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LET MY LOVE OPEN THE DOOR: THE CASE FOR EXTENDING MARITAL PRIVILEGES TO UNMARRIED COHABITANTS

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Catherine Acker and Samuel Holly lived together for twenty-five years and held themselves out as a married couple throughout that period.[1] The two states in which they lived over the course of their relationship did not recognize common law marriage.[2] In 1993, Catherine was a defendant in a criminal trial for robbery and unlawful use of a firearm.[3] Samuel agreed to testify against her.[4] Blindsided by the idea that intimate conversations with her longtime partner could be used against her at trial, Catherine sought refuge in the marital communications privilege to bar Samuel's testimony.[5] Even though a claim of a marital privilege generally must be supported by a valid marriage, she argued that it should extend to their relationship because it was akin to a marriage except for the technical legal status.[6]

The Court of Appeals for the Fourth Circuit considered Catherine's plea. First, it acknowledged the societal trend of couples choosing to cohabitate without marrying;[7] however, the Court disagreed with Catherine and followed the bright-line rule that marital privileges cannot be invoked in the absence of a valid marriage.[8] The Court thus rejected Catherine's privilege claim, and permitted Samuel's testimony.[9]

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1. United States v. Acker, 52 F.3d 509, 514 (4th Cir. 1995).
2. *Id.* at 514. They lived in New York and North Carolina. *Id.*
3. *Id.* at 511.
4. *Id.* at 511–12.
5. *Id.*
6. *Id.* at 514.
7. *Id.* at 515 (noting that "present day experience may indicate that more couples are living together without the benefit of marriage").
8. *Id.* (holding that "the defendant must have assumed both the privileges and the responsibilities of a valid marriage under the law of the state in which the privilege is asserted").
9. *Id.* at 515.

In the fifteen years following this decision, unmarried cohabitation has increased in popularity, subsequently gaining social acceptance.[10] Furthermore, states have granted a number of rights and protections traditionally accorded exclusively to married couples to unmarried partners.[11] But, like the Fourth Circuit, the criminal justice system has been slow to follow this trend, and still refuses to grant marital privileges to unmarried partners on the grounds that these privileges hamper the truth-finding process.

This note examines the conflict between the trend among states of protecting non-marital family relationships by granting legal rights and obligations to unmarried partners, and the criminal justice system's refusal to extend marital privilege to certain unmarried partners. Parts I and II discuss the history and background of the marital privileges. Part III examines cohabitation statistics, rights and obligations between cohabitants, and rights and obligations of cohabitants with respect to third parties. It also analyzes tort cases as a possible indicator of the benefits and consequences of extending marital privileges to unmarried partners.[12] Part IV provides recommendations for extending the marital privileges to unmarried cohabitants. This paper concludes that the marital communications privilege should be extended to unmarried couples deemed eligible after a factual inquiry.[13] The continuation of a status-based requirement is appropriate only for the adverse testimonial privilege.[14]

I. THE HISTORY, RATIONALE, AND DEVELOPMENT OF MARITAL PRIVILEGES

A. Background

An important right possessed by married individuals is the ability to invoke evidentiary privileges based on marriage in a criminal trial. These privileges consist of two parts: the marital communications privilege (MCP) and the adverse testimonial privilege (ATP). The MCP protects "communications made in confidence between the spouses during a valid marriage."[15] This privilege belongs to both

10. *See infra* Part III.A.

11. *See infra* Part III.B-C.

12. *See infra* Part III.C.

13. *See infra* Part IV.A.3.

14. *See infra* Part IV.B.

15. United States v. Lofton, 957 F.2d 476, 477 (7th Cir. 1992) (citing United States v. Byrd, 750 F.2d 585, 590 (7th Cir. 1984)).

spouses, or whichever spouse seeks to prevent disclosure of certain information, meaning that either a witness-spouse or a defendant-spouse may object to testimony by his or her spouse that would reveal a confidential communication.[16] The ATP allows a witness-spouse in a criminal case to refuse to testify against his or her spouse when the spouse is a defendant.[17] The privilege belongs to the witness spouse, meaning that only the witness spouse, not the defendant spouse, may refuse to testify both about facts she observed and about information communicated to her by her spouse.[18]

The underlying reason for both privileges is marital preservation.[19] The United States Supreme Court once described the marriage relationship as "the best solace of human existence,"[20] and later characterized marital privileges as "so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice."[21] However, this stance in favor of marital harmony stands at odds with the "fundamental maxim" long recognized by Supreme Court that the public has a right to "every man's evidence."[22]

Case law mandates that evidentiary privileges be narrowly construed in order to protect the truth-finding process.[23] When considering the scope of an evidentiary privilege, a court must decide whether it "promotes sufficiently important interests to outweigh the need for probative evidence in the administration of criminal justice."[24]

B. Marital Communications Privilege

The MCP exists to preserve and strengthen the marriage relationship by protecting intimate information exchanged between

16. *Id.*

17. *See, e.g.*, R. Michael Cassidy, *Reconsidering Spousal Privileges after Crawford*, 33 AM. J. CRIM. L. 339, 356–57 (2006).

