EXTENDING CONSORTIUM RIGHTS TO UNMARRIED COHABITANTS

INTRODUCTION

During the decade of the 1970s, the number of couples living in unmarried cohabitation arrangements increased more than twofold. The increase in the frequency of unmarried cohabitation has led to a flurry of cases challenging the traditional view of non-marital unions. The law, in turn, has been experiencing the pains of readjustment and accommodation as it attempts to respond to a changing social reality through legal recognition of these relationships.

This Comment addresses the issue whether unmarried cohabitants may recover for loss of consortium owing to tortious conduct. Consortium refers to the legally protected "relational interest" that one person acquires by virtue of his or her position with respect to another family member. An interference with this relational interest can be redressed through a tort action. The

1 In 1979, there were approximately 2,692,000 partners living in unmarried cohabitation arrangements—defined as any household in which two unmarried people of the opposite sex reside—more than twice the estimated 1,046,000 unmarried cohabitants living in the United States in 1970. Meanwhile, the number of married couples increased by only seven percent during these same nine years. U.S. BUREAU OF THE CENSUS, DEPT. OF COMMERCE, SERIES P-20, NO. 350, POPULATION PROFILE OF THE UNITED STATES: 1979, at 8 (1980) [hereinafter cited as POPULATION PROFILE]. See In re Cary: A Judicial Recognition of Illicit Cohabitation, 25 HASTINGS L.J. 1226, 1226 & n.1 (1974).


3 The Restatement (Second) of Torts refers to a spouse who has suffered the actual physical injury as the "impaired" spouse; the other spouse, who suffers from loss of consortium, is referred to as the "deprived" spouse. RESTATEMENT (SECOND) OF TORTS § 693, Comment a (1977) [hereinafter cited as TORTS RESTATEMENT]. This Comment will, in addition to adopting this terminology, also use the similar terms "impaired" and "deprived" cohabitant.

4 Although many of the arguments advanced in this Comment might logically be extended to support the granting of consortium rights to homosexual couples, numerous distinctions might be made as well. In any case, discussion of the extension of consortium rights to homosexual couples is beyond the scope of this Comment.

5 W. PROSSER, HANDBOOK OF THE LAW OF TORTS 873 (4th ed. 1971). "Consortium" comprises a variety of elements, including services, sexual relations, companionship, affection, and emotional support. See note 32 infra & accompanying text. Throughout this Comment, the term "consortium interest" will be used to refer to the existence of the various elements of consortium between a couple; the term "consortium rights" refers to the legal protection of the consortium interest.

6 Tort remedies have been fashioned for both intentional and negligent interferences with consortium interests. TORTS RESTATEMENT, supra note 3, at § 693(1) & Comment b. See W. PROSSER, supra note 5, at 873-78.
United States District Court for the District of New Jersey recently extended the reach of this relational interest by granting consortium rights to unmarried partners in *Bulloch v. United States.*

This Comment examines the *Bulloch* decision and its potential impact on consortium law. After a brief discussion of the history of the consortium doctrine, the Comment explores some of the cases dealing with the consortium doctrine and unmarried partners. In part II, the Comment traces the changing attitudes of the United States Supreme Court and of various state courts towards the institution of marriage, noting the development of a pragmatic and functional approach towards nontraditional domestic relationships that supports the extension of consortium rights to unmarried cohabitants. The Comment then discusses traditional principles of tort law and demonstrates that these principles support the recognition of consortium rights for unmarried cohabitants. Finally, the Comment proposes a procedure whereby the claims of all deprived cohabitants—married or unmarried—may be fairly heard, taking into account both the state interest in marriage and the interest in compensating all victims who are tortiously injured.

Before turning to this analysis, however, a thorough discussion of the district court's landmark decision in *Bulloch v. United States* is necessary. In *Bulloch,* the court confronted the difficult issue whether a loss of consortium claim could be asserted under New Jersey law in the absence of a legal marital relationship. David Bulloch had been severely injured in a scuba diving accident. The accident required him to undergo several months of hospitalization and rehabilitation and rendered him incapable of having sexual relations. He brought a tort suit against the federal government, as his employer, under a federal statute. Edith Bulloch, the woman with whom David had been cohabiting prior to the suit, joined David in his federal suit and sought damages for loss of consortium. The federal government moved to dismiss Edith's claim, asserting that legal marriage was a required element of proof in a consortium action. Rejecting this argument on policy grounds, the court denied the government's motion to dismiss.

8 Id.
9 Note that two 1980 decisions have discussed the consortium rights of persons who were not married at the time of the relevant accident. See Chiesa v. Rowe, 486 F. Supp. 236 (W.D. Mich. 1980); Sawyer v. Bailey, 413 A.2d 165 (Me. Sup. Jud. Ct. 1980); text accompanying notes 48-55 infra.
10 487 F. Supp. at 1079.
11 Id.
12 Id. 1088.
The facts of the Bulloch case are concededly remarkable. David and Edith Bulloch had had a long and stable relationship, as both married and unmarried cohabitants. They had been married to one another for twenty-three years and had raised two children together. Although the Bullochs were divorced after three years of marital discord, a reconciliation quickly followed. At the time of the accident, the couple had agreed to resume living together and, ultimately, to remarry. For the nearly three years between the accident and the trial, the Bullochs had cohabited and had held themselves out to the community as husband and wife.\(^\text{13}\) Apparently, they had failed to formalize their marriage only because of David's sexual impotence.

In examining Edith Bulloch's claim, Judge Ackerman first noted that no previous decision in New Jersey or any other jurisdiction had considered whether a legal marriage was a prerequisite for a loss of consortium action.\(^\text{14}\) The district court also stated that non-marital arrangements were becoming increasingly common. Because of rapidly changing societal conduct and social mores, the court noted that the legal status of unmarried cohabitants was in flux.\(^\text{15}\)

The Bulloch court found that unmarried cohabitation was probably a legally recognized relationship under New Jersey law.\(^\text{16}\) In Kozlowski v. Kozlowski,\(^\text{17}\) the New Jersey Supreme Court had enforced an implied contract between unmarried partners. In the state court's earlier decision in State v. Saunders,\(^\text{18}\) moreover, the state fornication statute was held to be an unconstitutional invasion of adults' right to privacy. Saunders expressly rejected the argument that a proper purpose of the criminal statute was to protect the marital relationship and the public morals:

\[\text{D}ecisions \text{ such as whether to marry are of a highly personal nature; they neither lend themselves to official coercion or sanction, nor fall within the regulatory power of those who are elected to govern. .. . To the extent that . . . [the fornication statute] serves as an official sanction of certain conceptions of desirable lifestyles, social mores}\]

\(^\text{13}\) Note, therefore, that at the time of the accident, the Bullochs were not cohabiting—they had merely agreed to resume cohabiting. Between the accident and the trial, however, the Bullochs had resumed their cohabiting relationship. Id. 1081.

\(^\text{14}\) Id. 1079.

\(^\text{15}\) Id. 1080.

\(^\text{16}\) Id. 1085.

\(^\text{17}\) 80 N.J. 378, 403 A.2d 902 (1979).

or individualized beliefs, it is not an appropriate exercise of the police power.\textsuperscript{19}

Judge Ackerman interpreted these New Jersey decisions as refusals by the state courts to regulate private morality or to deny judicial remedies on the basis of a moral judgment concerning the sexual behavior of nonmarital partners.\textsuperscript{20}

Given this general background, the district court reasoned that state courts would deem that a person's marital status is irrelevant to a consortium claim. Because "the purpose of tort law is to compensate the people whose injuries are proximately caused by tortious conduct[,] . . . concepts of reward and punishment related to a person's marital state are irrelevant to a consideration of who is entitled to compensation."\textsuperscript{21} The court also stated that the New Jersey courts had recently articulated a strong policy of expanding tort liability to compensate all those who are injured.\textsuperscript{22} Because an unmarried cohabitant can suffer damage identical to that suffered by a married spouse when a mate is injured,\textsuperscript{23} policy considerations were held to mandate recognition of a loss of consortium claim for such unmarried partners. Thus, Judge Ackerman deemed the state policy in favor of the institution of marriage\textsuperscript{24} outweighed by the state policy of compensating tort victims fully for any actual injury incurred.\textsuperscript{25}

With the preceding background, this Comment's analysis of the soundness of Bullock's extension of consortium rights to unmarried cohabitants can begin.

I. Development of the Consortium Doctrine

A. Historical Background

The historical development of consortium rights for marital partners has reflected the evolving conception of marriage, as well as an evolving attitude towards the relative rights of husband and wife. At common law, a husband acquired a quasi-proprietary interest in his wife's services, by virtue of the marital relationship;

\textsuperscript{19} Id. at 219, 381 A.2d at 342 (footnote omitted).

\textsuperscript{20} 487 F. Supp. at 1082-87.

\textsuperscript{21} Id. 1084.

\textsuperscript{22} Id. 1084-85.

\textsuperscript{23} Id. 1085. See note 130 infra.

\textsuperscript{24} See notes 107-10 infra & accompanying text.

\textsuperscript{25} 487 F. Supp. at 1085-86. See text accompanying notes 21 & 22 supra.
the wife's status was, in effect, one of a valuable but socially inferior servant. Any interference with the husband's property right in his wife's services, by way of negligent or intentional injury to her, gave rise to a loss of consortium claim by the husband. Given this view of marital roles and duties, loss of services gradually became the gist of loss of consortium actions and remained an indispensable element of such claims until relatively recently.

Saddled with the inequities of the common law conception of marriage, historically the wife was not granted a comparable tort remedy if injury to her husband interfered with her consortium interest. The master-servant model of marital relations relegated the wife to a socially inferior position and precluded her from having any legal entitlement to the services of her husband. As Blackstone explained, "the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury." In addition, numerous procedural difficulties prevented the wife from asserting a consortium claim.


28 See, e.g., Pennsylvania R.R. v. Goodman, 62 Pa. 329, 339 (1869) (in a husband's loss of consortium action, "the pecuniary loss was to be measured by the nature of the [wife's] service"). See generally W. Posses, supra note 5, at 874. One student commentator has concluded that the services concept of consortium developed because of the ease with which courts could compute damages; although society, comfort, and conjugal affection were originally included among consortium interests, these intangible interests were considered too vague and uncertain to be valued. Comment, The Negligent Impairment of Consortium—A Time For Recognition as a Cause of Action in Texas, 7 St. Mary's L.J. 864, 867 (1976).


30 3 W. Blackstone, Commentaries *142-43. One English jurist, Lord Campbell, disagreed with the Blackstone analysis and stated that consortium rights should extend to wives. Lynch v. Knight, 11 Eng. Rep. 854, 859-60 (H.L. 1861). This view, however, was not adopted by a majority of the English courts.

31 At common law, a wife was required to join her husband as a plaintiff in any lawsuit she instigated. A husband was also entitled to all proceeds of any suit brought by either the husband or his wife. See, e.g., Wolf v. Bauereis, 72 Md. 481,
As the common law conception of marriage began to recognize equality between the sexes, the services concept of the consortium interest lost judicial support. The broader, modern definition of consortium rights encompasses not only spousal services, but also the intangible elements of the marital relationship, including companionship, emotional support, and conjugal affection.32

Despite these changes in consortium law, the wife's right to a loss of consortium claim was extremely slow to materialize. The Married Women's Acts were passed by many states beginning in the 1840s in response to the re-evaluation of a woman's place in society.33 These emancipation statutes eliminated many of the procedural difficulties experienced by women bringing suits in their own right and led to judicial decisions granting wives consortium rights for intentional interferences with the marriage relationship.34 No equivalent rights, however, were granted to wives in negligent-interference cases.35


32 See, e.g., Ballard v. Lumbermens Mutual Casualty Co., 33 Wis. 2d 601, 613-14, 148 N.W.2d 65, 72 (1967). One student commentator has asserted that loss of consortium claims now consist primarily of "the sentimental and emotional elements" of marriage and should not be viewed as anachronistic in light of modern tort law allowing recovery for emotional distress. Comment, supra note 28, at 874.

33 These state emancipation statutes, though variable in their specific provisions, generally granted a wife: (1) separate ownership of her own property; (2) the right to sue without joining her husband and the right to retain the proceeds from suits as her own property, and (3) the capacity to be sued without forcing the plaintiff to join her husband along with separate responsibility for her own torts. See W. Prosser, supra note 5, at 861; Holbrook, supra note 27, at 4. For a collection of these state statutes, see 3 C. Vereen, AMERICAN FAMILY LAWS, §§ 167, 179, 180 (1935).

