. Large numbers of unmarried cohabitants procreate and raise children. Denying these couples the protection of evidentiary privileges exposes the children of these relationships to the harms against which the marital privileges were designed to protect. A cohabiting-parent privilege would provide children of unmarried cohabitants the same protection that the marital privileges provide children produced inside marriage. Furthermore, while the primary rationale for not extending legal benefits to unmarried cohabitants is that doing so would undermine marriage, this argument is not applicable to a cohabiting-parent privilege because the privilege would not reduce a couple’s incentive to marry.

---


A. Protecting Children of Unmarried Cohabitants

Despite the legal protections afforded the marital relationship and the characterization of marriage as the ideal setting for childrearing, unmarried cohabitants have not been deterred from raising children.\(^{128}\) In fact, unmarried cohabitants are statistically likely to have children.\(^{129}\) Census data confirms the prevalence of children born into homes consisting of unmarried cohabitants, as the 2000 census showed that 4.1 million children lived in cohabitating households.\(^{130}\) Of these children, about half were the biological children of both cohabitants.\(^{131}\) An earlier study found that in the early 1990s, twelve percent of the children born in the U.S. were conceived by parents who were unmarried and cohabiting.\(^{132}\) As the number of couples choosing to cohabitate continues to rise, it seems reasonable to assume that the number of children born to unmarried cohabitants will also continue to increase.

1. The Effects of Parental Separation

Whether a child’s parents are married or simply cohabiting, parental conflict and separation can negatively affect the child.\(^{133}\) The effects of parental separation on children can be wide-ranging, “[b]ut many children are worse off when their parents divorce or separate as far as the ‘three e’s’ of their existence—economics, emotions, and education.”\(^{134}\)

The dissolution of the parental relationship can have a significant negative economic impact on the child. When parents separate, children find themselves in single-parent households, usually with substantially fewer economic resources to provide for

---

129. Id.
134. Id. at 104.
their needs.135 Studies have found that upon the separation of their parents, children face up to a thirty percent reduction in their standard of living.136 This negative economic impact affects not only children enduring divorce, but also children of separated unmarried parents because cohabiting adults form economic relationships similar to married couples.137 "As a result, the dissolution of cohabiting unions has an impact upon the economic welfare of women and children comparable to that of divorce, leaving a substantial number of former cohabitants [and their children] in poverty."138 In fact, children of unmarried cohabitants may typically experience more severe economic disadvantages after parental separation than children of divorced parents because unmarried fathers generally pay child support less frequently than divorced fathers.139 Even in upper and middle-class families, in which parental separation does not force parents and children into poverty, dissolution of the parental relationship can negatively affect the child, as "children are often economically disadvantaged, particularly with regard to [the] ability to pay for higher education."140

Children may also experience severe emotional and psychological consequences from the separation of their parents. For instance, "[m]any [children] describe the date of their parents' physical separation as the saddest of their lives. Parental divorce or separation can generate simultaneous feelings of grief, guilt, uncertainty, rage, and hopelessness, powerful emotions that forever shape a child's view of the world."141 The psychological and emotional effects of parental separation can continue throughout the child's development. For example, parental separation often results in the diminishment of the relationship between the child and one of the biological parents, typically the father.142 Lack of a

136. Schepard, Parental Conflict Prevention Programs, supra note 133, at 104.
138. Id.
141. Schepard, Parental Conflict Prevention Programs, supra note 133, at 104–05.
142. See Coverdale, supra note 140, at 479 ("In 1994, only 69% of children under age eighteen were living with two parents. 23% were living with their
relationship with their fathers has been linked to negative psychological effects in both boys and girls.\textsuperscript{143} This problem is particularly prevalent in families consisting of unmarried cohabitants, as unmarried fathers typically maintain less contact with their children after parental separation than divorced fathers.\textsuperscript{144}

The absence of a parent from the home also generally results in less investment in the child's educational development.\textsuperscript{145} Consequently, parental separation and development within a single-parent home can produce serious educational disadvantages for the child. For instance, "[c]hildren living with both their biological parents [are] about half as likely to . . . repeat[] a grade in school compared with children in all other types of families."\textsuperscript{146} Studies also have shown that children reared by single-parent households and step-families "d[o] worse on standardized tests, ha[ve] lower grade point averages, attend[] school less regularly, and ha[ve] lower expectations about going to college than students from intact families after adjusting for race, sex, mother's education, father's education, number of siblings and place of residence."\textsuperscript{147}

Regardless of which familial setting is ideal for childrearing, children benefit from having their parents remain in a committed relationship. Children of unmarried cohabitants suffer much the same harm from parental separation as children of married couples. Indeed, children of unmarried cohabitants may experience more severe harms than children of divorced parents because unmarried fathers typically pay less child support and maintain less contact with their children than divorced fathers.\textsuperscript{148} Therefore, by denying evidentiary privileges to unmarried cohabiting parents, the law runs the risk not only of breaking up a relationship between the

---

\textsuperscript{143} \textit{ld}. at 487–88 ("Early grade school boys who have little contact with their fathers in preschool years are generally less assertive and more dependent on their peers, and are more likely to shy away from physical and competitive activities. This contributes to their 'unhappiness, loneliness, and sense of alienation.' Middle-school boys whose fathers are absent have less sense of masculinity and poorer interpersonal relations. Among adolescent girls, a lack of closeness to their fathers is associated with depressive and anxious moods, poor general adjustment, and negative body image.").

\textsuperscript{144} Garrison, \textit{supra} note 139, at 496–97.

\textsuperscript{145} Coverdale, \textit{supra} note 140, at 481.

\textsuperscript{146} Schepard, \textit{War and P.E.A.C.E.}, \textit{supra} note 135, at 143.

\textsuperscript{147} Coverdale, \textit{supra} note 140, at 491.

\textsuperscript{148} See \textit{supra} notes 139, 144 and accompanying text.
mother and father, but also of causing tremendous harm to the children of that relationship.

2. The Instability of Unmarried Cohabitation

Not only do children of unmarried cohabitants suffer greatly from parental separation—perhaps even more so than children of divorced parents—but they are also particularly susceptible to these harms because of the instability of cohabiting relationships. Studies confirm that marital relationships typically last longer than relationships between unmarried cohabitants. While on average first marriages last eight years,\(^1\) the average duration of a relationship between unmarried cohabitants is only eighteen months.\(^2\) Indeed, forty percent of unmarried cohabitants end their relationship within one year, while only ten percent of these relationships last longer than five years.\(^3\) This instability unquestionably affects children because “children born to cohabiting parents are two to four times more likely to experience their parents’ separation than are children born to married parents.”\(^4\) Therefore, because children of unmarried cohabitants are more likely not only to experience parental separation, but also to suffer greater harm when their parents do separate, these children are particularly in need of the protections of evidentiary privileges, perhaps even more so than children of married couples. As one commentator argued, “[D]ata comparing cohabiting unions to marriages—showing that they are in the aggregate shorter, less stable . . . and typically not as good a setting for children—are in fact strong arguments in favor of extending, rather than denying, legal protections for the parties to these arrangements.”\(^5\)

3. Protecting Children of Same-Sex Couples

A cohabiting-parent privilege would not only protect children of couples who choose not to marry, but would also provide protection to a class of children whose parents generally are unable to marry. Though homosexuals have fought extensively for the right to marry, same-sex couples are able to marry in only a handful of states and are able to enter into civil unions or domestic

---

149. Bowman, supra note 128, at 19 n.112.
150. Garrison, supra note 139, at 491.
152. Garrison, supra note 139, at 491.
partnerships in a limited number of others. As a result, while the marital privileges will protect children of heterosexual, unmarried cohabitants if their parents decide to marry, most children adopted by same-sex couples can never enjoy the benefits of the marital privileges.