18. *Id.*

19. *See id.* at 358–61.

20. Trammel v. United States, 445 U.S. 40, 51 (1980) (quoting Stein v. Bowman, 38 U.S. (13 Pet.) 209, 223 (1839)).

21. Wolfe v. United States, 291 U.S. 7, 14 (1934).

22. *Trammel*, 445 U.S. at 50 (quoting United States v. Byran, 339 U.S. 323, 331 (1950)).

23. *Id.* at 48–49 n.9 (state-specific statutes regarding martial privileges). Federal courts recognize both a MCP and an ATP under Federal Rule of Evidence 501, as established by common law. *See generally* FED. R. EVID. 501.

24. *Id.* at 51.

spouses.[25] To fall within the scope of the MCP, there must be a communication between a couple who was married at the time of the communication, and the communication must be intended to be confidential, meaning that it was not made in the presence of a third party or intended to be communicated to a third party.[26]

Unlike the ATP, the MCP may be invoked by *either* spouse to prevent disclosure of confidential communications between the spouses made during the marriage.[27] Accordingly, even when a witness spouse waives the ATP, he or she may not testify over the defendant spouse's objection about confidential communications made during the marriage.[28] The MCP endures even after the marriage in which the communication took place has ended.[29]

As a communication-based privilege, the MCP does not sweep as broadly as the ATP because it protects only *private* communications.[30] For this reason, it is analogous to other communication privileges available in a criminal trial such as the priest/penitent, attorney/client, and physician/patient privileges. Like other communication privileges, the MCP focuses on the nature of the communication rather than its content. Therefore, material of an intimate nature, intended to be confidential, discussed in front of a third party is not protected, while a fairly routine conversation kept between the spouses is protected.[31] Because evaluating the content is difficult without compelling release, the communication is presumed to be protected absent evidence that it has been shared with a third party or that it is part of a conspiracy.[32] Additionally, the privilege will not apply if, at the time of the communication, the couple was separated and the marriage was irreconcilable.[33]

Courts conduct factual investigations to determine whether the communication meets the elements required for use of the MCP. Where evidence exists that the communication has been shared with a

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25. *See, e.g.*, Coleman v. State, 281 Md. 538, 541(Md. 1977) (citing CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 86 (2d ed. 1972)).

26. *Id.* at 543 (defining a communication as "words or utterances intended to convey a message").

27. *See id.* at 543.

28. United States v. Estes, 793 F.2d 465, 476 (2d Cir. 1986).

29. *Lofton*, 957 F.2d at 476–77. A typical MCP statute states that "[o]ne spouse is not competent to disclose any confidential communication between the spouses occurring during the marriage." MD. CODE ANN., CTS & JUD. PROC. § 9-105 (LexisNexis 2006).

30. Trammel v. United States, 445 U.S. 40, 51 (1980).

31. *See* Wong-Wing v. State, 847 A.2d 1206, 1211–12 (Md. 2004).

32. United States v. Parker, 834 F.2d 408, 411 (4th Cir.1987). *See* 6 LYNN MCCLAIN, MARYLAND EVIDENCE: STATE AND FEDERAL, § 505:2, at 154 (2001).

33. *See infra* notes 15, 26.

third party, a court may conduct a factual inquiry to determine whether the communication is protected.[34] For example, one court determined that a husband's letter to his wife was not confidential when the husband knew that his wife had difficulty reading and would need a third party to read the letter aloud to her.[35]

Some courts also conduct factual inquiries to evaluate application of the MCP if there is evidence of separation and irreconcilability of the marriage at the time the statement was made.[36] If the court finds that the couple is legally or permanently separated, the marriage is considered irreconcilable and the privilege will not apply.[37] Courts consider several factors to determine whether a couple is permanently separated, including: duration of the separation; stability of the marriage at the time of the communication; whether a divorce action had been filed and the conduct of the parties since that filing; whether a property settlement had been proposed; and any statements by the parties regarding irreconcilability or the reasons for separation.[38]