34 Thus, wives were permitted to bring suits for the torts of alienation of affections and criminal conversation. See, e.g., Eliason v. Draper, 25 Del. 1, 77 A. 572 (Super. Ct. New Castle County 1910) (alienation of affections); Turner v. Heavrin, 182 Ky. 65, 206 S.W. 23 (1918) (criminal conversation); Sims v. Sims, 79 N.J.L. 577, 76 A. 1063 (1910) (alienation of affections).

35 See, e.g., Cravens v. L. & N. R.R., 195 Ky. 257, 242 S.W. 628 (1922); Emerson v. Taylor, 133 Md. 192, 104 A. 538 (1918); Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N.E. 204 (1915). See generally Holbrook, supra note 27, at 4-6. The reasoning generally provided in these cases for the distinction between negligent and intentional interference with the marital relationship was as follows: In cases of alienation of affection and criminal conversation, the husband is, in effect, a joint wrongdoer with the tortfeasor. He therefore has no cause of action against the defendant and cannot recover for the injury sustained. If the husband is negligently injured, however, he may institute his own suit and recover for pain and suffering and loss of earnings. Because the measurement of damages at trial is so crude, the maintenance of a separate loss of consortium suit by a wife will likely result in double recovery of damages in the negligent deprivation area, a risk not present in the case of intentional interferences with the marital relationship in which the husband is barred from suing. See Pound, Individual Interests in the Domestic Relations, 14 Mich. L. Rev. 177, 194 (1916) ("[I]f husband and wife were each
This sexist vestige of the common law consortium doctrine was successfully challenged in Hitaffer v. Argonne Co.,36 which granted a wife consortium rights in a case in which her husband was injured by negligent conduct. Forty states and the District of Columbia have followed suit and presently grant the wife consortium rights for negligent interference with the marital relationship, either by judicial decision 37 or by statute.38 Seven states have disallowed to sue, instead of each recovering an exact reparation, each would be pretty sure to recover what would repair the injury to both.”).


allowed loss of consortium suits by wives, while three states apparently have not resolved the issue.

B. Consortium Doctrine and Unmarried Partners

Although many aspects of consortium law have yielded to change as the common law doctrine has evolved, one element has remained constant: the restriction of loss of consortium claims to partners in a legally recognized marital relationship. As noted by the district court in Bulloch v. United States, nearly all previous decisions have assumed without discussion that legal marriage is a required element of proof in a loss of consortium action. Those decisions that have specifically examined the marital status of the plaintiff have typically involved a collateral attack on the validity of an asserted marriage. Thus, the legal analysis has been limited to whether a legal marital relationship (common law or otherwise) existed under the particular facts of the case. Indeed, the assumption of the necessity of a legally recognized marriage appears to have been shared by the plaintiffs, as well as by the other parties to the suit.

Bulloch is the first case to examine the question whether consortium rights should be granted to unmarried cohabitants as an incident of their particular cohabitational status. Notwithstanding the novel setting in which Bulloch arose, profitable comparisons can be made with previous suits brought by persons who mar-

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40 Those states that apparently have not addressed this issue directly include: Hawaii: Nishi v. Hartwell, 52 Hawaii 188, 473 P.2d 116 (1970) (implies that wives have consortium rights); Rhode Island: Mariani v. Nanni, 95 R.I. 153, 185 A.2d 119 (1963) (alludes to wives’ consortium rights); Washington: no case law or statutes located.


44 This might explain the relative paucity of loss of consortium suits instituted by unmarried plaintiffs.

45 See text following note 12 supra.
ried after the relevant accident but before filing a loss of consortium suit.

For example, in *Rademacher v. Torbensen*, a husband asserted a loss of consortium claim based on injuries incurred by his wife two months before their marriage. In discussing the plaintiff's claim, the court in *Rademacher* stated:

>[A]t the time of the alleged antenuptial tort suffered by the woman plaintiff subsequently married, the plaintiff sustained no injury. Under the allegations of his complaint plaintiff possessed no marital right at that time; he had then assumed no marital obligations. If, at the time of his subsequent marriage, plaintiff's wife was disabled as a result of a previous negligent act by the defendant, the plaintiff took her as his wife in her then existing state of health and thus assumed any deprivation resulting from such disability.

The underlying premises of the *Rademacher* court are that consortium rights stem directly from, and only from, the marriage relationship and that in knowingly choosing to marry a negligently injured person, the spouse waives any right he or she has to recover for harm to the marital relationship caused by a pre-marriage tort.

This line of reasoning has been echoed in several recent decisions that have continued to restrict consortium rights to marital partners. In *Chiesa v. Rowe* and *Sawyer v. Bailey*, loss of consortium actions were brought by persons whose spouses were injured during engagement but prior to marriage. In granting dismissal of the plaintiff's claim, the court in *Chiesa* summarily stated that a loss of consortium suit, by definition, exists only in the presence of a legal marriage. Consortium rights were held to be an incident of and solely derivative from the marital rela-

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50 486 F. Supp. at 238.
The court also relied on the concept of waiver: by marrying a previously injured person, one "waives her rights to another level or form of conjugal fellowship which might have been obtained had she married another." 52

The Sawyer opinion discussed the legal issues involved more extensively. The state court first recognized that the plaintiff possessed an inchoate expectation that the tortfeasor would use due care in relation to his fiancee, so that his prospective marital rights would not be harmed. 53 Despite this acknowledged legal duty, however, countervailing policy considerations mandated the confinement of consortium rights to marital partners. Although the actual harm might be incurred by the plaintiff, legal causation requires recoveries for loss of consortium to be restricted to the marital relationship in order to prevent the inordinate expansion of tort liability for loss of consortium claims. 54 The court in Sawyer then delegated the responsibility for establishing nonmarital consortium rights to the legislature. 55

In extending consortium rights to unmarried cohabitants, the Bulloch court's holding appears to be in conflict with the law of other jurisdictions. As noted above, most courts have summarily held that consortium rights flow solely and specifically from a legal marital relationship. These decisions imply that no injury to a consortium interest can be sustained by an unmarried person because such interests are, by definition, peculiar to a marital relationship.

To some extent, however, the reasoning of such decisions represents no more than an automatic adherence to the common law definition of consortium interest with its roots in the husband's marital right to his wife's services. 56 The validity of this doctrinal perspective, however, has been eroded over time by modern, more

51 Id.
52 Id.
53 413 A.2d at 167.
54 Id. 168.
55 Id. In Tong v. Jocson, 76 Cal. App. 3d 603, 142 Cal. Rptr. 726 (1977), the California Court of Appeals dealt with a factual situation even more similar to Bulloch. The plaintiff's partner sustained injuries during their engagement while the couple was cohabiting. The couple was married within one month of the accident. The Tong court denied consortium rights to the plaintiff, following reasoning similar to that employed by the court in Sawyer. Unlike the Bulloch opinion, the legal analysis of the Tong court did not center on the unmarried cohabitation arrangement and the legal rights that could derive from that relationship. Rather, the court merely adopted the traditional definition of consortium as only incident to the marital relationship.
56 See notes 26-31 supra & accompanying text.
egalitarian views of marriage. Although the services-based view of the consortium interest has not been completely abandoned, the modern doctrine now emphasizes the intangible sentimental aspects of the spousal relationship.

Because the essence of a modern loss of consortium action is the harm suffered by one spouse as the result of a close emotional involvement with an injured mate, denial of consortium rights to unmarried cohabitants in stable and intimate relationships cannot be justified on merely definitional grounds. The critical defect, therefore, of both Sawyer and Chiesa, and other similar decisions, is the courts' refusal to acknowledge that the relational interest protected by the modern consortium doctrine is not confined to marital relationships. The loss of companionship, emotional support, love, and affection caused by injury to an unmarried mate cannot be negated simply because of the lack of a state-sanctioned marital ceremony; the basis of the modern consortium interest is derived from the emotional commitment of the individuals, not from a marriage ceremony. Thus, changing social and legal attitudes towards the relative roles of husband and wife have broadened the basis of the modern consortium interest; as that interest has broadened, the definitional approach of courts denying loss of consortium actions to unmarried plaintiffs has had decreasing validity.

Because both married and unmarried cohabitants can theoretically suffer identical damage to their relational interests, it would appear, as an initial matter, that both should be entitled to legal protection of their consortium interests. This Comment next explores the changing judicial attitudes toward marriage and unmarried cohabitation to determine whether policy reasons exist to justify extending or withholding standing to maintain loss of consortium suits to unmarried cohabitants. This general policy discussion is followed by an examination of how traditional principles of tort law would apply to an unmarried deprived cohabitant's action for loss of consortium.

II. LEGAL ATTITUDES TOWARD MARRIAGE AND UNMARRIED COHABITATION

Although this Comment subsequently demonstrates that the application of traditional tort principles supports the granting of a loss of consortium action to unmarried cohabitants, the decision whether to afford legal protection to the consortium interests of

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87 See note 32 supra & accompanying text.
unmarried cohabitants rests, ultimately, on social policy consider-
tions. More specifically, the denial of a cause of action to un-
married cohabitants can be justified only by the state’s attitude to-
wards the institution of marriage itself. The distinction drawn
between marital and nonmarital consortium rights is valid only if
one can isolate underlying values that are protected and promoted
solely within the legal marital relationship. An examination of
these intimate relationships, as defined by constitutional and state
law, reveals that the absolute denial of consortium rights to un-
married cohabitants is not defensible on social policy grounds be-
cause nonmarital unions frequently contain the essential attributes
of marital relationships—those attributes isolated by the courts and
demed worthy of protection.

A. The Supreme Court, Marriage, and the Family

The Supreme Court has long considered the right to marry to
be “one of the vital personal rights essential to the orderly pursuit
of happiness by free men.” Although the Court has frequently
noted the importance of this individual right, the unequivocal
elevation of the right to marry to a constitutionally protected
plane did not occur until the Court decided Zablocki v. Redhail in 1978. The Redhail Court struck down a state statute that placed severe restrictions on the right of a certain class of persons to marry by holding that the right to marry was fundamental and

68 In an analogous situation, the New Jersey Supreme Court stated:
In the ultimate, the acceptance or rejection of the wife’s consortium claim
must be rested on sound policy considerations and a proper balancing of
the interests concerned. While engaging in their activities, the defendants
clearly came under the comprehensive common law duty of due care with
tort liability for its breach. . . . [T]here being no sufficient countervailing
policy, the law now rightly views them as remediable by the responsible
tortfeasors.
Ekalo v. Constructive Serv. Corp. of Am., 46 N.J. 82, 95, 215 A.2d 1, 8 (1965).
69 Loving v. Virginia, 388 U.S. 1, 12 (1967).
60 See, e.g., Griswold v. Connecticut, 381 U.S. 479, 486 (1965):
Marriage is a coming together for better or for worse, hopefully enduring,
and intimate to the degree of being sacred. It is an association that pro-
motes a way of life, not causes; a harmony in living, not political faiths;
a bilateral loyalty, not commercial or social projects. Yet it is an association
for as noble a purpose as any involved in our prior decisions.
61 In Meyer v. Nebraska, 262 U.S. 390, 399 (1923), the Court stated in
dictum that the substantive right of “liberty” protected by the due process clause
of the fourteenth amendment included the right of an individual to “marry, establish
a home and bring up children” as a fundamental privilege of personal freedom.
63 The Court in Redhail dealt with a state statute that conditioned the right of
certain individuals to marry on a showing of compliance with child support obliga-
that any direct and substantial infringements of that right must be subjected to rigorous judicial scrutiny.\textsuperscript{64}

Although the Court in \textit{Redhail} extended special constitutional protection to the marital relationship, the Supreme Court has, thus far, limited this special protection of associational rights to the context of the traditional marital relationship.\textsuperscript{65} One of the reasons for this limitation is the Court’s perception of the role of marriage—apart from its importance to individuals—as one of the fundamental cornerstones of American society. As early as 1888, the Court described marriage as “creating the most important relation in life, having more to do with the morals and civilization of a people than any other institution.”\textsuperscript{66} More specifically, special treatment of marriage is viewed as appropriate by the Court because of that relationship’s role as the structural core of the American family.\textsuperscript{67} Thus, this Comment argues, the Court’s protective attitude towards marriage is based not on any “moral” view about unmarried cohabitation, but rather on a judgment that marriage is the paradigmatic building block for the American nuclear

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\textsuperscript{64} Id. 386-88. The court in \textit{Redhail} noted specifically that many forms of state regulation of marriage were permissible, despite the fundamental nature of the right to marry:

By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.