In the landmark case of *Goodridge v. Department of Public Health*, the Massachusetts Supreme Judicial Court recognized the right of homosexual couples to marry. A few states, such as Connecticut and Iowa, currently go as far as Massachusetts and allow same-sex couples to marry. Nevertheless, some states have recognized other types of unions that provide couples some of the legal consequences of marriage. For example, New Jersey allows same-sex couples to enter into civil unions that bestow the couples with all of the legal benefits of marriage. Other states permit same-sex couples to enter into domestic partnerships, which provide the couples legal benefits that vary from state to state. For example, Oregon and Washington provide couples with nearly all of the consequences of marriage under their domestic partnership laws, including the benefit of the marital privileges. Yet, other states that have enacted domestic partnership laws have not extended the protections of the marital privileges to these couples.

Although the majority of states prohibit same-sex couples from marrying or entering into other legally recognized unions that provide the protection of the marital privileges, these couples generally are allowed to adopt children. Only Mississippi "expressly prohibit[s] homosexuals from adopting children."

154. See infra notes 155, 157 and accompanying text.
159. Maine and the District of Columbia have enacted domestic partnerships laws that do not provide the benefits of the marital privileges. See D.C. CODE § 32-701 to -710 (2001); ME. REV. STAT. ANN. tit. 22, § 2710 (Supp. 2008) (creating a domestic partnership registry); ME. R. EVID. 504 (providing only husbands and wives the benefits of the privileges). Additionally, Hawaii allows same-sex couples to enter into reciprocal beneficiary agreements that do not include the benefits of the marital privileges. See HAW. REV. STAT. ANN. § 572C-6 (LexisNexis 2005 & Supp. 2007) ("Unless otherwise expressly provided by law, reciprocal beneficiaries shall not have the same rights and obligations under the law that are conferred through marriage . . . ."); HAW. REV. STAT. ANN. § 626-1, R. 505 (LexisNexis 2007) (extending the scope of the marital privileges only to spouses).
160. DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE 629 (3d ed. 2007); see MISS. CODE ANN. §
Additionally, Utah’s adoption laws effectively prevent homosexual couples from adopting because adoption is available only to legally married couples or single persons not living in a cohabiting relationship. However, “only eleven states and the District of Columbia, either by statute or findings by their highest courts, specifically permit adoption by gays and lesbians.” In the states that do not expressly allow children to be placed in same-sex households, an adoption petition filed by a homosexual couple is judged on an individual basis by a court seeking to further the best interests of the child.

Despite their inability to marry, in those states in which same-sex adoption is permitted, homosexual couples do adopt. A recent study found that forty percent of both private and public adoption agencies have placed children with same-sex couples and that sixty percent of agencies will at least accept applications from homosexual couples. These numbers are likely underreported, as most agencies do not keep records of applicants’ sexual orientations. Furthermore, the 2000 census found that over 1.5 million children were being reared by adoptive parents. The Census Bureau does not keep records on the number of adopted children being reared by same-sex couples, but a recent demographic study estimates that one percent of all adoptees, or roughly 15,000 children, are reared by homosexual adoptive


163. ABRAMS & RAMSEY, supra note 160, at 629.

164. EVAN B. DONALDSON ADOPTION INST., supra note 162, at 11 (reporting further that “some [agencies] actively reach out to [same-sex couples]”).

165. Id.

parents. These statistics indicate that "opportunities for gay men and lesbians to become parents through adoption" are "readily available" and that many same-sex couples are indeed taking advantage of these opportunities.

Although the number of children adopted by same-sex couples may seem relatively small, these children are susceptible to the negative effects of parental separation to the same extent as children of heterosexual couples, and they are equally as worthy of the protection that evidentiary privileges can provide. Unfortunately, these children cannot enjoy the benefits of the marital privileges because even if their parents wanted to marry, they cannot do so. Therefore, a cohabiting-parent privilege would fill the void left by the nearly universal ban on same-sex marriage and would provide the same protection from parental separation that children of married couples enjoy.

A cohabiting-parent privilege would also provide children of same-sex couples an additional means of protection against the effects of parental separation. "The inability to marry is a badge of inferiority and validates discrimination against and disapproval" of same-sex couples. The Supreme Judicial Court of Massachusetts acknowledged this effect while recognizing the right of homosexual couples to marry: "The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason." Studies have shown that the stigmatization and discrimination faced by same-sex couples cause stress and other negative mental effects that can strain the couple’s

---


168. EVAN B. DONALDSON ADOPTION INST., supra note 162, at 12.

169. Nancy D. Polikoff, For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark, 8 N.Y. CITY L. REV. 573, 593 (2005); see Madeline Marzano-Lesnevich & Galit Moskowitz, In the Interest of Children of Same-Sex Couples, 19 J. AM. ACAD. MATRIMONIAL LAW. 255, 264 (2005) ("If same-sex couples are denied the right to marry, they are treated as second-class citizens based entirely on sexual orientation. The differentiation of same-sex couples perpetuates a stigma attached to homosexuality that has negative effects on committed homosexual couples and their children."); Katherine M. Forbes, Note, Time for a New Privilege: Allowing Unmarried Cohabitating Couples to Claim the Spousal Testimony Privilege, 40 SUFFOLK U. L. REV. 887, 903 (2007) (explaining that the inability of homosexual couples to marry "sends the message that their relationships, unlike relationships between heterosexuals who can procreate naturally, are not worth protecting").

commitment to each other and that may ultimately lead to the dissolution of the relationship.\textsuperscript{171} If same-sex parents separate as a result of this stigma, the adopted child is exposed to the potentially severe consequences of parental separation.\textsuperscript{172} The cohabiting-parent privilege would protect the child from the effects of parental separation by not only providing the safeguards of evidentiary privileges, but by also potentially alleviating some of the stigma faced by same-sex couples. By applying equally to both heterosexual and homosexual couples, a cohabiting-parent privilege would signal that same-sex relationships deserve protection and are worthy of greater societal respect.\textsuperscript{173} This greater respect could lead to less conflict between same-sex couples and consequently fewer children suffering the negative effects of parental separation.

4. The Cohabiting-Parent Privilege Would Not Endanger Children

Some may argue that a privilege for cohabiting parents could harm rather than protect children. If an adult remains in the child’s home because the invocation of the cohabiting-parent privilege resulted in the acquittal of the defendant-spouse, the argument would follow that the child could be harmed because the adult might be a negative and potentially dangerous presence in the child’s life. However, in the most dangerous scenarios the cohabiting-parent privilege, like the marital privileges, would be unavailable. In most jurisdictions, a spouse can invoke neither the spousal testimonial privilege nor the marital communication privilege if the defendant-spouse is accused of harming a child or

\textsuperscript{171} See Michael G. Dudley et al., \textit{Same-Sex Couples' Experiences with Homonegativity}, J. GLBT FAM. STUD., Sept. 2005, at 75 (“[T]he stigma attached to gay and lesbians in general and to same-sex couples in particular compounds the normal stresses experienced by any two people involved in forming and maintaining a committed relationship.”); Melanie D. Otis et al., \textit{Stress and Relationship Quality in Same-Sex Couples}, 23 J. SOC. & PERS. RELATIONSHIPS 81, 85 (2006) (“Compounding the effects of minority stress, individuals tend to carry the effects of discrimination with them to other spheres of their lives, where those effects have negative consequences on a variety of relationships. Intimate relationships are particularly at risk.”).