C. Adverse Testimonial Privilege

The ATP is rooted in common law jurisprudence and was originally based on a two-step theory. First, a husband was not permitted to testify against himself because he was an interested party in the proceeding.[39] Second, a wife was considered to be the same person as her husband and therefore could not testify against him due to the Fifth Amendment protection against self-incrimination.[40] When women began gaining legal rights,[41] the justification for the ATP shifted towards the strong public policy interest in protecting the peace and harmony of a marital unit.[42] The Maryland Court of Appeals

34. Coleman v. State, 281 Md. 538, 543 (1977) (citing Pereira v. United States, 347, 361 (1954)).

35. Grulkey v. United States, 394 F.2d 244, 246 (8th Cir. 1968).

36. *See, e.g.*, United States v. Roberson, 859 F.2d 1376, 1381 (9th Cir. 1988). *See infra* Part IV.A.3.

37. *Roberson*, 859 F.2d at 1381.

38. United States v. Murphy, 65 F.3d 758, 761 (9th Cir. 1995) (citing *Roberson*, 859 F.2d at 1381).

39. Trammel v. United States, 445 U.S. 40, 44 (1980).

40. *Id. See also* U.S. CONST. amend. V.

41. *See e.g.* Trammel v. United States, 445 U.S. 40, 52 (1980).

42. M. Peter Moser, *Compellability of One Spouse to Testify Against the Other In Criminal Cases*, 15 MD. L. REV. 16, 17–18 (1955). *See, e.g.*, Wolfe v. United States, 291 U.S. 7, 14 (1934) (regarding marital confidences "as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice"); Johnson v.

predicted that absence of the ATP "would adversely affect familial ties and strike at the heart of domestic relations."[43] Without the privilege, witness spouses would potentially face contempt of court charges, perjury charges, or the destruction of their marriage.[44]

Despite the policy-driven purpose of marital harmony and preservation, Maryland courts have applied the ATP in instances where the value of the relationship is questionable and the marital harmony is already disrupted.[45] Failing marriages and marriages entered into for reasons other than love qualify without inquiry.[46] While some states have refused to apply the privilege where the purpose of the marriage was to perpetrate a fraud and hinder the truth-finding process, the motive for the marriage in most states is irrelevant and courts do not conduct factual inquiries into the motives for the marriage.[47]

In *Trammel v. United States*, the Supreme Court limited the availability of the ATP to the witness spouse.[48] The holding changed the previous rule, which gave the defendant spouse the right to keep a willing witness spouse off the stand.[49] The Court reasoned that only the witness spouse possesses a sufficiently important interest in marital harmony.[50] Regardless of the witness spouse's motivation, when he or she chooses to testify against the defendant spouse, "their relationship is almost certainly in disrepair [and] there is probably little in the way of marital harmony for the privilege to preserve."[51] Accordingly, the Court upheld this narrow version of the ATP, resting it solely in the hands of the witness spouse while adhering to the policy rationale behind it.[52]

State, 848 A.2d 660, 667 (Md. Ct. Spec. App. 2004) (referring to the ATP as necessary "to maintain and foster the marital relationship").

43. Parler & Wobber v. Miles & Stockbridge, 756 A.2d 526, 543 (Md. 2000).

44. *Rule Rendering Husband or Wife Incompetent as a Witness for the Other in a Criminal Case*, 93 A.L.R. 1144 (1934); 6 MCCLAIN, *supra* note 33, at § 505.1, at 148–49. *See also* Funk v. United States, 290 U.S. 371, 381 (1933) (arguing that admitting spousal testimony "would subject the witness to the temptation to commit perjury").

45. Hagez v. State, 676 A.2d 992, 1001 n.7 (Md. Ct. Spec. App. 1996) (explaining that the privilege applies "to anyone who qualifies as a 'spouse,' without regard for the motive of the marriage" and that the trial court is not required to investigate the reasons for the marriage); Coleman v. State, 281 Md. 538, 544 (Md.1977) (asserting that "application of the privilege does not depend upon the stability of the marriage . . . .").

46. *See Hagez*, 676 A.2d at 1001 n.7; *Coleman*, 281 Md. at 544.

47. 6, *supra* note 33, at § 505:2, at 153.

48. 445 U.S. 40, 52 (1980).

49. *See* Hawkins v. United States, 358 U.S. 74, 79 (1958).

50. *Trammel*, 445 U.S. at 52–53 (1980).

51. *Id.* at 52.

52. *Id.* at 53.