\textit{Id.} 386. This reasoning is consistent with an earlier decision, Califano v. Jobst, 434 U.S. 47 (1977), in which the Court upheld a Social Security Act provision that reduced benefits granted to a certain class of persons after marriage. Because the statute’s interference with the marital relationship was not significant, low-level judicial scrutiny was justified and the provision survived attack.

\textsuperscript{65} Thus, the Court has refused to extend the constitutional right to marry to homosexual couples. Baker v. Nelson, 409 U.S. 810 (1972) (dismissal of an appeal from the denial of a marriage license to a homosexual couple).

\textsuperscript{66} Maynard v. Hill, 125 U.S. 190, 205 (1888) (considering the validity of a state legislative enactment granting a divorce).

\textsuperscript{67} Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 843 (1977). See Maynard v. Hill, 125 U.S. at 211 (“[Marriage] is an institution, in the maintenance of which . . . the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.”). Several other decisions, by citing cases dealing with the family, have implied that marriage is a fundamental right because of its familial role. See, e.g., Zablocki v. Redhail, 434 U.S. at 384-85; Loving v. Virginia, 388 U.S. at 12; Griswold v. Connecticut, 381 U.S. at 432. See generally \textit{Developments in the Law—The Constitution and the Family}, 93 \textit{Harv. L. Rev.} 1156, 1270-77 (1980) [hereinafter cited as \textit{Family Developments}].
family and, therefore, that it is the family as an institution that
the Court is seeking to protect.

This interpretation of the Supreme Court's view of marriage
takes on added meaning because of the Court's willingness to rec-
ognize that many familial attributes can be present in nontradi-
tional family arrangements. Recent opinions of the Court have
helped expose some of the Court's thinking with respect to what
types of personal relationships possess the characteristics that war-
rant extending to them the constitutional protection that previously
had been accorded only to the traditional nuclear family. In three
of those opinions—Moore v. City of East Cleveland, United States
Department of Agriculture v. Moreno, and Village of Belle Terre
v. Boraas—the Court appeared to limit its strict scrutiny (symp-

68 The traditional nuclear family consists of two adults who consensually form
a heterosexual union under formal legal sanction and raise children within this
relationship. See Zelditch & Morris, Family, Marriage and Kinship, in HANDBOOK
OF MODERN SOCIOLOGY 697 (R. Fam's ed. 1964).

69 See Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("Nor has the law refused
to recognize those family relationships unlegitimized by a marriage.").

70 431 U.S. 494 (1977) (plurality opinion).

Moore was the first Supreme Court decision to grant an extended family special
constitutional protection. The Court in Moore invalidated a city housing ordinance
that limited dwelling occupancy to members of a single "family," where "family"
had been defined as encompassing only certain blood and familial relations. In
recognizing that the constitutional rights of the "family" inhered in a household of
a grandmother and two grandsons who were cousins, the Court was guided by
American tradition, history, and the societal values that underlie the sanctity of the
family unit. The plurality explained that "[o]urs is by no means a tradition limited
to respect for the bonds uniting the members of the nuclear family. The tradition
of uncles, aunts, cousins, and especially grandparents sharing a household along
with parents and children has roots equally venerable and equally deserving of
constitutional recognition." Id. 504.

The plurality in Moore also pointed out that childrearing duties and other tra-
ditional household responsibilities necessary for the maintenance of a secure home
life are often delegated to an extended family unit in times of family death or
economic need. Id. 505. The Court further noted that the Constitution prevents
the standardization of personal lifestyles "by forcing all to live in certain narrowly
defined family patterns." Id. 506. Thus, the Moore decision is a clear manifestation
of the Supreme Court's willingness to extend certain "family" rights to domestic
arrangements that embrace personal commitments, family responsibilities, and emo-
tional ties similar to those present in the nuclear family unit.

71 413 U.S. 528 (1973).

In Moreno, the Supreme Court struck down a provision denying food stamp
assistance to households of unrelated individuals. The Court, however, did not base
its decision on any fundamental associational right in the particular household rela-
tionship at issue in the case. The Court stated that the purpose of the unrelated
person provision was to prevent "hippie communes" from participating in the food
stamp program and held that such a purpose could not salvage the law. This
holding was not based on an associational right, but rather on the notion that equal
protection "must at the very least mean that a bare congressional desire to harm a
politically unpopular group cannot constitute a legitimate governmental interest." Id.
534 (emphasis in original).


In Belle Terre, the Court upheld a village zoning ordinance that restricted
residence occupancy to households of no more than two unrelated persons. The
tomatic of special constitutional protection) to blood relatives or legally sanctioned relationships. In none of those decisions, however, did the Court make any attempt to articulate precisely the essential elements in a relationship that ultimately determine whether a “family” entitled to special protection exists.\(^7\)

In another recent opinion, *Smith v. Organization of Foster Families for Equality and Reform* \(^7\) (OFFER), the Supreme Court finally turned to this task. OFFER upheld the constitutionality of a state law that provided procedures for the removal of foster children from foster homes. Although resting its decision on other grounds, the Court in OFFER explored the possibility of a constitutionally protected right to “family” privacy and integrity in the foster family unit. The Court first stated that the concept of the “family” usually implies a biological relationship, as between a parent and child.\(^7\) Justice Brennan then noted in dictum that

\[
\text{[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children, . . . as well as from the fact of blood relationship.}\(^7\)
\]

The OFFER Court’s analysis is crucial because of the opinion’s recognition that the importance of the family, from both a personal and societal perspective, stems from the emotional and psychological support and companionship\(^7\) that it provides for

\(^7\) In *Family Developments, supra* note 67, at 1280-81, the authors suggest five attributes that, in some combination, constitute the essence of a constitutionally protected family relationship: (1) biological relationship; (2) potential parent-child relationship; (3) cohabitation; (4) permanence and formal commitment, and (5) psychological support and involvement.

\(^7\) 431 U.S. 816 (1977).

\(^7\) Id. 843.

\(^7\) Id. 844 (citation omitted). OFFER also cited a final consideration peculiar to foster families, the origin of the family relationship in state contractual arrangements. This final consideration persuaded the Court that no “liberty interest” inhered in the foster family unit. *Id.* 845-46. See *Kyees v. County Dep’t of Pub. Welfare of Tippecanoe County*, 600 F.2d 693 (7th Cir. 1979); *Drummond v. Fulton County Dep’t of Family & Children’s Servs.*, 563 F.2d 1200 (5th Cir. 1977).

\(^7\) Note the similarity between those valuable “family” attributes recognized by the Court in OFFER and the interests protected by the modern consortium doctrine. See text accompanying note 32 supra.
each family member. The OFFER decision implies that the essence of the family stems not from any legally structured family unit, but from the stability and intimacy of an established home environment.

Taken as a group, these four Supreme Court cases demonstrate that the Court, though guided by historical and traditional definitions of the American family, has also looked to the values protected by and cultivated within various domestic arrangements in developing a modern definition of the family. In viewing the family unit functionally—as a transmitter of culture, a stable provider of emotional commitment and financial support, an educator of children, and a setting for procreative activity—one realizes that the essence of the family can be found outside of the narrow confines of the traditional family relationship. Similarly, if marriage gains its sanctity as the genesis of family life, any intimate domestic

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78 Two subsequent Supreme Court opinions have followed the OFFER Court's lead and examined extensively the quality of nontraditional family arrangements as an integral step in the adjudication of conflicting constitutional rights.

In Quilloin v. Walcott, 434 U.S. 246 (1978), the Court upheld a Georgia statute allowing a natural mother and stepfather to adopt a child without the consent of the child's natural, unwed father. The Court noted that the natural father had never shouldered any responsibility for the daily supervision, education, protection, or care of his children and, therefore, was not entitled to the paternal rights traditionally associated with his blood relationship. Id. 256. But Quilloin was distinguished in Caban v. Mohammed, 441 U.S. 380 (1979), during the following term. In Caban, the Court sustained a similar New York statute. Although the holding was based on equal protection grounds, the Court noted expressly that the father in Caban had a "significant paternal interest in the child." Id. 394.

Thus, even in the case of unmarried cohabitation arrangements, the Court apparently views the quality of the familial relationship to be the determinative consideration. Quilloin and Caban together imply that blood relationships, a traditionally "formal" consideration, must give way to more functional analyses of the dynamics of individual family relationships.

79 One commentator has noted that "the most significant function of marriage today seems to be that it furnishes emotional satisfaction to be found in no other relationships." Clark, The New Marriage, 12 Williamette L.J. 441, 443 (1976). This statement is consistent with the view that marriage is socially beneficial because of its role as the structural origin of the American family.

80 See, e.g., note 70 supra.

81 See Moore v. City of East Cleveland, 431 U.S. at 508 (Brennan, J., concurring):

In today's America, the "nuclear family" is the pattern so often found in much of white suburbia. . . . The Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us white suburbia's preference in patterns of family living. The "extended family" . . . remains not merely still a pervasive living pattern, but under the goad of brutal economic necessity, a prominent pattern—virtually a means of survival—for large numbers of the poor and deprived minorities of our society.

82 See text accompanying note 76 supra.

83 See text accompanying notes 65-68 supra.
relationship—such as unmarried cohabitation—that promotes and protects these essential familial attributes should receive the same judicial protection and respect.84

Application of this functional approach to consortium law argues for the recognition of nonmarital consortium rights.85 The rigid limitation of consortium rights to married partners highlights the courts' failure to examine the characteristics of individual non-

84 One general manifestation of the judicial protection granted by the Supreme Court to individuals in familial matters is the Court's description of the scope of the constitutional right to privacy. In Eisenstadt v. Baird, 405 U.S. 438 (1972), the Court recognized a constitutional right to privacy that protects individuals from unwarranted governmental intrusion into any intimate associations or relationships into which they choose to enter. In striking down a state statute outlawing the dispensation of contraceptives to unmarried persons, the Court in Eisenstadt relied on Griswold v. Connecticut, 381 U.S. 479 (1965), which had recognized a constitutional right to privacy inhering in the marital relationship. As the Eisenstadt Court stated:

[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as to be fair or beget a child.


In addition, the individual's right to privacy in the choice of nontraditional lifestyles has been protected by several lower federal courts dealing with cases involving denial of or dismissal from employment owing to one's sexual conduct. See Andrews v. Drew Municipal Separate School Dist., 507 F.2d 611 (5th Cir. 1975) (denial of employment to unwed parents violates due process and equal protection clauses); Drake v. Covington County Bd. of Educ., 371 F. Supp. 974 (M.D. Ala. 1974) (immorality provision of state code held to be applied in manner that violated plaintiff's right to privacy); Mindel v. United States Civil Serv. Comm'n, 312 F. Supp. 485 (N.D. Cal. 1970) (termination of postal clerk's employment because of private sex life violates right to privacy). The Supreme Court, however, failed to extend a similar protection to an unmarried cohabiting couple who had been discharged from their state jobs because of their openly acknowledged sexual behavior in Hollengaugh v. Carnegie Free Library, 439 U.S. 1052 (1978) (denial of certiorari). Justice Marshall argued in dissent that "[p]etitioners' right to pursue an open rather than a clandestine personal relationship to rear their child together in this environment closely resemble the other aspects of personal privacy to which we have extended constitutional protection. That petitioners' arrangement was unconventional or socially disapproved does not negate the resemblance..." Id. 1055 (Marshall, J., dissenting).

85 At times, Congress also has tended to view unmarried cohabitation arrangements in a functional manner. The Supplemental Security Income program provides one such example. See 42 U.S.C. §§ 1381-1383c (1976 & Supp. III 1979). The statutory scheme for determining SSI eligibility "deems" the income and resources of the applicant-spouse to include the income and resources of his or her spouse "living with him [or her] in the same household." Id. § 1382c(f)(1) (1976). Apparently in recognition of the functional equivalence of unmarried cohabitation and marriage, partners "holding themselves out to the community in which they reside as husband and wife" are expressly deemed to be spouses for the purposes of the SSI program. Id. § 1382c(d)(2).
marital unions and to protect those intimate relationships that are the functional equivalent of marriage. Consonant with the Supreme Court's approach, consortium rights should be granted to any nonmarital union that embraces and cultivates the essential attributes of the traditional family unit.