\textsuperscript{172} See supra Part III.A.1.

\textsuperscript{173} Recognition of same-sex marriage certainly would provide a stronger signal that same-sex relationships are worthy of societal respect. See F. H. Buckley & Larry E. Ribstein, \textit{Calling a Truce in the Marriage Wars}, 2001 U. ILL. L. REV. 561, 580 (2001). The point is merely that bestowing the protections of evidentiary privileges to some same-sex couples may reduce the stigma (perhaps only to a small degree) associated with homosexual relationships.
the witness-spouse. Even if the witness does not want to testify, the court can compel her testimony over her objection. Similarly, the cohabiting-parent privilege would be unavailable in situations in which the defendant-cohabitant had shown aggression toward the child or the other parent. Therefore, in the most dangerous situations the privilege would not cause a negative presence to remain in the child's home.

Even if the defendant-cohabitant is not accused of harming the child or the other cohabitant, the privilege might not be invoked. Only the witness holds the spousal testimonial privilege; thus, the defendant-spouse cannot choose to exercise the privilege. If the witness wishes to testify against her spouse, she may do so. Likewise, under the cohabiting-parent privilege, the witness-cohabitant would have the option of invoking or waiving the testimonial privilege. If the witness-cohabitant determines that waiving the privilege is in the best interest of her child and the rest of her family, she may testify. If she determines that testifying would be detrimental to herself or her child, she may invoke the privilege. Hence, the witness-spouse has the power to decide what is best for her child. This decision should not be questioned because parents have the constitutional right to raise their children as they see fit, and the law presumes that a fit parent acts in the best interests of her child.

In sum, the cohabiting-parent privilege likely would not harm the child. In the most dangerous situations, the cohabiting-parent privilege would be unavailable, and in all other scenarios the witness spouse could waive the testimonial privilege if doing so would be in the child's best interests. However, the cohabiting-parent privilege could raise a concern when the confidential communication privilege is available and the defendant-spouse is

174. See United States v. Bahe, 128 F.3d 1440, 1446 (10th Cir. 1997) (recognizing the crimes against children exception and explaining that "[s]ome states have established a broad exception to the privilege when one spouse is accused of abusing any child" and "[o]ther states have adopted a narrower exception, applicable only to crimes against children of either spouse"); Malinda L. Seymore, Isn't It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence, 90 NW. U. L. REV. 1032, 1050–51 (1996) (providing a history of the exception); Pamela A. Haun, Note, The Marital Privilege in the Twenty-First Century, 32 U. MEM. L. REV. 137, 163–64 (2001).
177. Id.
178. Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").
179. Troxel v. Granville, 530 U.S. 57, 58 (2000) ("There is a presumption that fit parents act in their children's best interests.").
not accused of harming the child or the child’s other parent. In contrast to the spousal testimonial privilege, both the defendant-spouse and the witness spouse hold the marital communication privilege.\textsuperscript{180} Therefore, both spouses must agree to waive the privilege.\textsuperscript{181} Likewise, the defendant-cohabitant can invoke the confidential communication privilege for cohabiting parents even if the witness-spouse determines it is in the best interests of the child for her to reveal the confidential communications. Even in this scenario, though, the potential for harm to the child is small because the defendant-cohabitant has not threatened the child or the child’s other parent, and if the witness-spouse ultimately determines that the child is endangered by remaining in the defendant’s home, she can move out and remove the child from the dangerous situation.

B. The Cohabiting-Parent Privilege Would Not Undermine Marriage

Based upon the belief that marriage is the ideal setting for procreation and childrearing, states have provided marriage extensive legal benefits. On the other hand, unmarried cohabitants have been denied these benefits based upon the reasoning that, because of society’s strong interests in marriage, the law should foster and protect only the marital relationship. In other words, because “various family forms are not ‘equally successful in accomplishing the family’s important care giving, teaching, and socializing functions, . . . society has an interest in preferring and encouraging those that work best.”\textsuperscript{182} Thus, married couples are afforded legal benefits in order to incentivize marriage and to discourage unmarried cohabitation because the law has deemed marriage the ideal family structure.\textsuperscript{183} As one scholar argues, “[T]he commitments inherent in formal families . . . increase the likelihood of stability and continuity for children. Those factors are so essential to child development that they alone may justify the legal incentives and preferences traditionally given to permanent

\footnotesize{\textsuperscript{180} United States v. Bahe, 128 F.3d 1440, 1442 (10th Cir. 1997).}

\footnotesize{\textsuperscript{181} See id.}


\footnotesize{\textsuperscript{183} Bowman, \textit{supra} note 128, at 2 (“Recent articles about cohabitation have argued simply that the institution of marriage is better than cohabitation for both the couple and their children, and the law should therefore be structured so as to discourage this conduct, because to give legal protections to cohabitants will harm the institution of marriage.”).}
kinship units based on marriage." Likewise, "[t]he same factors can justify the denial of legal protection to unstable social patterns that threaten children's developmental environment." 

Marriage is a more stable family unit than unmarried cohabitation. However, even if this instability provides adequate justification to withhold most of the benefits of marriage from unmarried cohabitants, it does not justify withholding the protection of evidentiary privileges from cohabiting parents and their children. Evidentiary privileges are unique from other benefits of marriage. Most consequences of marriage can be seen as benefits that make the relationship attractive and, therefore, provide incentives for couples to marry. For example, married couples are provided a favorable tax status as a result of their marital union. This preferential tax status and its resulting economic benefit can be viewed as an inducement for couples to marry. In contrast, the marital privileges are not designed to encourage couples to enter into marriage but are instead intended to foster the continuation of the relationship once the marriage has commenced. Therefore, for most couples the privileges only weakly incentivize marriage.

1. The Marital Privileges Are Weak Incentives to Marry

Unlike the marital tax advantages, an average couple likely would not think of the protections that the marital privileges

---


185. Id. at 476; see also Garrison, supra note 139, at 500–01 ("As family sociologist Paul Amato has put it, 'the evidence consistently indicates that children with two happily and securely married parents have a statistical advantage over children raised in other family groups.' And '[b]ecause we all have an interest in the well-being of children, it is reasonable for social institutions (such as the state) to attempt to increase the proportion of children raised by married parents with satisfying and stable marriages.' In sum, formal marriage is associated with a wide range of public and private benefits. These benefits support public policies designed to encourage formal registration of marital intentions and childbearing within formalized relationships." (quoting Paul Amato, Tension Between Institutional and Individual Views of Marriage, 66 J. Marriage & Fam. 959, 962–63 (2004))).