Statutes allowing the ATP reflect the *Trammel* holding that the privilege belongs solely to the witness spouse in a criminal case.[53] Neither the defendant spouse nor a witness who is not married to the defendant spouse may invoke it. [54] Unlike the MCP, it is invoked to exclude evidence of criminal acts and *both* public and private communications.[55]

Courts emphasize that a witness spouse's ability to exercise the privilege is contingent upon the existence of a valid marriage to the defendant spouse at the time of the trial.[56] The witness spouse must prove the validity of the marriage at trial by a preponderance of the evidence, typically by showing the marriage certificate.[57] It is the *status* of marriage, not the quality or characteristics of the relationship, that makes a spouse non-compellable for testimony.[58]

II. THE DEVELOPMENT OF PRIVILEGES IN THE AMERICAN JUDICIAL SYSTEM

Testimonial privileges are generally disfavored within the criminal justice system because they hamper the truth-finding process.[59] Courts strongly disfavor testimonial privileges in criminal cases,[60] mandating that they be "strictly construed"[61] and accepted only where permitting the privilege serves "a public good transcending the normally predominant principle of utilizing all rational means for

53. A typical statute states that the "spouse of a person on trial for a crime may not be compelled to testify as an adverse witness." MD. CODE ANN., CTS & JUD. PROC. § 9-106. While the ATP belongs solely to the witness spouse in the majority of states, the ATP belongs to the defendant in some states. See, e.g. Wash. Rev. Code Ann. §5.60.060 (West 2009 & Supp. 2010). In other states, the ATP belongs to both spouses. See, e.g.. W. VA. CODE ANN. §57-3-3 (LexisNexis 2005).

54. *See Trammel*, 445 U.S. at 53 (1980).

55. *Id.* at 51.

56. United States v. Acker, 52 F.3d 509, 515 (1994).

57. 6 MCCLAIN, *supra* note 33, at § 505:1, at 150. The privilege does not exist once the marriage has terminated. *Id.* at 151.

58. Rule Rendering Husband or Wife Incompetent as a Witness for the Other in a Criminal Case, *supra* note 55.

59. *Trammel*, 445 U.S. at 50 (stating that "privilege contravenes that fundamental principle that 'the public...has a right to every man's evidence'" (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)); Jaffe v. Redmond, 518 U.S. 1, 19 (1996) (Scalia, J., dissenting) (regarding testimonial privileges as "not lightly created not expansively construed, for they are in derogation for the search for truth" (quoting United States v. Nixon, 418 U.S. 683, 710 (1974)).

60. United States v. Burtrum, 17 F.3d 1299, 1302 (10th Cir. 1994) (discouraging testimonial privileges because "they result in the suppression of competent evidence").

61. *Trammel*, 445 U.S. at 50.

ascertaining truth."[62] As Justice Scalia proclaimed, it is "our duty to proceed cautiously when erecting barriers between us and the truth."[63]

In the 1996 case of *Jaffee v. Redmond*, the Supreme Court took the rare step of approving an additional privilege, the psychotherapist-patient privilege.[64] In *Jaffee*, the family of a man shot and killed by a police officer brought a civil suit against the officer.[65] The family alleged that the officer violated the deceased's constitutional rights by using excessive force.[66] The lower court ordered the defendant officer to provide the plaintiff with notes taken by a social worker during her counseling sessions with the police officer after the shooting.[67] Neither the social worker nor the officer complied.[68] The Supreme Court determined that the psychotherapist privilege "promotes sufficiently important interests to outweigh the need for probative evidence."[69] Such interests include the need for absolute trust and confidence for effective psychotherapy treatment, and the public interest in "the mental health of our Nation's citizenry."[70] The Court emphasized in its decision, however, that part of the reason it accepted the privilege was because it would have a minimal effect on truth-finding.[71]

Despite the Court's admission in *Jaffe* that the privilege had a minimal effect on truth-finding, the decision nonetheless affirms the notion that society and the judiciary support the existence of privileges at the expense of truth-finding because they promote the interest of protecting important relationships.[72] The relationship between husband and wife is at the top of this list. American courts have repeatedly emphasized the importance of the institution of marriage, recognizing

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62. Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

63. *Jaffee*, 518 U.S. at 21 (Scalia, J. dissenting).

64. *Id.* at 9–10 (majority opinion).

65. *Id.* at 43–45.

66. *Id.* at 5.

67. *Id.* at 5–6.

68. *Jaffee*, 518 U.S. at 5.

69. *Id.* at 9–10.

70. *Id.* at 11.