B. The State Courts and Unmarried Cohabitation

The Supreme Court's recent willingness to view nontraditional family units in functional terms has been echoed in state court regulation of these relationships. In dealing with unmarried cohabitation, several states have exhibited a drastic shift in approach as a result of changing moral standards and increasing recognition that these relationships often display the essential attributes of marriage and traditional family life. Like the Supreme Court's more expansive view of familial interests entitled to special protection, state courts' increasing acceptance of unmarried cohabitation arrangements argues for the extension of a loss of consortium action to unmarried cohabitants.

1. Property Rights

Recent state court decisions have displayed a growing recognition of property rights emanating from the structure of the nonmarital union. For many years, separating unmarried partners with disputes over economic matters were rebuffed by the courts that they petitioned to aid in the resolution of their disagreements. Dismissing nonmarital cohabitation as "meretricious," many courts traditionally have refused to enforce contracts between un-

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90 See Hinkle v. McColm, 89 Wash. 2d 769, 575 P.2d 711 (1978). Classification of all unmarried cohabitation as immoral or meretricious is exceedingly unjust
married partners on the grounds that such contracts were based on immoral and illicit consideration.\textsuperscript{90}

\textit{Marvin v. Marvin},\textsuperscript{91} a landmark decision of the California Supreme Court, marked a shift in the legal recognition of the property rights of unmarried cohabitants. The \textit{Marvin} court stated that nonmarital unions were not immoral per se and that the denial of judicial relief on moral grounds could not be defended:

\begin{quote}
[W]e believe that the prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship . . . . [T]he nonenforceability of agreements expressly providing for meretricious conduct rested on the fact that such conduct, as the word suggests, pertained to and encompassed prostitution. To equate the nonmarital relationship of today to such a subject matter is to do violence to an accepted and wholly different practice.\textsuperscript{92}
\end{quote}

The court in \textit{Marvin} then held that courts should enforce not only express contracts between nonmarital partners, but also should employ the doctrines of implied contract, quantum meruit, and other equitable remedies to achieve a fair distribution of cohabitational property.\textsuperscript{93}

Many recent state court decisions have followed \textit{Marvin}'s lead, and the analogous lead of the Supreme Court, and have taken a prag-

\begin{footnotesize}
\textsuperscript{90}E.g., Stevens v. Anderson, 75 Ariz. 331, 335, 256 P.2d 712, 715 (1953). The frequently unjust results of such judicial reasoning are illustrated in \textit{Rehak} v. Mathis, 239 Ga. 541, 238 S.E.2d 81 (1977). The couple involved in \textit{Rehak} had cohabited for 18 years. Although the woman paid more than half the purchase price of their home and consistently rendered household services, the state court refused to grant her any compensation for her services or her interest in the property because, in the court's view, any contract between the parties was founded on immoral consideration. One commentator has noted, however, that state courts have often avoided such inequitable results through the use of judicial devices—including notions of common law marriage, marriage by estoppel, conclusive presumption, or prescription, and putative marriage—granting "marital status" to informal, de facto marriages. Weyrauch, \textit{Informal and Formal Marriage—An Appraisal of Trends in Family Organization}, 28 U. Cin. L. Rev. 88, 104-08 (1960). For an example of the lengths to which courts have gone in devising a legal remedy to effect an equitable result, see \textit{McCullon} v. \textit{McCullon}, 96 Misc. 2d 962, 410 N.Y.S.2d 226 (Sup. Ct. 1978) (common law marriage found in case in which cohabiting couple held themselves out as man and wife during annual vacations to a state recognizing this legal relationship).\textsuperscript{91} 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).
\textsuperscript{92}Id. at 683, 557 P.2d at 122, 134 Cal. Rptr. at 831.
\textsuperscript{93}Id. at 684, 557 P.2d at 122-23, 134 Cal. Rptr. at 831-32.
\end{footnotesize}
matic approach to nonmarital unions. These cases have looked to the outward appearance of an unconventional family relationship and actual investments of the parties involved, and have granted relief to partners in relationships that are the functional equivalent of the marital union. Many of these decisions are ostensibly based on the express or implied agreements of the unmarried partners. But it is unclear that the intention of unmarried partners can always be so clearly discerned. In any case, the extension of many marital rights to nonmarital relationships implies a judicial acknowledgment that unmarried cohabitation, in some cases, may encompass all of the essential attributes of a legally sanctioned marital union.

2. Workmen’s Compensation

Workmen’s compensation law is also beginning to recognize that legal rights may stem from unmarried relationships. Workmen’s compensation programs have been set up to provide benefits


95 See Tyranski v. Piggins, 44 Mich. App. 570, 205 N.W.2d 595 (1973) (express contract); Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979) (express contract to provide lifelong support for cohabiting spouse); McHenry v. Smith, 45 Or. App. 813, 609 P.2d 855 (1980) (oral contract to pool resources and to establish a home and live together as husband and wife); Beal v. Beal, 282 Or. 115, 577 P.2d 507 (1978) (implied contract to pool resources); Latham v. Latham, 247 Or. 421, 547 P.2d 144 (1976) (express contract). But see Hewitt v. Hewitt, 77 Ill. 2d 49, 61, 394 N.E.2d 1204, 1209 (1979) (“In our view ... the situation alleged here was not the kind of arm's length bargain envisioned by traditional contract principles, but an intimate arrangement of a fundamentally different kind.”).

96 See Morone v. Morone, 50 N.Y.2d 481, 407 N.E.2d 438, 429 N.Y.S.2d 592 (1980) (refusal to find implied contract with respect to assets and earnings because the agreement was “so amorphous as practically to defy equitable enforcement”).

97 In Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979), the court openly discussed the legal issues involved in determining property rights of unmarried cohabitants:

[T]he situation alleged here was not the kind of arm’s length bargain envisioned by traditional contract principles, but an intimate arrangement of a fundamentally different kind. The issue, realistically, is whether it is appropriate for this Court to grant a legal status to a private arrangement substituting for the institution of marriage sanctioned by the State. Id. at 61, 394 N.E.2d at 1209. The court in Hewitt held that this policy decision should be addressed by the legislature. The court also expressed concern that imposition of the legal incidents of marriage on nonmarital relationships would, in practical effect, constitute a revival of the doctrine of common law marriage. In a similar vein, one commentator has expressed a concern that the present trend in the law will lead to uncertainty in predicting the legal consequences of a nonmarital living arrangement. Clark, supra note 79, at 451.
to dependents for loss of income owing to work-related injuries, regardless of fault.\textsuperscript{98} The statutes traditionally have been interpreted to exclude unmarried partners from the category of "dependents" who are eligible for statutory benefits.\textsuperscript{99} This interpretation generally has been based on traditional views of domestic relationships—similar to those noted in connection with property rights for unmarried cohabitants—that have condemned nonmarital unions as immoral.\textsuperscript{100}

In recent years, however, several jurisdictions have extended benefits to dependent partners in nonmarital relationships.\textsuperscript{101} These decisions have reasoned that the objective of workmen's compensation programs—providing financial support to dependents of injured workmen—is unrelated to the marital status of the dependents or to any moral judgments based on that status.\textsuperscript{102} To be sure, unmarried partners are not eligible to receive workmen's compensation benefits in all states.\textsuperscript{103} But courts that deny benefits to such claimants tend to do so on narrow, statutory-based grounds;\textsuperscript{104} the moral content of the older decisions is conspicuously absent.\textsuperscript{105} And in states in which the statute is permissive, courts tend to view the unmarried relationship functionally and make their determinations based on the equivalent dependent status of married and unmarried partners.\textsuperscript{106}

3. State Interest Favoring Marriage

These state decisions are indicative of the judiciary's increasing willingness to look beyond legal marital status, to the circumstances

\textsuperscript{98}See W. Schneider, Schneider's Workmen's Compensation § 3 (3d ed. 1941).
\textsuperscript{99}See, e.g., Powell v. Rogers, 496 F.2d 1248 (9th Cir. 1974); W. Schneider, supra note 98, at § 1310.
\textsuperscript{100}See generally A. Barbarini, Pennsylvania Workmen's Compensation and Occupational Disease §§ 5.34(1)(b), 5.34(2) (1975).
\textsuperscript{103}A. Larson, The Law of Workmen's Compensation § 63.43 (1980 & Supp.).
and characteristics of particular intimate arrangements, in deter-
mining the legal rights and responsibilities involved in a cohabita-
tional relationship. The states still, however, have some interest
in the institution of marriage.\textsuperscript{107} This state interest in marriage
might be asserted as a ground for denying legal protection to the
consortium interest of unmarried cohabitants. Yet, as Judge
Ackerman noted in his opinion in Bulloch \textit{v. United States}, granting
a loss of consortium action to an unmarried deprived cohabitant
"does not mean that the marital relationship is devalued."\textsuperscript{108} As
Judge Ackerman pointed out, it is highly unlikely that the restric-
tion of legally protected consortium rights to married persons will
encourage unmarried cohabitants to marry so that they might be
able to maintain a loss of consortium action should one of them be
tortiously injured.\textsuperscript{109} Instead, the denial of a loss of consortium
action for unmarried cohabitants will serve only to deprive poten-
tial plaintiffs of any chance of compensation for genuine injuries
suffered. The only beneficiaries of such a policy, the \textit{Bulloch} court
suggested, would be tortfeasors who are fortunate enough to injure
an unmarried, rather than a married, cohabitant.\textsuperscript{110}

\textsuperscript{107} States have asserted such interests in marriage as the need to collect vital
statistics and the need to enforce public health measures concerning venereal or
contagious diseases that might affect spouses or children. \textit{See} H. Cl\textit{a}r\textit{e}, \textit{The Law
of Domestic Relations in the United States} 36 (1968). Regulation of marital
status has also been justified by the state interest in prohibiting such status to persons
of a certain age or mental capacity who are generally deemed incapable of handling
the responsibilities of the marriage relationship. \textit{See} Family Developments, supra
note 67, at 1257-70; Comment, \textit{A Constitutional Analysis of Pennsylvania's Restric-


I do not believe . . . that the New Jersey courts would interpose this
policy favoring marriage between a cohabitant and a tortfeasor. There
simply seems to be no reason to allow a tortfeasor to benefit from the policy
favoring marriage and, in the ultimate analysis, only tortfeasors would
benefit from such a holding.

. . . Recognizing an action for loss of consortium . . . [for unmarried
cohabitants] only means that tortfeasors will compensate more fully for the
actual damage caused. It does not mean that the marital relationship is
devalued. While many considerations may lead to marriage, I doubt many
decide to marry because they want to have a cause of action for loss of
consortium. Deciding against a cause of action for cohabitants, therefore,
is unlikely to encourage people to wed. Realistically, both married couples
and cohabitants dread the possibility of injury to their mate and suffer
when that injury occurs. It is the suffering of the mate of the physically
injured plaintiff that the tort compensates. . . .

\textit{Id.} (citation omitted).

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} \textit{Id.}
In view of the strong probability that denial of a loss of consortium action for unmarried cohabitants will not promote the state interest in marriage, and in light of the changing attitude of the judiciary towards unmarried cohabitation in other areas of the law, it is submitted that state policies favor the extension of legal protection to the consortium interests of unmarried cohabitants. This Comment next considers whether traditional tort principles present any obstacles to such an extension.

III. APPLICATION OF TRADITIONAL TORT PRINCIPLES

Application of traditional tort principles to loss of consortium claims reveals the inequities that inhere in limiting such damage awards to legally married partners. Moreover, tort-based analysis discloses another fundamental problem of the majority view of loss of consortium actions; the simplistic use of marital status as a standing screen is both under-inclusive and over-inclusive in effect. Changing cohabitational practices mandate the adoption of a judicial standard that is more capable of identifying actual loss of consortium suffered by partners in intimate personal relationships, both inside and outside of marriage.