186. Married taxpayers are generally permitted to file joint returns . . . . Although married couples . . . file separately, the rate tables are structured so that separate filing almost always results in increased tax liability . . . . Joint filing allows a married couple to split . . . . their total income and obtain the benefit of lower marginal tax rates. Lewis A. Silverman, Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of a Child of the Union, 102 W. Va. L. Rev. 411, 437 (1999).
provide as incentives to marry. It is odd to think that the ability to refrain from testifying against a spouse at a criminal trial would induce anyone to marry. For such an incentive to work, a potential husband or wife would have to think, "My significant other might be charged with a crime, and I might be called to testify. Therefore, it would be a good idea to marry so that I will not have to incriminate my spouse." When contemplating marriage, it is unlikely that anyone would think about the potential of testifying against a spouse or the possibility of revealing confidential communications.\textsuperscript{187} As one scholar remarked, "The decision to marry is based on a myriad of factors; it is hard to believe that the marital privileges could ever play a significant role."\textsuperscript{188}

The marital privileges likely are not considered in a couple's decision to marry for several reasons. First, the potential incentive to marry provided by the marital privileges is difficult to quantify. Incentives are most effective "in situations when information about their calculation and allocation can be disseminated."\textsuperscript{189} For instance, consider the incentive to marry provided by a preferential tax status. A couple can do a few calculations or visit an accountant and easily determine the amount of economic benefit they will gain through marriage. The extra dollars resulting from the preferential tax status provide an effective incentive to marry because the couple can easily attach a value to the reward they receive by marrying. In contrast, benefits that are difficult to value serve as poor incentives because the targets of the incentives do not know the precise nature of the reward they stand to receive by altering their behavior. Unlike the concrete economic benefit of a preferential tax status, the benefits of the marital privileges are intangible and not easily quantifiable. What is the value of the ability to refuse to testify against a significant other or to refuse to reveal confidential marital communications? Most people, especially those who are in relationships with law-abiding partners or who have never been called to testify at trial, will have a difficult time assigning a value to these benefits. Consequently, the marital privileges are weak incentives to marry because potential spouses cannot easily quantify the reward they stand to gain by marrying.

\textsuperscript{187} See Bowman, supra note 128, at 2 ("[F]ew people even know, much less are influenced by, their legal rights when making decisions about intimate relationships . . . .").

\textsuperscript{188} Frost, supra note 99, at 18.

Second, not only are the advantages of the marital privileges not easily quantifiable, but they also are speculative. An incentive is most effective when there is a clear "link" between the "reward" and "the conduct sought to be induced." A preferential tax status is an effective incentive because once a couple marries they will immediately receive the benefit of the tax advantage. In other words, the link between marriage and saved tax dollars is clear and certain. In contrast, the link between marriage and the benefits of the marital privileges is not as clear because realization of the benefit is dependent on more than mere marital status. To obtain the benefit of the spousal testimonial privilege, one spouse must be charged with a crime, and the other spouse must be called to testify. Likewise, to realize the benefit of the marital communication privilege, a spouse must be called as a witness in a case where private marital communications could be of evidentiary value. These two situations are scenarios that most couples would assume are unlikely to occur, and, indeed, relatively few married couples are ever in the position to exercise these privileges. As a result, the marital privileges are weak incentives to marry because the link between the rewards of the evidentiary privileges and a couple's decision to marry is so attenuated.

Finally, evidentiary privileges are ineffective incentives to marry because few couples are aware of them. As far back as 1929, scholars noted the lack of public knowledge of the marital privileges. One law review article commented that "one may seriously doubt that the law of evidence has any formative effect on family life in general. Too few people get into court, and the adjective law is little known outside of it." Four decades later, the advisory committee for the Federal Rules of Evidence also recognized the general public ignorance of the marital privileges. Although there is some suggestion that public

190. Id. at 297.
191. See supra Part II.A.
192. See supra Part II.B.
193. See Frost, supra note 99, at 16 ("[C]ourts assume that the testimonial privileges foster the formation of all covered relationships, of which only a small percentage will ever be involved in litigation."); Thomas G. Krattenmaker, Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence, 62 GEO. L.J. 61, 92 (1973) ("For in protecting those relatively few confidential utterances that do bear upon concrete litigation, the law protects all those that may.").
195. Id. at 677.
196. Amendments to the Federal Rules of Civil Procedure, 56 F.R.D. 183, 246 (1973) (FED. R. EVID. 505(a) advisory committee reporting that "in all likelihood" couples are "unaware" of the "privilege for martial communications").
awareness of the marital privileges has increased in recent years, the general notion persists that "those outside the legal profession rarely] know the rules regarding marital privilege." Even if the level of public awareness is uncertain, "it is logical to assume" that the marital privileges enjoy a relatively low level of public awareness when compared to other privileges, such as the doctor–patient privilege or the attorney–client privilege. Doctors and attorneys have incentives to publicize the privileges that patients and clients enjoy "because [those privileges] make[] their services more attractive to the general public." On the other hand, the marital privileges lack an advocate who is incentivized to increase the general awareness of the privileges. As a result, "married couples only come to learn of the privilege after one member of the couple is involved in litigation and the other is called to testify." The marital privileges, "therefore, benefit[] only the minority of marital relationships in which one spouse has independent knowledge of the privilege."

An incentive is effective in altering behavior only if the targeted individuals are aware of the benefit they stand to gain. For the marital privileges to be effective inducements to marry, couples must be aware of the benefits they could receive from the privileges. A couple will not consider the marital privileges when making the decision to marry if they know nothing of them, and, indeed, the general public awareness of the marital privileges and the rules that govern them is at best questionable. On the whole, the marital privileges are weak incentives to marry because they are unquantifiable, speculative, and unknown. Thus, an ordinary couple likely will never consider the marital privileges when deciding to marry. If the marital privileges do not incentivize marriage, providing some unmarried couples with similar

197. See Mark Reutlinger, Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privileges, 61 CAL. L. REV. 1353, 1374 (1973) ("[T]he media, especially television, lead to increased public awareness of legal concepts such as privileges.").
198. Renee L. Rold, All States Should Adopt Spousal Privilege Exception Statutes, 55 J. Mo. B. 249, 251 (1999); see GIANNELLI, supra note 72, § 39.03 ("The efficacy of this privilege, however, may be questioned. Most married couples do not know of the privilege . . .").
200. Id.
201. Id.
202. Id.
203. See id. (explaining that "the degree to which the public is aware of the privileges and acts on that knowledge is an essential factor in determining the utility of the marital privileges" in promoting marriage).
privileges will not reduce the attractiveness of the marital relationship. Consequently, a cohabiting-parent privilege would not undermine marriage.

2. Couples Affirmatively Seeking the Protections of Evidentiary Privileges

Although the marital privileges do not effectively induce the majority of couples to marry, for some couples the privileges may be sufficiently quantifiable, certain, and known to serve as effective incentives. These couples consist of partners who either have committed a crime or are contemplating committing a crime. In such situations, the benefits of the privileges are more easily quantifiable because the couple can anticipate the criminal punishment that the defendant-spouse could face if prosecuted. For instance, the couple can estimate the amount of a monetary fine or the length of a period of incarceration that the defendant potentially could avoid by the non-defendant-spouse exercising the marital privileges. In these situations the benefit of the marital privileges is also less speculative. The couple will know not only that one spouse has committed a crime, but also whether the non-defendant-spouse possesses damaging information. Although the arrest and prosecution of a spouse is still uncertain, these couples are more likely to realize the benefits of the marital privileges than couples who are not contemplating criminal activity. Finally, these couples likely are more aware of the marital privileges because they have an incentive to learn about the criminal proceedings they may face if prosecuted, and they may be aware of the privileges through their own research or through consultation with an attorney. Additionally, because a large portion of criminals are repeat offenders, the defendant-spouse previously may have been prosecuted and learned of the rules governing the marital privileges.

In sum, the marital privileges generally are more effective incentives to marry for couples in which one or both members have committed a crime or are contemplating committing a crime because the benefits of the privileges are more quantifiable, certain, and known. Consequently, for these couples the cohabiting-parent privilege could provide an alternative to the

marital privileges. However, for several reasons, recognition of a cohabiting-parent privilege likely would not reduce the incentive to marry for these couples; therefore, recognition of this new privilege would not undermine marriage.