Several tort-based arguments might be raised against the granting of consortium rights to unmarried cohabitants. These include the risk of affording plaintiffs a double recovery, the remoteness of (or lack of proximate cause for) the deprived cohabitant's injury, lack of foreseeability, the danger of inordinate expansion of liability of tortfeasors, and the speculative nature of the deprived cohabitant's injury. Of these, the risk of double recovery and the


112 It should be noted that actions for loss of consortium are generally considered to be derivative. See TORTS RESTATEMENT, supra note 3, at § 693, Comment e; id. § 696, Comment a. Although it need not always be the case, this Comment assumes that all loss of consortium actions discussed herein are cases in which the deprived plaintiff's case is either joined with, or follows, the impaired plaintiff's own cause of action. Thus, the deprived-cohabitant plaintiff need not prove the various elements of an ordinary tort claim—existence of a duty, breach of that duty, proximate cause, etc.—as they will be proved in the impaired cohabitant's case. Likewise, any defense that the tortfeasor has against the impaired partner, such as assumption of risk or contributory negligence, is also good against the deprived partner. See id. § 693, Comment e; W. PROSSER, supra note 5, at 892. But see Lantis v. Condon, 95 Cal. App. 3d 152, 157 Cal. Rptr. 22 (1979) (refusing to impute husband's contributory negligence to wife as a matter of statutory construction). Throughout the remainder of this Comment, whenever examples are used it will be further assumed that the impaired cohabitant has a valid claim, subject to no defenses, against the defendant.

remoteness of the deprived cohabitant's injury have been adequately discussed by courts in the context of providing a loss of consortium action to deprived spouses; no new considerations are present when unmarried cohabitants are involved. The latter three potential arguments do, however, present additional problems in the context of unmarried cohabitants, and are therefore discussed below.

A. Foreseeability

The potential argument that extending consortium rights to unmarried cohabitants conflicts with the traditional tort policy confining liability to injuries that were reasonably foreseeable at the time of the accident is not a valid reason for distinguishing between the consortium rights of married and unmarried partners. Realistically, injury to consortium interests cannot be consistently predicted or foreseen because tortfeasors are generally not aware of the personal relationships in which their victims are involved. Yet courts have already determined that lack of foreseeability is not problematic; case law concerning married partners supports the legal judgment that it is reasonably foreseeable that negligent conduct toward an individual will have legally recognized effects on the consortium rights of third parties. The extension of consortium rights to unmarried cohabitants is consistent with this view of the foreseeability issue. If injury to a married partner is deemed sufficiently foreseeable to justify imposing liability on tortfeasors, then, by definition, injury to both married and unmarried partners — whose numbers are obviously greater than the number of married victims alone — is sufficiently foreseeable to justify holding tort-

114 See, e.g., id. at 399-401, 525 P.2d at 679-81, 115 Cal. Rptr. at 775-77.


117 In 1979, there were approximately 95,324,000 persons living as married couples in the United States. U.S. Bureau of the Census, Supt. of Commerce, Series P-20, No. 352, Household and Family Characteristics: March 1979, Table A (1980). During the same year, there were approximately 2,692,000 unmarried partners living in the United States. Population Profile, supra note 1, at 8. See note 1 supra.
feasors liable for injuries to the consortium interests of both married and unmarried partners.

B. Inordinate Expansion of Liability

A potentially more telling objection to extending loss of consortium actions to unmarried cohabitants is the familiar rallying cry that such a policy change would unduly expand the liability of tortfeasors. Courts have regularly employed the fear of inordinate expansion of tort liability as a rationale for denying consortium rights to children whose parents have been injured by a tortfeasor. This denial of consortium rights, by failing to provide recovery for plaintiffs with legitimate injuries, is arbitrarily harsh and has been strongly criticized by many commentators.

Regardless of the wisdom of using the "inordinate expansion of liability" argument to deny consortium rights to children, however, the claim of a deprived cohabitant is distinguishable on the basis of numbers alone. As the district court in Bulloch v. United States noted, although an injured plaintiff may have a large number of children, an impaired cohabitant will be accompanied by at most only one deprived cohabitant, whether married or not, who might sue the defendant on a loss of consortium theory. And, as the Bulloch court further observed, the number of couples living in unmarried cohabitational relationships is relatively small: of all the couples living together in the United States, only three percent are unmarried.

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119 See, e.g., W. Prosser, supra note 5, at 896 & n.26.


122 For instance, the impaired mother in Borer v. American Airlines, Inc., 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977), had nine children, each of whom sued the defendants for $100,000. Id. at 445, 563 P.2d at 861, 138 Cal. Rptr. at 305.

123 487 F. Supp. at 1086.

124 Id. (citing U.S. Bureau of the Census, Dept. of Commerce, Series P-20, No. 349, Marital Status and Living Arrangements: March 1979, at 3 (1980)). This figure represents approximately 2.7 million people. Id.

By way of contrast, in March 1979 there were 62,389,000 children under 18 years of age in America, excluding those who were heads or spouses of heads of families and subfamilies. . . . It seems obvious that the cost of permitting children to bring suit [for loss of consortium] is very much higher than the cost of permitting a cohabiting partner to bring suit.

Id. 1086 (citation omitted).
Thus, although the granting of consortium rights to unmarried cohabitants will undoubtedly increase the number of loss of consortium actions brought, this increase, and the corresponding increase in costs to society,\(^\text{125}\) will be relatively slight. Because an unmarried deprived cohabitant frequently suffers injury identical to that suffered by a deprived spouse,\(^\text{126}\) this Comment argues that this small expansion of tort liability is justified by its result.

C. Speculativeness and the Problem of Line Drawing

The most formidable tort-based policy problem in any loss of consortium case is the speculative nature of the injury suffered. Because the consortium doctrine concerns nonphysical injury to intangible relational interests, problems of identifying those interests and of calculating the extent of actual loss suffered necessarily arise. The real analytic problem in this context is not one of determining damages once the plaintiff establishes that an injury to consortium interests has occurred, because such damages, though speculative, are closely akin to damages routinely awarded for mental or emotional distress.\(^\text{127}\) Rather, the difficulty lies in making the initial determination whether a relationship is sufficiently solid to permit the jury to find any injury at all. One possible argument for limiting legal protection of consortium rights to married couples is the familiar one of the necessity for line drawing: Because the establishment and computation of damages for loss of consortium is necessarily speculative, the action should be restricted to married persons. The line is drawn at the marital relationship because such partners have taken their relationship sufficiently seriously to exchange marriage vows, thereby allowing one to conclude, with some certainty, that impairment of one spouse will cause injury to the deprived spouse. Such certainty is lacking in a nonmarital cohabitational relationship, the argument continues, and therefore, increased litigation concerning consortium rights could possibly result in a rise in insurance rates and increased administrative costs in the legal system. Cf. Borer v. American Airlines, Inc., 19 Cal. 3d at 447, 563 P.2d at 862, 138 Cal. Rptr. at 306 (explaining increased costs to society from granting children consortium rights for injuries to parents).

\(^{125}\) Some courts have argued that damages for loss of consortium are too speculative because of their intangible nature. See, e.g., Deshotel v. Atchinson, Topeka & Santa Fe Ry., 50 Cal. 2d 664, 328 P.2d 449 (1958), overruled, Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974). This argument, however, appears to have been employed more as an excuse for the now discredited denial of consortium rights to wives; such problems arise in any suit involving emotional or mental distress and have been adequately dealt with in that context. See generally W. Prosser, supra note 5, at § 54.
the extension of consortium rights to such relationships will require courts to engage in difficult determinations to ascertain which relationships are sufficiently strong or stable to justify a finding of actual injury to the deprived cohabitant. Thus, the argument runs, in order to simplify the court's task, it is best to grant the loss of consortium action only to married couples.

This argument has a certain surface appeal. Restricting legal protection of consortium interests to married cohabitants would, at least, conserve considerable judicial resources that would otherwise be engaged in determinations that, admittedly, would often be quite difficult. This "conservation," however, would come at the expense of unmarried deprived cohabitants who may have suffered real injury. The complete denial of any possibility of compensation for genuine injury cannot be justified on the ground that it will save judges from having to make difficult determinations.128

Modern consortium rights include the right to enjoy the affection, companionship, and psychological support that arise from intimate personal relations.129 Certainly the associational interests protected by loss of consortium actions can exist in both marital and non-marital relationships containing elements of intimacy, stability, and commitment.130

Thus, the use of marriage as a conclusive presumption that such interests exist is both under- and over-inclusive in its result: unmarried deprived cohabitants with solid relationships will be denied a cause of action for their injuries, while "deprived" spouses, who may have no relationship with their partners at all, aside from the title of husband and wife, will be granted standing to bring a loss of consortium action.131 Such a presumption fails to recognize

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128 In an analogous situation—the decision whether to extend consortium rights to the wife—the California Supreme Court rejected the line-drawing argument out of hand: "the alleged inability to fix definitions for recovery on the different facts of future cases does not justify the denial of recovery on the specific facts of the instant case; in any event, proper guidelines can indicate the extent of liability for such future cases." Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d at 403, 525 P.2d at 682, 115 Cal. Rptr. at 778 (quoting Dillon v. Legg, 68 Cal. 2d 728, 731, 441 P.2d 912, 914, 69 Cal. Rptr. 72, 74 (1968)).

129 See text accompanying note 32 supra.

130 And, just as certainly, "[i]t seems obvious that a member of a cohabiting couple can suffer identical damage to that suffered by a spouse when his or her mate is injured." Bulloch v. United States, 487 F. Supp. at 1085 (citations omitted).

131 As a paradigmatic example, compare an unmarried couple who have cohabited for 25 years, sharing a home, raising children, and exhibiting all the signs of intimacy, affection, companionship, and support that the consortium doctrine is designed to protect, with a married couple who have lived apart (and perhaps with other partners) for 10 years without any form of communication between them, and with no intention of ever reuniting. Assume that one of the partners in each
that the problem of speculativeness inheres in any loss of consortium action, regardless of whether the cohabitants are married.

This Comment next turns to a more extensive analysis of the speculativeness issue both in and out of the marital relationship.

1. Speculativeness Within the Marriage Relationship 132

Traditionally, courts have dealt with the speculative nature of consortium interests, and of damage to those interests, in an unsatisfactory manner. The legal status of marriage has generally served as a conclusive, per se presumption that the emotional bonds and relational interests present within a particular relationship are of sufficient quality to deserve the legal protection of the consortium doctrine. 133 Similarly, proof of injury to the impaired spouse has generally given rise to a presumption of injury to the deprived spouse's consortium interest. These presumptions have occasionally been extended to quite unjustifiable extremes, such as the refusal to permit defendants to introduce evidence tending to show that the plaintiff lacked any significant consortium interest, and consequently, that the damage suffered by the deprived spouse was negligible. 134 Fundamental tort principles mandate that compensation of these relationships is injured tortiously and, as a result, suffers a change in disposition for the worse and is rendered incapable of having sexual relations. If the existence of a legal marriage is taken as the necessary and sufficient prerequisite for maintaining a loss of consortium action, then the "deprived" member of the second couple will be permitted to sue for loss of consortium, though the deprived member of the first couple will be denied such a right. Further, the "deprived" member of the second couple may even be able to collect substantial damages in some states, despite the lack of any apparent consortium interest. See notes 132-36 infra & accompanying text.

132 The following subsection is based on the rather simplistic assumption that the best interests of society and justice demand that plaintiffs in loss of consortium actions be compensated only to the extent of actual damage suffered (calculated as accurately as possible) and that, to this end, all otherwise admissible evidence necessary to that calculation be introduced at the trial. This assumption is somewhat unrealistic, of course, as there may be countervailing policy reasons militating against the introduction of certain evidence. Some of these considerations will be addressed more fully below. See text following note 161 infra.

133 The validity of this presumption can, of course, be forcefully disputed, especially in light of official government predictions that the proportion of marriages ending in divorce may soon reach 40%. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, SERIES P-23, NO. 84, DIVORCE, CHILD CUSTODY AND CHILD SUPPORT I (1979).