First, for those couples who are not currently parents, the availability of the cohabiting-parent privilege would not reduce the incentive to marry because the marital privileges provide an easier method to obtain the benefits of the privileges. If the couple does not have a child the couple would have to conceive or adopt a child to obtain the benefits of the cohabiting-parent privilege. Pregnancy and adoption are lengthy processes and result in the extensive costs of raising a child. In these situations, the option of marriage to obtain the benefit of evidentiary privileges is significantly more attractive because it is more expeditious and is not accompanied by the long-term responsibilities of parenthood. Hence, a childless couple seeking the protection of evidentiary privileges likely would choose marriage as a means to obtain the benefits of evidentiary privileges, regardless of the availability of a cohabiting-parent privilege.

Though, for childless unmarried couples, the cohabiting-parent privilege would not reduce the incentive to marry, for unmarried parents, recognition of this new privilege could reduce the incentive to marry provided by the marital privileges. Such couples either would already qualify for the cohabiting-parent privilege or simply would have to begin cohabiting to qualify. In these circumstances, the elimination of the need to marry in order to obtain the benefits of evidentiary privileges would also eliminate the incentive to marry. However, the marital privileges are not available to many of the couples in this situation, so in many instances these couples have no incentive to marry. The availability of the cohabiting-parent privilege, then, would have no effect on their decision to marry. For example, some federal and state courts exclude the couples that would benefit most from marrying, namely couples in which both individuals participate in

205. Susan J. G. Alexander, A Fairer Hand: Why Courts Must Recognize the Value of a Child’s Companionship, 8 T.M. COOLEY L. REV. 273, 312 (1991) ("Parents currently spend a large amount of money to raise a child. Various sources have come up with differing figures, but the consensus is that raising a child . . . is an expensive undertaking."); Richard R. Bradley, Making a Mountain Out of a Molehill: A Law and Economics Defense of Same-Sex Foster Case Adoptions, 45 FAM. CT. REV. 133, 133 (2007) (explaining that the adoption process “is unduly burdensome, requiring extensive amounts of time and money”).
the crime, from the protection of the privileges.\textsuperscript{206} If the privileges applied in such situations, neither spouse would be able to testify against the other even though they were accomplices in the same crime. Yet, in jurisdictions that recognize this joint participation exception, the marital privileges are unavailable if the husband and wife participated in the same crime, so, for couples who commit joint crimes, the availability of the cohabiting-parent privilege would not reduce the incentive to marry because the marital privileges are unavailable. Consequently, the marital privileges do not served as a motivation to marry.

The marital privileges also may not serve as incentives to marry for couples in which only one spouse has committed a crime. In all jurisdictions, the marital communication privilege applies only to communications made during marriage.\textsuperscript{207} Likewise, in some jurisdictions, the spousal testimonial privilege applies only to events that occurred after the commencement of the marriage.\textsuperscript{208} The marital communication privilege, therefore, does not protect spouses from revealing confidential information conveyed before marriage, and the spousal testimonial privilege oftentimes does not prevent one spouse from testifying against another spouse with respect to events that took place before the marriage. Accordingly, for couples in which one spouse has already committed a crime, the marital privileges do not serve as strong incentives to marry because the couple may be ineligible to receive the benefits of privileges. Even couples in which one spouse is merely contemplating committing a crime will find the marital privileges to be a weak incentive to marry because, like criminal acts that occur before marriage, the premarital initial discussions of the crime may not be protected.

In sum, the marital privileges appear to be effective incentives to marry only for couples in which one spouse has committed a

\textsuperscript{206} See United States v. Bey, 188 F.3d 1, 5 (1st Cir. 1999); United States v. Clark, 712 F.2d 299, 301 (7th Cir. 1983) ("[A] joint participants exception is consistent with the general policy of narrowly construing the privilege."); Amy G. Bermingham, Note, Partners in Crime: The Joint Participation Exception to the Privilege Against Adverse Spousal Testimony, 53 Fordham L. Rev. 1019, 1027–32 (1985) (discussing the rationales for the joint participation exception to the spousal testimonial privilege); Haun, supra note 174, at 164 (identifying Alabama, Kentucky, New York, and South Dakota as having a joint participation exception for the marital communication privilege).

\textsuperscript{207} See, e.g., United States v. Lea, 249 F.3d 632, 641 (7th Cir. 2001) ("The privilege . . . applies only to communications made in confidence between the spouses during a valid marriage.").

\textsuperscript{208} Steven N. Gofman, Note, "Honey, The Judge Says We're History": Abrogating the Marital Privileges Via Modern Doctrines of Marital Worthiness, 77 Cornell L. Rev. 843 (1992) (reporting that the Seventh Circuit and eight states have adopted a premarriage act exception).
crime or is contemplating criminal conduct because only for these couples are the benefits of marital privileges sufficiently quantifiable, certain, and known. The majority of couples, then, likely will not consider the privileges when deciding to marry. Furthermore, for those couples that are incentivized to marry, the availability of a cohabiting-parent privilege likely will not reduce the incentive to marry. For instance, for couples that do not have children, marriage is an easier way to obtain the benefits of the privileges, and for couples with children, the marital privileges may not be available if the jurisdiction recognizes a joint participation exception or a premarital acts exception to the privileges. Therefore, the only couples for whom the marital privileges likely will serve as incentives to marry are those couples who have children, who are contemplating committing a crime or have committed a crime, and who live in jurisdictions that do not foreclose the availability of the marital privileges to couples in these situations. Reducing the incentive to marry for these couples by providing cohabiting parents with evidentiary privileges is a small price to pay to protect the large number of children born to unmarried, cohabiting parents. In fact, "[i]t could be argued that any marriage in which the marital privileges provide the motivation for the union . . . is not a relationship worth protecting."\textsuperscript{209}

C. The Cohabiting-Parent Privilege Could Promote Marriage

Some proponents of marriage may disfavor the extension of marital benefits to any non-marital relationship, even if such an extension does not reduce the incentive to marry. However, the force of this criticism diminishes when one considers that a cohabiting-parent privilege could actually promote marriage. For a significant number of cohabitants, "cohabitation is an extension of the courtship process—a prelude to marriage."\textsuperscript{210} Indeed, the percentage of first marriages that begin with cohabitation has increased steadily, so that by the early 1990s over half of the couples marrying for the first time began their relationship by living together.\textsuperscript{211} When viewed from the opposite perspective,

\textsuperscript{209} Frost, supra note 99, at 18.

\textsuperscript{210} Forste, supra note 2, at 91; see also Bumpass & Sweet, supra note 151, at 621 ("For some [cohabitants], marriage is definitely planned and all that is at issue is the timing of the ceremony.").

\textsuperscript{211} Larry Bumpass & Hsien-Hen Lu, Trends in Cohabitation and Implications for Children's Family Contexts in the United States, 54 POPULATION STUD. 29, 33 (2000) (reporting that between 1980 and 1984 forty-three percent of first marriages began with cohabitation and that that percentage
namely the proportion of cohabiting relationships that result in marriage, the connection between marriage and cohabitation is also apparent. In the early 1980s, up to sixty percent of first-time cohabiting relationships transitioned into marriage. Although this percentage has decreased in recent years, about half of today’s first-time cohabiting couples eventually marry. The percentage of cohabiting relationships that transition into marriage likely increases when the couple produces a child. For example, one study found that cohabiting couples “who are pregnant with their first child are more likely to marry than to continue cohabiting or to separate in relation to those with no children,” and “[a]lthough the effects are smaller, having children also significantly increases the odds of marriage.” The researchers hypothesized that “[c]ouples who cohabit with children already present may be more committed to the union than those without children, and . . . that this commitment increases with time as stronger ties are forged between the cohabiting partner and the child or children.”