134 In Bedillion v. Frazee, 197 Pa. Super. Ct. 20, 175 A.2d 905 (1961), rev'd, 408 Pa. 281, 183 A.2d 341 (1962), the defendant attempted to introduce evidence that the impaired spouse was in the habit of dating men other than her husband as often as three nights a week. Id. at 22-23, 175 A.2d at 907. The defendant's purpose was to demonstrate that the deprived spouse had a reduced consortium interest in his wife's company and therefore to limit the plaintiff's damage recovery.
In refusing to admit a defendant's evidence relating to the particular circumstances of a plaintiff's personal relationship with an impaired spouse, and instead relying on a presumption of injury from proof of legal marriage and proof of injury to the impaired spouse, courts violate these fundamental principles. 138

The Pennsylvania Superior Court, the Commonwealth's intermediate appellate court, first stated the general rule for proving damages for loss of consortium:

When a husband sues for the loss of his wife's consortium he is not obliged to prove the value of the loss in dollars and cents. The fact of marriage to the [impaired] . . . spouse is itself enough to support a finding for recovery because "in such cases jurors, endowed with at least a modicum of common sense, may be supposed to have some knowledge of ordinary affairs of life."

Id. at 23, 175 A.2d at 907 (quoting Kelley v. Mayberry Township, 154 Pa. 440, 448, 26 A. 595, 597 (1893)).

The court then noted that, in actions for criminal conversation, the defendant has the right to introduce evidence of particular acts of the impaired spouse in order to mitigate the damages. Analogously, the court concluded, defendants in ordinary loss of consortium actions should also have the right to introduce evidence relating to the quality of the deprived spouse's consortium interest in mitigation of damages: "[Defendant] had a perfect right to bring out evidence to show that the wife-plaintiff spent little of her time to comfort and aid her husband but in fact worked in a hotel restaurant until midnight and then went on dates with other men after that hour." Id. at 24, 175 A.2d at 907.

The Pennsylvania Supreme Court affirmed the superior court's statement of the general rule, 408 Pa. at 288, 183 A.2d at 345, but then, without any stated rationale, held that the rules for mitigating damages in the area of criminal conversation were not applicable in loss of consortium actions and that the "evidence attempted to be introduced on the morals of the . . . [impaired spouse] were not relevant or proper in any attempt to mitigate damages for the loss of consortium due the . . . [deprived spouse]." Id. at 288-89, 183 A.2d at 345. Although the court might have intended that its holding be limited to particularly blatant cases in which arguably highly prejudicial evidence relating to the "morals" of the impaired spouse is sought to be introduced, its broad statement appears to make irrebuttable the general presumption of damages that follows simple proof of marriage to the impaired spouse.

Pennsylvania is not the only jurisdiction that appears to allow such a presumption of damages for spouses following proof of marriage. See, e.g., Metropolitan St. R.R. v. Johnson, 91 Ga. 466, 471-72, 18 S.E. 816, 817 (1893) (wife's services are special and need not be calculated in same way as a servant's services; husbands whose wives do not perform manual labor are as entitled to "compensation from wrongdoers for causing inability to perform service" as husbands whose wives do perform such labor; thus, "there need be no direct or express evidence of the value of the wife's services, either by the day, week, month, or any other period of time, or any aggregate sum."). But see Davis v. Blum, 70 A.D.2d 583, 584, 416 N.Y.S.2d 57, 58 (1979) (implying that it was permissible for defendant to introduce evidence of plaintiff's alcoholism in order "to controvert the . . . [deprived spouse's] testimony as to the plaintiffs' exemplary home life on her loss of services cause of action."); note 139 infra.

Otherwise, plaintiffs would receive a windfall, and defendants would be unjustly required to compensate in excess of the harm they cause. In cases in which the injury has been caused intentionally, or other flagrant circumstances exist, of course, courts might permit awards in excess of actual damages as punitive or exemplary damages. See generally W. Prosser, supra note 5, at 9-14.

"[N]either a cohabitant nor a spouse should be compensated through a tort action for loss of consortium when the proximate cause of the loss is not the defend-
Because married couples have differing levels of emotional commitment, intimacy, personal interaction, and psychological support, calculation of the actual loss of consortium incurred through a spouse's injury can be accomplished only by examining the particular personal relationship at issue.\textsuperscript{137} Such a process would involve the introduction of evidence at trial by both parties concerning the relational interest of the impaired and deprived spouses and the consortium damage sustained. Such judicial scrutiny of marital relationships could lead the jury to deny damages for loss of consortium to those spouses whose relationships do not involve the emotional commitment and companionship that is meant to be protected by the consortium doctrine. This analysis would also allow mitigation of loss of consortium damages if the defendant proves that the actual loss suffered by the plaintiff is less than would otherwise be presumed.\textsuperscript{138}

This suggested approach to loss of consortium suits brought by a married partner finds some support in recent case law. For example, several decisions have denied recovery to plaintiffs who failed to introduce specific evidence concerning their marital relationship.

\textsuperscript{137} New York provides expressly that juries are entitled to contrast the quality of the particular plaintiffs' marital relationship both before and after the injury to the impaired spouse. The pattern jury instructions on damages for loss of consortium are as follows:

\begin{quote}
In determining the amount of such damages you may, therefore, take into consideration the nature and extent of the (husband's, wife's) services and society prior to the incident, including (his, her) disposition, temperament, character and attainments; the interest (he, she) manifested in (his, her) home, the social life of (his, her) family and in the comfort, happiness, education and general welfare of the members of the family; the services (he, she) rendered in superintending the household, training the children, assisting (his, her) spouse in the management of the business or affairs in which the spouse was engaged, if any; (his, her) acts of affection, love and sexual intercourse performed and the extent to which the injuries (he, she) sustained in the incident incapacitated (him, her) from performing such services and providing such society after the incident.
\end{quote}

\textsuperscript{138} See Note, supra note 136.
and the precise injurious effect that the negligent injury to their spouses had on that relationship.\textsuperscript{139} Appellate court opinions sustaining loss of consortium damage awards have looked to trial court testimony concerning specific changes in an injured spouse's health and disposition and the impact of such changes on the sexual relations, social and family life, household and childraising activities, and personal interaction of the couple involved.\textsuperscript{140} Such an inquiry attempts to identify changes in the quality of the marriage itself and impairment of the consortium interest in each particular relationship. The size of the damage awards in these cases has been set according to the extent of the disruption of the marital relationship by the impaired spouse's injury\textsuperscript{141} and according to the value that

\textsuperscript{139} Thus, modern courts have frequently upheld jury verdicts in favor of the injured spouse while denying loss of consortium damages to the deprived plaintiff. Although negligent injury to the impaired spouse was proven, loss of consortium damages were denied because of the lack of evidence concerning the condition of the marital relationship before and after the accident. See, e.g., City of Fairbanks v. Smith, 525 P.2d 1095 (Alaska Sup. Ct. 1974); Guitierrez v. Hobbs, 505 P.2d 1318 (Colo. Ct. App. 1973); Welsh v. Fowler, 124 Ga. App. 369, 183 S.E.2d 574 (1971); Washington v. Jones, 386 Mich. 466, 192 N.W.2d 234 (1971); Armstrong v. LeBlanc, 51 Mich. App. 652, 216 N.W.2d 79 (1974); Kucen v. Hygrade Food Products Corp., 51 Mich. App. 471, 215 N.W.2d 772 (1974); Whitson v. Whiteley Poultry Co., 11 Mich. App. 598, 162 N.W.2d 102 (1968); Hodges v. Johnson, 417 S.W.2d 685 (Mo. Ct. App. 1967); Christman v. Bailey, 38 A.D.2d 773, 774, 327 N.Y.S.2d 966, 967 (1972) (verdict of $12,000 awarded to husband for loss of consortium held "grossly excessive" because, although both husband and wife testified they had had no "marital relations" since wife's injury, "[t]here [was] no testimony that the loss of consortium resulted from the accident nor is there any evidence as to the pre-accident relationship."); Hinkle v. Hampton, 495 P.2d 117 (Okl. Sup. Ct. 1972).

\textsuperscript{140} E.g., Carpenter v. Koehring Co., 391 F. Supp. 206 (E.D. Pa. 1975) (damage award to wife not excessive given evidence of duties thrust on her because of husband's injuries, change in husband's personality, and anticipated duration of situation); Morrison v. Ted Wilkerson, Inc., 343 F. Supp. 1319 (W.D. Mo. 1971) ($20,000 damage award to wife not excessive in light of constant attention required of her and radical changes for the worse in her husband's personality); Dawdowycz v. Quady, 300 Minn. 436, 220 N.W.2d 478 (1974) ($8,000 damage award to wife not excessive in light of testimony on husband's argumentative disposition since the injury and in light of rehabilitative care she provided); Tribble v. Gregory, 285 So. 2d 13 (Miss. Sup. Ct. 1974) (evidence that the husband and wife no longer had sexual relations, that the husband no longer assisted his wife, and that the husband and wife were unable to participate in their usual social activities supported jury's award of damages); Helming v. Dulsie, 441 S.W.2d 350 (Mo. Sup. Ct. 1969) (additional job taken by wife and resulting disruptive influence justify damage award); Blond v. Overesch, 527 S.W.2d 663 (Mo. Ct. App. 1975) (evidence that husband's physical condition made him unable to do work he had done prior to the accident supported $15,000 verdict for loss of consortium); Rocha v. New York, 77 Misc. 2d 250, 352 N.Y.S. 980 (Ct. Cl. 1974) ($50,000 damage award to wife justified because of her spouse's need for constant care and for loss of sexual partnership).

\textsuperscript{141} United States v. Varner, 400 F.2d 369 (5th Cir. 1968) (affirming damage award that limited loss of consortium recovery to 20 years although life expectancy was 35 years because of trial judge's belief that conditions disrupting the marriage would diminish with time); Grasle Elec. Co. v. Clark, 525 P.2d 1081 (Alaska Sup. Ct. 1974). In Sullivan v. Lowell & Dracut St. Ry., 162 Mass. 536, 39 N.E. 185
the plaintiff, as a unique individual, placed on the intimate aspects of married life.\textsuperscript{142}

Thus, the most logical assessment of loss of consortium claims by married partners should focus on the quality and conditions of each individual couple's marital relationship, both before and after the relevant accident. Only by hearing the testimony of both sides can such an inquiry be made fairly. Relying solely on the testimony of the plaintiff—or worse, relying on an irrebuttable presumption of injury as a substitute for any inquiry—provides little hope for consistently accurate damage awards.

2. Speculativeness Outside the Marriage Relationship

The summary denial of consortium rights to unmarried cohabitants is equally illogical. Nonmarital unions, like marital ones, include a broad spectrum of personal arrangements that vary widely in their nature.\textsuperscript{143} When the legal status of marriage is used as the sole basis for allowing consortium rights, the results are inequitable.\textsuperscript{144} In short, marital status is a crude and unsatisfactory indicator of the type of personal relationship in which the plaintiff is involved and, therefore, is an inadequate basis on which to evaluate the value of any loss of consortium.

This Comment proposes that the right to prove damages for loss of consortium be extended to all unmarried cohabitants. The fact of cohabitation itself guarantees a certain associational stability

\textsuperscript{142} Thill v. Modern Erecting Co., 292 Minn. 80, 193 N.W.2d 298 (1971) (upholding loss of consortium award of $100,000 in part because of the extreme importance of married life to the plaintiff as an individual).


\textsuperscript{144} See note 131 \textit{supra} & accompanying text.
and gives rise to a reasonable presumption that some substantial emotional commitment has arisen from the intimacy of daily association. This presumption justifies recognition of a cause of action for loss of nonmarital consortium. Such an alteration in current decisional law will enable unmarried deprived cohabitants to introduce evidence at trial concerning the characteristics of their relationships and the precise injurious effect of their partners' injuries on their relational interests. Because these issues are identical to those that are explored (or should be explored) in marital consortium suits, nonmarital suits should impose no unique, analytic burden on the judicial system.

As is the case with deprived spouses, loss of consortium awards should be limited to those deprived cohabitants who actually suffer loss. To ensure this result, courts should carefully scrutinize the relationship between the deprived and impaired cohabitant in exactly the same way it has been argued that they should examine the marital relationship of a deprived spouse suing for loss of consortium. This examination would require the deprived cohabitant to introduce evidence concerning the quality of his or her cohabitational relationship; the defendant would then be permitted to introduce evidence tending to minimize the plaintiff's claim of a damaged consortium interest. Such close judicial scrutiny will enable courts to distinguish between casual sexual affairs and those nonmarital relationships that contain those interests that the consortium doctrine is designed to protect. Thus, such an approach will lead to a denial of damage awards to those unmarried cohabitants whose relationships do not embrace the

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146 See text accompanying notes 134-38 supra.