In sum, a significant portion of cohabiting relationships result in marriage and an even greater portion of cohabiting parents eventually formalize their unions. By failing to protect cohabiting parents with evidentiary privileges, the law exposes relationships that likely lead to marriage to potential disruption and dissolution. In contrast, a cohabiting-parent privilege would protect these
relationships. This protection would not only benefit the child by increasing the relationship’s stability, but would also potentially increase the number of cohabitants that eventually marry by shielding the unmarried couples that are most likely to marry from the discord that can result from testifying against an intimate partner or from revealing confidential communications that were intended to remain within the relationship.

IV. A COMPARISON TO EXTENDING EVIDENTIARY PRIVILEGES TO ALL UNMARRIED COHABITANTS

In recent years, a number of scholars have argued that evidentiary privileges should be extended either to unmarried same-sex couples or to all unmarried cohabitants. These proposals have elicited criticism that goes beyond the primary opposition to the extension of any legal consequence to non-marital relationships, namely that recognition of legal benefits for unmarried cohabitants will reduce the incentive to marry. However, just as the cohabiting-parent privilege is not susceptible to the criticism that it will dissuade couples from formalizing their union, a cohabiting-parent privilege is also less susceptible to the additional criticisms that are specific to the recognition of evidentiary privileges for all unmarried cohabitants.

217. See 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5422.1, at n.34 (“The junior author is, indeed, happy to abolish [the distinction between same-sex couples and heterosexual couples] at least insofar as it affects privilege.”); Jennifer R. Brannen, Note, Unmarried with Privileges? Extending the Evidentiary Privilege to Same-Sex Couples, 17 REV. LITIG. 311, 341 (1998) (“Extension of the marital evidentiary privilege would insure procedural fairness for deserving couples. The law of evidence should not discriminate against same-sex couples solely on the basis of status.”).

218. See Developments in the Law: Privileged Communications, 98 HARV. L. REV. 1450, 1590 (1985) [hereinafter Developments in the Law] (proposing a new privilege for a number of familial relationships, including “relationships between unmarried cohabitants” and “homosexual lovers”); Forbes, supra note 169, at 906–07 (arguing for the extension of the privileges to all unmarried cohabitants); Krattenmaker, supra note 193, at 94 (arguing for “a general, qualified privilege for confidential communications that pass between individuals intimately related or in a position of close personal trust”).

A. Narrowly Construing the Privilege

The first argument against extending evidentiary privileges to all unmarried cohabitants is founded on the judicial system's truth seeking function. America's courts are designed to discover the truth, and, therefore, privileges, which are "exceptions to the demand for every man's evidence," should not be "lightly created nor expansively construed, for they are in derogation of the search for truth." Because evidentiary privileges withhold evidence from the court, some argue that expanding the coverage of evidentiary privileges to all unmarried cohabitants would place an overly burdensome restriction on the court's truth seeking function. As one critic of the expansion of evidentiary privileges argued, "[E]videntiary privileges are intended to be a narrow exception to the rule that a tribunal should have access to all relevant information. Making the [marital] privilege available to unmarried partners would significantly expand the body of evidence that potentially could be withheld from the legal system."

Even if this argument—that too much evidence would be withheld from the purview of the court—is persuasive, such that evidentiary privileges should not be extended to all unmarried cohabitants, this argument loses much of its force when the proposed privilege is limited to cohabiting parents. If evidentiary privileges were extended to all unmarried cohabitants, nearly five million couples would qualify for the privileges' protection. In contrast, a privilege for cohabiting parents would drastically reduce the number of couples that qualify. Roughly four million children live in cohabiting households. Even if all of these children lived in different households and were the legal children of both cohabitants, the number of qualifying couples would be twenty percent lower than if the privileges protected all unmarried cohabitants. However, the number of cohabiting couples that live with children is much lower, as only about half of all cohabiting households, or 2.5 million families, include children.


221. Regan, supra note 219, at 1459–60; see O'Brien, supra note 219, at 439–40 (arguing that the privileges should be limited to married couples "because . . . the privileges must be construed narrowly since they operate to exclude valuable evidence").

222. Aycock, supra note 5, at 234 (reporting that 4.9 million children lived with unmarried cohabitants in 2000).

223. See supra note 130 and accompanying text.

224. Forste, supra note 2, at 94.
Furthermore, the actual percentage of unmarried cohabitants that would qualify for the cohabiting-parent privilege would be lower than fifty percent because in many of the households both cohabitants are undoubtedly not the legal parents of the children. Thus, because significantly fewer couples would qualify for a cohabiting-parent privilege than a privilege for all unmarried cohabitants, limiting the extension of evidentiary privileges to cohabiting parents is in keeping with the general rule that the scope of evidentiary privileges should be narrow so as to further the court's purpose of ascertaining the truth.

Narrowly construing evidentiary privileges entails not only limiting the amount of evidence that is excluded, but also ensuring that evidence is withheld only to further important policy considerations. As Justice Frankfurter explained, evidentiary privileges are tolerable "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." He explained further that "[t]he basic consideration . . . is whether there are present any overriding reasons for not accepting [relevant] evidence . . . ." This aspect of a narrow construction of evidentiary privileges has been invoked as an argument against extending the marital privileges to all unmarried cohabitants. As one commentator argued, "[T]he social interest in protecting [cohabiting] relationships is minimal, if at all existent . . . ." Therefore, "[a]n extension of the privileges to cohabitants would . . . [not] advance any social goals," and, consequently, "the [marital] privileges should continue to be limited to those who are actually married."  

Regardless of whether fostering and preserving a cohabiting relationship provides sufficiently important policy considerations to outweigh the competing interest of ascertaining the truth, the protection of children is a long-recognized important societal interest. For example, states possess the inherent power of

225. Rios v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting); see Mem'l Hosp. for McHenry County v. Shadur, 664 F.2d 1058, 1062 (7th Cir. 1981) ("[I]n deciding whether the privilege asserted should be recognized . . . [i]n weighing the need for truth against the importance of the relationship or policy sought to be furthered by the privilege . . . ." (quoting Ryan v. Comm'r, 568 F.2d 531, 542 (7th Cir. 1977))).

226. O'Brien, supra note 219, at 441.

227. Id. at 442.

228. See W.E.J. v. Superior Court, 160 Cal. Rptr. 862, 869 (Cal. Ct. App. 1979) ("The protection of the child is well recognized as an important state interest."); G.C. v. Dep't of Children & Families, 791 So. 2d 17, 21 (Fla. Dist.
parens patriae.\textsuperscript{229} This power, with origins reaching back centuries,\textsuperscript{230} "gives the state authority to serve as a substitute parent and ultimate protector of children's interests" and includes the power "to ensure [children's] safety and well-being."\textsuperscript{231} The state's parens patriae power manifests itself in a number of contexts, including child custody proceedings, in which judges make decisions based on the best interests of the child,\textsuperscript{232} the juvenile court system, which was designed "to help delinquent and dependant children achieve better lives";\textsuperscript{233} and abuse and neglect laws, which aim to protect children from the mistreatment of their parents.\textsuperscript{234} Child protection as a significant policy consideration is not limited to these contexts,\textsuperscript{235} and, indeed, its importance enjoys

\textsuperscript{229} See Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 57 (1890); DOUGLAS E. ABRAMS, A VERY SPECIAL PLACE IN LIFE: THE HISTORY OF JUVENILE JUSTICE IN MISSOURI 4 (2003) (explaining that "[p]arens patriae has always been part of... state law").