147 See text accompanying note 138 supra.

148 See text accompanying notes 134-38 supra.

149 Any such judicial scrutiny would necessarily take place on a case by case basis, as each relationship is unique. A variety of circumstances might be considered by the court in making its determination. In an analogous situation, that of determining whether a former spouse has a particular relationship with a third party to justify terminating his or her right to continue receiving alimony, one author suggests some considerations that might be useful to discuss in deciding "whether the relationship was the functional and emotional equivalent of marriage." Oldham, supra note 143, at 262. These considerations include the amount of trust and confidentiality in the relationship, use of the same surname, whether the couple "holds themselves out" as husband and wife, whether they decide to conceive a child, the length of the relationship, and whether the couple pool their resources. Id. Of these considerations, the author appears to consider the last three to be the most relevant—particularly the last two, which he incorporates into a suggestion for employing a rebuttable presumption that a "de facto marriage" exists in the presence of certain circumstances. Id. 262, 263.
commitment, companionship, support, and affection recognized and protected by the consortium doctrine.\textsuperscript{150}

It might be argued that the consortium interests of unmarried cohabitants are less deserving of protection—and damage to those interests more speculative—because the unmarried cohabitational relationship is less permanent than marriage. Thus, the argument might continue, an unmarried cohabitant might be more likely to leave an injured partner—and, consequently, suffer less harm—than would a similarly situated spouse. This argument is based on overbroad generalizations about both marriage and unmarried cohabitation, and, even if accepted as accurate, cannot justify a complete denial of consortium rights to unmarried cohabitants. Changing cohabitational practices, both inside and outside of marriage, highlight this point. Although marriage once might have been presumed to be an eternal bond between partners, recent statistics disclose that nearly forty percent of all marriages now end in divorce.\textsuperscript{151} Thus, the marriage vows no longer lead to any reasonable certainty of relational permanence. Further, nonmarital unions often display the elements of permanence and stability that are commonly associated with legal marriage.\textsuperscript{152}

In any case, the conceptual link between post-injury stability of a relationship and the size of the loss of consortium damage award is not clearly established even in the case of suits by married partners. Courts faced with the difficulty of determining the proper amount of damages to award for continuing, post-trial loss of consortium have taken two different approaches. Some courts, without discussing the longevity of either the particular marriage at issue or of the “average” marriage, have used a life expectancy standard to calculate marital consortium damages,\textsuperscript{153} revealing an underly-

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150 Judge Ackerman had no doubt that courts would be capable of making such distinctions:

I do not believe that my decision today [granting consortium rights to an unmarried cohabitant] will lead to a vast amount of frivolous litigation whenever an injured party has engaged in a fleeting escapade. I have confidence that judges and juries are capable of separating wheat from chaff and that the bar is sufficiently aware of this fact to prevent its wasting time with frivolous claims.


151 See note 133 \textit{supra} \& accompanying text.

152 See note 143 \textit{supra}.

153 See, e.g., Carpenter v. Koehring Co., 391 F. Supp. 206, 213 (E.D. Pa. 1975) (“The trial occurred when . . . [the impaired spouse] was 48 years old and had a life expectancy of 24.7 years . . . . Since [the deprived spouse’s] life expectancy was slightly over 30 years, we may assume for the purposes of this opinion that they will have 24.7 more years of married life.”); Metropolitan St. R.R. v. Johnson, 91 Ga. App. 466, 18 S.E. 816 (1893).
\end{flushright}
ing presumption that the relationship will endure until the death of one spouse. Other decisions, however, have awarded damages to plaintiffs who prove that their marriage has been completely destroyed by the impaired spouse's injury but who do not intend to remain married. The total deterioration of the marital relationship is held by this second group of courts to evidence the value of the loss of consortium to the deprived spouse. This approach too is probably based on the presumption that the plaintiffs' marriage would have continued but for the tortious injury to the impaired spouse.

Under current consortium doctrine, the presumption of life-long marriage with one partner is an irrebuttable one. Yet, as discussed above, the divorce rate has reached a level sufficient to cast doubt on the validity of that presumption. Its continued application can be justified only as a result of the following logical argument: Application of the presumption raises the possibility of a windfall to a loss of consortium plaintiff who becomes divorced or separated from his or her impaired spouse; permitting the defendant to introduce evidence that convinces a jury that damages should be lower than they would otherwise be with the presumption guarantees the defendant a windfall as the impaired spouse's next partner would have no standing to recover any damages at all.

Thus, the current application of an irrebuttable presumption in favor of life-long marriage is justified as a mechanism that deprives culpable defendants of windfalls even though it might sometimes lead to windfalls for plaintiffs in unstable marriages. The courts' current willingness to ignore the effect of the post-injury instability of a marriage on policy grounds supports this Comment's argument that post-injury instability of unmarried cohabitational arrangements is no reason to deny loss of consortium claims to such partners. This argument is even more plausible given the more

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184 Thus, in Grasle Elec. Co. v. Clark, 525 P.2d 1081 (Alaska Sup. Ct. 1974), the court affirmed a verdict in favor of the wife for loss of consortium resulting from injuries to her husband. The court noted that there was evidence that the plaintiffs "were maritally well-adjusted prior to the accident," id. 1084, but that, after the accident, "the marital relationship was destroyed." Id. Shortly after the accident, the plaintiffs' marriage had deteriorated to the point where they had separated, on the advice of their psychiatrist, who "was afraid that one would use deadly or maiming force on the other." Id. 1082. At the time of the trial, the couple attempted to effect a reconciliation, but apparently failed. Id. 1083. Despite the apparent lack of any possibility of a continuing marital relationship, the court affirmed the jury's award of $44,000 damages to the wife for loss of consortium. The court did note, however, that the defendant's brief had not addressed the issue whether the damage award should be reduced because the plaintiffs had separated. Id. 1082.

185 See notes 46-55 supra & accompanying text.
comparable stability that now exists in married and unmarried relationships.\footnote{158}

In sum, the legal distinctions in consortium doctrine between marital and nonmarital unions should be abandoned. Consortium rights should be granted to any adult couple cohabiting as a discrete family unit. Courts should then focus on the factual circumstances and characteristics of each relationship in order to determine whether any actual loss of consortium has been suffered by the plaintiff. In cases in which no provable loss has been sustained, because of the pre-existing character of the personal relationship, loss of consortium damages should be denied. The decision whether to award loss of consortium damages, however, should be based not on marital status but on the facts developed at trial. Only this individualized scrutiny of the personal relationships involved will effectuate the general tort policy of providing compensation for actual loss of consortium, inside or outside of a marital relationship.

IV. A PROPOSED PROCEDURE

The decision by the United States District Court for the District of New Jersey in \textit{Bullock v. United States} \footnote{157} appears to be unique in its holding that unmarried cohabitants have an action for loss of consortium.\footnote{158} In all other jurisdictions, an unmarried deprived cohabitant would be automatically denied standing to bring a loss of consortium action, as marriage is deemed to be a required element of a loss of consortium claim. Procedurally, therefore, an unmarried deprived cohabitant who filed an action alleging loss of consortium would be nonsuited on the defendant's filing of a demurrer or other equivalent motion.\footnote{159}

It appears that, in some jurisdictions, a married deprived cohabitant is entitled to a presumption of substantial damages to the consortium interest.\footnote{160} In some instances, this presumption has been carried to the point of denying the defendant the opportunity to introduce evidence concerning the quality of the plaintiff's relationship with the defendant.

\footnote{156} See note 143 \textit{supra}.


\footnote{158} See notes 41 & 42 \textit{supra} & accompanying text.

\footnote{159} In federal court, the defendant would, pursuant to \textit{Fed. R. Civ. P.} 12(b)(6), file a motion to dismiss for "failure to state a claim upon which relief can be granted." \textit{See} 2A J. MOORE \& J. LUCAS, \textit{Moore's Federal Practice} \S 12.08 (2d ed. 1979) [hereinafter cited as \textit{Moore's}].

\footnote{160} See note 134 \textit{supra} \& accompanying text.
tionship in order to mitigate damages. This Comment proposes a procedure in which both of these inflexible presumptions will be changed.

The procedure proposed below will not, and is not intended to, equalize the status of unmarried cohabitants and married couples. The proposed procedure addresses the twin inequities of (1) completely denying unmarried cohabitants a cause of action for loss of consortium, and (2) permitting married couples to recover damages for loss of consortium in cases in which no consortium interest has been shown to exist and in which the defendant might have evidence showing that no such interest actually did exist. After these concerns are addressed, however, there might still be reasons to retain some presumption in favor of married couples.

First, although specific instances can always be found to contradict this general rule, it is probable that, on the average, married cohabitants are more likely to have a consortium interest than unmarried cohabitants. Further, whatever interest married couples do have is likely to be greater than that of unmarried cohabitants. Thus, granting some evidentiary presumptions in favor of married cohabitants will tend to conserve the resources of both the parties and the judiciary. These presumptions must be rebuttable, however, so that the likelihood of injustice is minimized in those cases in which the assumptions on which the presumptions are based do not hold true.

Second, although the state interest in favor of legal marriage is not sufficiently strong to justify a complete denial of a loss of consortium action for all unmarried cohabitants, the state's interest might be sufficiently strong to justify retaining some presumptions in favor of married plaintiffs.

Finally, courts have sometimes exhibited an unwillingness to probe into the details of a marital relationship. The use of certain presumptions in favor of married couples would tend to minimize the need for such probing, without creating unjust results.

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162 Courts have exhibited a strong preference, sometimes articulated as a constitutional requirement, for rebuttable, as opposed to irrebuttable, presumptions. See, e.g., Heiner v. Donnan, 285 U.S. 312 (1932); Schlesinger v. State of Wisconsin, 270 U.S. 230 (1926); Mourning v. Family Publications Service, Inc., 449 F.2d 235 (5th Cir. 1971).

163 See text accompanying notes 107-10 supra.

164 See, e.g., United States v. Walker, 176 F.2d 564, 568 (2d Cir. 1949) ("[N]ot all estrangements are final . . . . The common law avoided . . . . [a detailed inquiry into the details of the marital relationship] by taking divorce as the only test . . . .")
In light of these principles, this Comment's proposal is as follows: First, standing to bring a loss of consortium action should be extended to unmarried cohabitants. Thus, a deprived partner who alleges in the complaint that he or she cohabits with the impaired partner could not be nonsuited owing to lack of a marital relationship.

Second, defendants should always be permitted to introduce relevant evidence concerning the quality of the plaintiffs' relationship prior to the occurrence of the injury that is the basis of the impaired cohabitant's claim.

Third, in the case of married deprived plaintiffs, a rebuttable presumption that a consortium interest does exist should be employed. In the case of unmarried deprived cohabitants, a rebuttable presumption that no consortium interest exists should be employed. The result of the presumption in favor of married plaintiffs is that, unless the defendant introduces evidence tending to disprove the existence of a consortium interest, the married plaintiffs will be able to survive a summary judgment motion without having to introduce any affidavits or other evidence demonstrating the existence of a consortium interest. Unmarried plaintiffs, on the other hand, will have to submit affidavits or other evidence in order to survive a motion for summary judgment.

Fourth, the Comment proposes that married plaintiffs should bear a lesser burden of proof in establishing the amount of damages than their unmarried counterparts. This result could be accomplished through the use of a formal presumption in favor of deprived

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165 Of course, the general evidentiary rules of admissibility would still apply. See Fed. R. Evid. 401-403; 10 Moore's, supra note 159, at §§ 400-403.

166 See notes 134-42 supra & accompanying text.

167 It is crucial to note that this rebuttable presumption differs significantly from the irrebuttable presumption in favor of the existence of a consortium interest that is frequently employed today. See note 133 supra & accompanying text. Further, this presumption applies only to the existence of the consortium interest; damages would not be presumed at this point. See notes 134-42 supra & accompanying text and text following note 168 infra.