\textsuperscript{231} Kay P. Kindred, God Bless the Child: Poor Children, Parens Patriae, and a State Obligation to Provide Assistance, 57 OHIO ST. L.J. 519, 521, 526 (1996).

\textsuperscript{232} See Huff v. Huff, 444 A.2d 396, 398 (Me. 1982) ("In making custody determinations the trial judge must decide as a 'wise, affectionate and careful parent' what custody arrangement will be in the child's best interest." (quoting Cyr v. Cyr, 432 A.2d 793, 796 (Me. 1981))).

\textsuperscript{233} ABRAMS & RAMSEY, supra note 160, at 1004; see also In re Gault, 387 U.S. 1, 15 (1967) (explaining that "early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals" and that "society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but 'What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career").

\textsuperscript{234} See ABRAMS & RAMSEY, supra note 160, at 283. A number of criminal laws also aim to protect children. See Justine A. Dunlap, Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect, 50 LOY. L. REV. 565, 613–14 (2004) ("Today, a variety of legal means exist to address harms committed against children. Child endangerment and child neglect are both subject to criminalization. The criminal system also punishes the act of causing mental harm to children and enhances punishment for assaults or other crimes that are not directed at children, but which are committed in their presence.").

\textsuperscript{235} See ABRAMS & RAMSEY, supra note 160, at 16 ("The parens patriae doctrine underlies much federal and state regulation . . . in areas such as abuse, neglect, foster care, adoption, medical decisionmaking, support and delinquency.").
worldwide recognition. Protection of children undoubtedly is an important societal interest that is much more firmly established than society's interest in protecting unmarried cohabitation, and, consequently, it serves as a more compelling basis for an evidentiary privilege that excludes valuable information from consideration by the court.

In sum, a cohabiting-parent privilege is more narrowly tailored than evidentiary privileges for all unmarried cohabitants because it applies to fewer couples and is founded on a deeply rooted, important societal interest. The cohabiting-parent privilege is, therefore, less susceptible to a major criticism elicited by proposals to extend evidentiary privileges to all unmarried couples, namely that such an expansion of evidentiary privileges beyond the marital relationship would be overly broad and would not outweigh society's interest in ascertaining the truth.

B. Avoiding Individual Judicial Determinations of the Privilege’s Applicability

A second concern raised by extending evidentiary privileges to all unmarried cohabitants is that the courts must make difficult individual determinations as to whether a particular couple is worthy of the privileges' protections. Proposals for the extension of evidentiary privileges to either same-sex couples or all unmarried cohabitants typically do not suggest that every couple living together should enjoy the benefits of the privileges.237


237. See Peter Nicolas, “They Say He’s Gay”: The Admissibility of Evidence of Sexual Orientation, 37 GA. L. REV. 793, 872 (2003) (“[F]or same-sex couples, [the applicability of the privilege] is simply a matter in some cases of asking if they have registered as domestic partners or have entered into a civil union . . . , or asking them to provide evidence that they live together and share basic living expenses.”); Elizabeth Kimberly (Kyhm) Penfil, In Light of Reason and Experience: Should Federal Evidence Law Protect Confidential Communications Between Same-Sex Partners?, 88 MARQ. L. REV. 815, 844 (2005) (suggesting that “courts might inquire whether the [same-sex] partners have created as much of a marriage as the law allows them to” and providing five criteria the court should consider, including “whether the partners cohabitate,” “whether the partners are jointly responsible for ‘basic living expenses’ or share other financial responsibilities,” “whether the partners are both on the deed or lease to their home,” “whether the partners have made provisions for each other,” and “the length of the relationship and the intentions of both partners regarding the permanence of relationship”); Forbes, supra note 169, at 905 (“Cohabitating couples should not be entitled to the spousal testimony privilege based solely on their living together.”).
Instead, only certain cohabitants that display indicia of a committed and intimate relationship should be provided the benefits of evidentiary privileges under these proposals. For example, the Arizona Supreme Court recognized that any proposal of evidentiary privileges for unmarried cohabitants would require courts to make “a case by case qualitative and quantitative analysis of such factors as [the couple’s] intimacy, voluntary commitment, stability and psychological involvement.”

Some federal courts already make similar determinations when deciding whether to allow married couples to invoke the marital privileges. As one commentator observed, “The rule that the validity of a marriage for purposes of marital privileges is to be determined according to state law has recently begun to be eroded by the adoption by some federal courts of the ‘bum marriage’ doctrine.” This doctrine, also known as the “viability doctrine,” permits the courts to look into the state of the marriage to determine whether the protection of the relationship outweighs the suppression of evidence that would result if the marital privileges were to apply. If the marital relationship is in disrepair or lacks the intimacy and commitment that is the hallmark of a traditional marriage, the courts will refuse to apply the privilege. As the Seventh Circuit Court of Appeals explained, “[T]he testimonial privilege may not be asserted where the marriage between the defendant and the testifying spouse is in fact moribund, though legally still valid.” In such cases, application of the privilege “could not possibly achieve the intended benefit of the rule and would serve only to thwart common sense.”

The viability doctrine, however, has elicited criticism. The first concern raised by this doctrine is that courts are ill-equipped to efficiently make individual determinations of the privilege’s applicability beyond simply determining whether the couple is married, and “[a]ny attempt to develop this expertise and to gather the information to make such a determination would be unduly time-consuming.” Similarly, prior to the emergence of the

239. WRIGHT & GRAHAM, supra note 18, § 5573.
240. See Gofman, supra note 208, at 860.
241. See id. (providing a detailed explanation of the viability doctrine); see also WRIGHT & GRAHAM, supra note 18, § 5573.
242. See Gofman, supra note 208, at 860; see also WRIGHT & GRAHAM, supra note 18, § 5573.
viability doctrine, Judge Learned Hand cautioned against judicial assessment of the state of a marital relationship: "[i]t [is] [n]either practicable [n]or desirable to make" the applicability of the marital privileges "dependent upon the judge's conclusion that in the instance before him the marriage has already been so far wrecked that there is nothing to save" because "[t]he question will always arise in the progress of the trial . . . and its answer will introduce a collateral inquiry likely to complicate the trial seriously."246 A related second criticism of the viability doctrine is that, because courts have not fashioned a clear set of criteria with which to assess marital relationships, an assessment of the state of a particular marriage largely depends on the individual beliefs and biases of the court making the determination.247

Similar to the courts' involvement in assessing the viability of a particular marriage, potential individual judicial determinations of the applicability of evidentiary privileges for unmarried cohabitants have also elicited criticism, which has largely echoed the arguments associated with the marital viability doctrine. As one critic explained:

[T]he court would have to conduct an in-depth inquiry into every unmarried relationship that is asserted as the basis for the privilege. . . . [T]his would increase the probability of contradictory and unpredictable decisions. The ramifications of this may be especially serious, because inconsistent exclusion of evidence could erode confidence in the ability of the legal system to arrive at just decisions.248

Another critic argued that "[e]xpanding . . . privileges [to] unmarried cohabitants is fraught with difficulties of judicial administration" and "[t]he individual determinations this would require would result in an increased burden on an already clogged

minitrials during criminal cases to determine the viability of marriages," and "[t]herefore, criminal proceedings are not appropriate forums for evaluating the condition of particular marriages"); see Byrd, 750 F.2d at 592 ("[T]he making of the determinations of when a marriage has deteriorated to the point when its communications are no longer confidential would involve courts in difficult factual inquires in which we are reluctant to require trial courts to become involved."); In re Malfitano, 633 F.2d 276, 279 (3d Cir. 1980) (stating that "given the theoretical and empirical difficulties of assessing the utility of [a] marriage[]" the court is "not confident that courts can assess the social worthiness of particular marriages or the need of particular marriages for the protection of the privilege").
247. See Gofman, supra note 208, at 861; Medine, supra note 245, at 533.
248. Regan, supra note 219, at 1459.
Proponents of extending evidentiary privileges to unmarried cohabitants acknowledge that the individual judicial determinations of the privileges’ applicability would create significant administrative difficulties for the courts. These administrative difficulties are founded on “the costs of uncertainty arising from the recognition of nonformalized relationships.”

In contrast to the marital privileges, a privilege for all unmarried cohabitants would produce these costs of uncertainty because the determination of the privilege’s application “is not as easy as just looking to whether or not the couple has a marriage license.” Instead, the courts would have to make value determinations as to a couple’s worthiness of protection because the courts lack an easily identifiable proxy for a relationship that is worthy of protection, such as a legally valid marriage. Implicit in proposals for an evidentiary privilege for all unmarried cohabitants is the belief that the benefit of the privilege outweighs the administrative difficulties that accompany uncertain administration. Regardless of the merits of this argument, a cohabiting-parent privilege is much less susceptible to the claim that it would create these administrative burdens.

As previously explained, the marital privileges provide few administrative difficulties because the courts need only determine whether a couple is legally married for the privileges to be available. Similarly, a court could also easily determine the applicability of the cohabiting-parent privilege. The court must first determine the legal parentage of the child. In many cases, this

---

249. O’Brien, supra note 219, at 440. The author continues:

It is unclear, for example, how long a couple should have to cohabit to trigger the privilege. In addition, any extension would likely apply only to those meretricious spouses involved in stable family situations. As a result, the trial court would bear the massive burden of determining the requirements for establishing the existence of a stable relationship and of evaluating the facts of each case to ascertain whether the requirements have been satisfied.

250. See Brannen, supra note 217, at 337–38; Developments in the Law, supra note 218, at 1591 (“Clearly, courts might have difficulty in determining whether a particular relationship is sufficiently ‘intimate’ to warrant recognition of a privilege.”); Penfil, supra note 237, at 844–45 (recognizing “the practical considerations of extending the privilege to same-sex partners” and concluding that they “are not insurmountable”).

251. Mahoney, supra note 3, at 196.
252. Nicolas, supra note 237, at 872.
253. See Mahoney, supra note 3, at 190 (explaining that “[p]roponents of legal recognition [of unmarried cohabitation] believe that the costs associated with [this] uncertainty about legal family status would be outweighed by the benefits of recognition,” such as “the fairness to family members and the stabilization of de facto families”).
requires a simple check of the child’s birth certificate or adoption records. In cases in which legal parentage is disputed, though, the determination of the cohabiting-parent privilege’s applicability would not be so simple. Some may argue that determining legal parentage in these cases would impose the same administrative burdens on the courts as would a privilege for all unmarried cohabitants because such a determination would require an in-depth collateral inquiry. However, to avoid these collateral inquiries, birth certificates and adoption records could be deemed conclusive proof of legal parentage for purposes of determining the applicability of the cohabiting-parent privilege. Permitting courts to look only to these records would eliminate potential administrative difficulties, and parties wishing to dispute legal parentage would be directed to pursue their claims in separate legal proceedings.

To determine whether a couple qualifies for the cohabiting-parent privilege, the courts must also determine whether the couple is cohabiting. This may be a more fact-intensive task than simply checking a birth certificate or marriage license, but, unlike a determination of whether a couple exhibits the characteristics of a committed relationship, it is not a factual determination that is foreign to the courts. The courts need not make a value judgment regarding the worthiness or viability of a particular couple, but must simply make a typical factual determination based upon the available evidence.

In sum, the cohabiting-parent privilege may require slightly more work by the courts than the marital privileges because the courts would have to determine parentage of the child and the residency of the couple instead of merely determining whether a couple is validly married. On the other hand, a cohabiting-parent privilege would place a significantly lesser administrative burden on the courts than a privilege for all unmarried cohabitants because the courts need not make in-depth inquiries into the state of couples’ marital relationships.

**Conclusion**

The law provides marriage a privileged status, and married couples enjoy a number of benefits as a result of their union. Two of the oldest benefits conferred upon marriage are the marital privileges, which today consist of the spousal testimonial privilege and the marital communication privilege. These privileges are designed to avoid the marital discord that could follow from one spouse testifying against the other and to strengthen the marital union by encouraging open communication between the spouses.
Not only are these privileges designed to protect the husband and wife, but they are also meant to protect the children of the marriage. Parental separation can have severe emotional, developmental, and financial effects on the child. Therefore, by potentially strengthening the marriage, the marital privileges aim to protect children from the harms of divorce and parental separation.

Though in the past most children may have been protected by the marital privileges, America's families are changing. Instead of the vast majority of children being born and reared within marriage, unmarried couples increasingly are becoming parents. Not only are unmarried couples bringing children into the world, but they are also rearing their offspring together under the same roof. Consequently, the distinction between families united by marriage and families living together without a formal union has become blurred. As the U.S. Supreme Court explained almost a decade ago, because “[t]he demographic changes of the past century” have caused “[t]he composition of families [to] var[y] greatly from household to household,” it is “difficult to speak of an average American family.”

Even though the law currently does not provide the protections of evidentiary privileges to children of unmarried cohabitants, parental separation can have the same negative effects on all children, regardless of whether they were born inside or outside of marriage. Thus, this Article proposes a new evidentiary privilege that would protect the growing number of children who live in families that on the surface might look like traditional families, but whose parents are unmarried and cohabiting. This new cohabiting-parent privilege would allow unmarried, cohabiting parents to invoke the same evidentiary privileges that married couples currently enjoy.

Federal Rule of Evidence 501 directs federal courts to recognize new evidentiary privileges “in light of reason and experience.” Although a cohabiting-parent privilege lacks historical recognition, both society and the law have long recognized the underlying interest of protecting children. Not coincidentally, the protection of marital children is a principal objective of the marital privileges, which is based upon a rationale that the preservation of marriage safeguards the stable environment best suited for childrearing. Reason surely suggests that, as the number of children born outside of marriage continues to increase, new evidentiary privileges should be developed to protect these children. Federal courts, therefore, should exercise the discretion

255. FED. R. EVID. 501.
bestowed upon them by the drafters of the Federal Rules of Evidence and should recognize a new evidentiary privilege for cohabiting parents. Likewise, state legislatures and state courts should utilize their respective powers\textsuperscript{256} to provide children of unmarried cohabitants the protection that reason and experience require.

\textsuperscript{256} See Raymond F. Miller, Comment, Creating Evidentiary Privileges: An Argument for the Judicial Approach, 31 CONN. L. REV. 771, 780 (1999) ("Unlike the federal judiciary, state courts play a limited role in the introduction of new privileges. During the past two decades, the majority of new state evidentiary privileges have been introduced by statute. 'The development of [state] judge-made privileges [has] virtually halted.'" (quoting CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE 156 (4th ed. 1992))).