168 A likely further practical result of these presumptions is that married plaintiffs will be better able to settle, and for higher amounts, than will unmarried plaintiffs. This is so because it will be easier, and therefore less expensive, for married plaintiffs to get to trial and, conversely, because it will be more difficult, and therefore more expensive, for a defendant to fight a loss of consortium case brought by a married plaintiff. Because one important dimension of settlement negotiations are the relative costs of the parties in actually trying the case, the higher net cost to defendants opposing married plaintiffs should generate higher settlement offers to married plaintiffs. See generally C. Karass, The Negotiating Game (1970); Mabry, The Pure Theory of Bargaining, 18 Indus. & Lab. Rel. Rev. 479 (1965); Note, An Analysis of Settlement, 22 Stan. L. Rev. 67 (1969).
spouses that damages exist.169 The presumption could come into play after proof of injury to the impaired spouse.170 As a result of this presumption, married plaintiffs would be required only to offer evidence of the most general nature in order to prove damages; unmarried plaintiffs would be required to introduce detailed, specific evidence of their damages.171 In reality, however, it is unlikely that such a formal presumption is necessary because juries, in determining damage awards, are likely to employ an informal presumption and require more evidence from unmarried plaintiffs in any case. Thus, even in the absence of a legal presumption in favor of finding damages for married plaintiffs, such plaintiffs will still be able to recover the same damages as would unmarried plaintiffs even though the married plaintiffs’ proof was less persuasive.172

Under this proposal, a demurrer will be insufficient to nonsuit a deprived plaintiff who alleges either a marital or cohabitational relationship with an impaired partner. Frivolous suits,174 however, need not always go to full trial; many of these will be weeded out before trial by the equivalent of a motion for judgment on the

169 This Comment’s proposed presumption is a rebuttable one, as distinguished from the irrebuttable presumption of damages employed in some jurisdictions. See notes 134-38 supra & accompanying text.


171 As always, the defendant would be free to offer evidence to rebut the plaintiff’s claim of damages. See notes 165 & 166 supra & accompanying text.

172 Of course, the evidence required to establish damages would be much the same as that offered to prove the existence of a consortium interest.

173 It is further suggested, however, that regardless of whether married plaintiffs are afforded a formal presumption of damages, or merely benefit from the jury’s informal presumption of damages, it will still, in most cases, be in those plaintiffs’ best interests to introduce specific evidence on the amount of damage. This would be particularly true if there were special circumstances in the marital relationship—of which the jury might not otherwise be aware—that tended to increase the amount of the harm caused to the consortium interest. Thus, for example, in order to increase the size of their award, deprived spouses might wish to introduce evidence that the impaired spouse was an unusually caring person or that the impaired spouse was unusually helpful around the house. On the other hand, if the couple were extremely jealous of their privacy, and if the defendant offered no evidence in mitigation of damages, they might prefer simply to rest on the presumption—whether formal or informal—and take their chances with the jury. The existence of a presumption gives them this option, not available to unmarried plaintiffs, and is entirely consistent with the judicial unwillingness to probe unnecessarily into the details of a marital relationship. See note 164 supra & accompanying text.

174 See note 150 supra & accompanying text.
pleadings or a motion for summary judgment. Suits that survive these motions will go to full trial at which the jury will be instructed about the presumptions on the existence of consortium interests and on damage to consortium interests, and it will render its verdict accordingly.

To illustrate the operation of this Comment's proposal, four hypothetical examples will be considered below. In each case, the male member of the couple has been injured in an automobile accident caused solely by the defendant's negligence. The results of the accident, in each case, are that the injured man has become permanently paralyzed from the neck down, thus rendering him incapable of having sexual relations or of performing any work. Further, as a result of the injuries, each man has become extremely irritable and, consequently, difficult to get along with. All suits occur in federal court and the plaintiff requests a jury trial in each case.

A. Couple A: Married, No Consortium Interest

Andy and Amy have been married for twenty-five years. They have no children. After ten years of marriage, they began to quarrel frequently and eventually agreed to separate. For the last ten years they have been living apart. During those ten years, the only communication they have had was a telephone call on the day before Andy's accident, when they decided to contact their respective attorneys and instruct them to institute divorce proceedings. After Andy was injured, he filed suit against the defendant; Amy also filed suit against the defendant, alleging that she is married to Andy and that she has suffered a loss of consortium.

Defendant, through discovery, learns of the true relationship between Andy and Amy. He moves to dismiss her claim for failure to state a claim. This motion is denied because Amy has alleged in her complaint that she is married to Andy. Defendant then files

175 See Fed. R. Civ. P. 12(c); 2A Moore's, supra note 159, at § 12.15.
176 See Fed. R. Civ. P. 56; 6 Moore's, supra note 159, at §§ 56.01-.27.
177 Of course, there may not always be a jury trial, or if there is, the judge might grant a directed verdict, see Fed. R. Civ. P. 50(a); 5A Moore's, supra note 159, at §§ 50.02-.06, in favor of one of the parties. In either case, the judge should employ the same presumptions with respect to existence of a consortium interest and damage to that interest. Likewise, the judge should follow these presumptions in ruling on a motion for a judgment notwithstanding the verdict, see Fed. R. Civ. P. 50(b); 5A Moore's, supra note 159, at §§ 50.07-.13, or its equivalent.
178 Each of the hypotheticals is an extreme case chosen to demonstrate some aspect of the procedure discussed above. Variations are discussed in the footnotes.
179 See Fed. R. Civ. P. 12(b)(6); note 159 supra.
his answer and moves for a judgment on the pleadings or he files additional affidavits and moves for summary judgment. At this point, Amy’s claim should be dismissed, as it is patently frivolous; her relationship with Andy exhibits none of the values that the consortium doctrine is designed to protect.

B. Couple B: Unmarried, No Consortium Interest

Bob and Barb met in a bar the night before Bob’s accident occurred. They had several drinks together and then went to Barb’s home, where they engaged in sexual relations. After the accident, Barb joined her loss of consortium claim to Bob’s suit for damages. In her complaint, Barb alleged that she cohabits with Bob. In this case, the defendant does not bother to file a motion to dismiss for failure to state a claim; he knows that such a motion would be denied, as Barb has alleged in her pleadings that she cohabits with Bob. Defendant does, however, make a motion for judgment on the pleadings or for summary judgment after his answer. Barb’s case, like Amy’s in the preceding example, is wholly devoid of merit and her claim should be dismissed at this stage of the proceedings.

C. Couple C: Married, Strong Consortium Interest

Christopher and Christine have been married for twenty-five years. They have raised two children together and manage all their assets jointly. After Christopher’s accident, the two file suit against the defendant. Christopher seeks damages for the injuries he has sustained; Christine seeks damages for her loss of consortium. In her portion of the complaint, Christine merely alleges that she is Christopher’s wife and that, as a result of the injuries Christopher has sustained, she has suffered loss of consortium damages.

The defendant files a motion to dismiss Christine’s complaint for failure to state a claim; this motion is denied. The defendant then files his answer. The case goes to trial, and after Christopher testifies about the nature of his injuries, the defendant moves for summary judgment on Christine’s loss of consortium claim. The defendant is unable to introduce any evidence showing that Christine did not have a consortium interest in Christopher, and

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180 See Fed. R. Civ. P. 12(c); note 175 supra.
182 See, e.g., note 132 supra & accompanying text.
Christine, who is an intensely private person, chooses to rely on the rebuttable presumption proposed by this Comment that a consortium interest exists between married couples. She too offers no evidence, and the judge denies the defendant's motion for summary judgment.\textsuperscript{183}

During the damage phase of the trial, Christine testifies merely that she and Christopher had had a happy marriage up until the time of the accident; that they had rarely quarreled; that they had enjoyed "normal" sexual relations, and that they had shared the household chores. Her attorney then recites some of Christopher's testimony that, since the accident, the couple often quarreled, could no longer enjoy sexual relations, and were unable to share the household chores. The attorney asks Christine if she agrees with this testimony; she states her assent. She offers no more specific evidence about the injury to her consortium interest\textsuperscript{184} and the defendant offers no evidence in rebuttal.\textsuperscript{185}

The judge then instructs the jury that there is a rebuttable presumption that a consortium interest exists between Christopher and Christine and gives it the appropriate instruction on computing Christine's damages, should it determine that she has prevailed on the issue of liability.\textsuperscript{186} The jury returns with a verdict for Christopher on his claim and for Christine on hers. Christine is awarded $10,000 for her loss of consortium. The defendant appeals this award, contending that it is too high considering the general nature of the evidence Christine offered on the extent of her loss of consortium. The court of appeals affirms, holding that Christine did offer sufficient evidence to support the jury's award.

\textsuperscript{183} Of course, the defendant could have offered evidence tending to negate the existence of any consortium interest thereby rebutting this Comment's proposed presumption. Then Christine would have had to introduce evidence to survive the summary judgment motion.

\textsuperscript{184} Christine's attorney had advised her that, as a married plaintiff, this was the minimum evidence she could offer in the damage phase of the trial, absent evidence by the defendant tending to mitigate the amount of her damages. The attorney had also strongly suggested that she offer more specific proof of her loss; she declined to follow this advice, however, because of the high value she places on her privacy, and because she abhorred the thought of testifying about the particulars of her private marital relationship.

\textsuperscript{185} The defendant obviously could have offered rebuttal evidence, which might have made it necessary for Christine to introduce more specific evidence.

\textsuperscript{186} If this jurisdiction recognizes a formal presumption in favor of finding damages for the deprived spouse's loss of consortium, one of the advantages for married couples contained in this Comment's proposal, see notes 169-72 supra & accompanying text, the judge would instruct the jury about this presumption; otherwise, the judge would simply tell the jury that they could award whatever damages seemed appropriate considering all the evidence. Even under this latter option, married partners would appear to have an advantage over unmarried cohabitants. See note 173 supra & accompanying text.
D. Couple D: Unmarried, Strong
Consortium Interest

Don and Donna have lived together for fifteen years. They are unmarried. They own a house jointly. Both work and they put their earnings into a joint bank account. After the couple had cohabited for several years, they decided to have a child; when their son was born, Donna took a two-year maternity leave from work. She then returned to her job and Don took a two-year paternity leave from his job. After Don returned to work, the two arranged their schedules so that they could spend the maximum amount of time with their son and with each other. Donna uses Don’s surname, as does their son.

After the accident, Don and Donna file suit against the defendant. In her portion of the complaint, Donna alleges that she cohabits with Don and that she has suffered loss of consortium as a result of Don’s injuries. The defendant files his answer and moves for a judgment on the pleadings with respect to Donna’s claim. At this point, because the Comment’s proposal employs a rebuttable presumption that unmarried plaintiffs have no consortium interests, Donna is obliged to introduce evidence, by way of affidavit, that she does indeed have a legally cognizable consortium interest in Don. This evidence will go beyond the allegations of the pleadings; the judge will therefore treat the defendant’s motion as one for summary judgment.187 The defendant offers no evidence to suggest that Donna’s claim of a consortium interest is false; the judge, satisfied that Donna has rebutted the presumption, denies the defendant’s motion. But the unmarried plaintiff has already been put to a greater burden than Christine, the married plaintiff in a comparable position.

At trial, the defendant offers no evidence to show that Don and Donna did not share a consortium interest.188 Don and Donna, however, both testify extensively about the quality of their relationship both before and after Don’s accident. The judge, at the close of the trial, charges the jury that there is a presumption, which Donna has the burden of rebutting, that Don and Donna do not share a consortium interest. The judge further instructs the jury that, if it finds that Donna has suffered some loss of consortium, it should award damages based on the evidence given.189

187 See Fed. R. Civ. P. 12(c); note 175 supra.
188 Once again, the defendant would be entitled to introduce evidence tending to negate the existence of a consortium interest. See note 183 supra.
189 Depending on the jurisdiction, the judge would simply instruct the jury to award damages based either on the specific evidence presented by the plaintiff or
jury returns a verdict in favor of both Don and Donna and awards Donna $10,000 for her loss of consortium. The defendant appeals this award, but the court of appeals affirms, finding that the evidence offered at trial supports the size of the award.

**Conclusion**

Taking the lead from Judge Ackerman's pioneer decision in *Bullock v. United States*, this Comment has proposed that consortium rights be extended to unmarried cohabitants. This extension follows logically from the trend—in both the United States Supreme Court and in various state courts—towards increased judicial recognition of nontraditional domestic relationships. An analysis based on tort law principles likewise supports such an extension. Finally, this Comment proposed a procedure whereby consortium rights could be granted to unmarried cohabitants without undercutting the state interest in the institution of marriage.

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*See text following note 172 supra. In any case, the advantageous presumption of damages available for married loss of consortium plaintiffs, see note 186 supra, would not be available for the unmarried cohabitant.*