71. *Id.* at 12 (explaining that "the likely evidentiary benefit that would result from the denial of the privilege is modest" because without the privilege, "confidential conversations between psychotherapists and their patients would surely be chilled, particularly when its obvious that the circumstances that give rise to the need for treatment will probably result in litigation." Therefore, "much of the desirable evidence to which litigants...seek access...is unlikely to come into being. This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged.").

72. *See infra* Part I.A-C.; *See, e.g.*, Coleman v. State, 281 Md. 538, 542 (Md. 1977) (explaining that the privilege "was designed to protect and strengthen the marital bond") (citing Poppe v. Poppe, 144 N.E.2d 72, 73 (N.Y. 1957)).

it as a fundamental right,[73] and characterizing it as "the most important relation in life"[74] that is "fundamental to [our] very existence and survival."[75]

The interest in protecting sufficiently important relationships, however, inevitably conflicts with the interest in a successful criminal justice system based on truth-finding.[76] The Supreme Court has recognized this conflict.[77] In *Trammel*, for example, it acknowledged the need to balance these competing interests in its decision to scale back the ATP.[78] It observed that the pre-*Trammel* scope of the ATP goes well beyond making "every man's house his castle," and allows an individual to make his house "a den of thieves."[79] In other words, it "secures every man one safe and unquestionable and ever ready accomplice for every imaginable crime."[80]

By contrast, the Court has emphasized that when Congress created the Federal Rule of Evidence 501 on privilege,[81] it intended to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis, and to leave the door open to change."[82] A court's ability to re-define privileges and recognize new ones, combined with the deeply-rooted interest in protecting family relationships and modern perceptions of such relationships, suggest that marital privileges could be well-situated for change.

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73. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (recognizing the right to marry as "of fundamental importance for all individuals" and as "part of the fundamental 'right of privacy'") (quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965)); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) (identifying "[m]arriage and procreation [as] fundamental to the very existence and survival of the race"); Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

74. Maynard v. Hill, 125 U.S. 190, 205 (1888).

75. *Skinner*, 316 U.S. at 541.

76. Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

77. Trammel v. United States, 445 U.S. 40, 47–50 (1980).

78. *Id.* at 52.

79. *Id.* at 51–52 (quoting 5 Rationale of Judicial Evidence 340 (1827)).

80. *Id.* at 52 (quoting 5 Rationale of Judicial Evidence 338 (1827)).

81. FED. R. EVID. 501.

82. *Trammel*, 445 U.S. at 46 (quoting 120 CONG. REC. 40,891 (1974) (statement of Rep. Hungate).

III. THE STATISTICS AND RIGHTS AND OBLIGATIONS OF COHABITANTS

A. The Rising Popularity of Cohabitation

Cohabitation is an increasingly popular alternative to marriage in the United States. The relative importance of marital versus non-marital relationships has undergone significant transformation in the last 50 years, and increasing numbers of couples are cohabitating rather than marrying.[83] Cohabitating couples include both couples legally eligible to marry who choose not to (homosexual and heterosexual), and homosexual couples who are legally ineligible to marry in their state. Both groups of cohabitants are steadily gaining legal and societal acceptance.[84]

The cultural and societal movements of the 1960s provided an environment conducive to cohabitation. The Vietnam War and the Civil Rights Movement created a sharp contrast to the traditional and conservative society of the 1950s. The counterculture attitude of the times "produced a new world in which the vision of sex without reputational harm became a reality."[85]

The number of unmarried cohabitants is increasing, but still pales in comparison to the married population.[86] The percentage of married adults has fallen in the last decade, "from fifty-seven percent in 2000 to fifty-two percent in 2009."[87] In 2008, there were approximately 5.6 million opposite-sex unmarried cohabitants and approximately 415,000 same-sex unmarried cohabitants in the United States.[88] The number of unmarried same-sex couples in 2008 increased by 75,000 couples since 2000.[89] Approximately 55.6 million opposite-sex couples and a mere 32,000 same-sex couples were reported as married in 2008.[90] That year, more than 80,000 same-sex couples

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83. *See infra* notes 85–90 and accompanying text.

84. *See The Legal Rights of Unmarried Cohabitants in Maryland*, WOMEN'S LAW CTR. OF MD., 7 (2002), http://www.wlcmd.org/pdf/UnmarriedCohabitants.pdf.

85. Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 312 (2008-2009).

86. Gary J. Gates, *Same-Sex Spouses and Unmarried Partners in the American Community Survey,2008*, THE WILLIAMS INST., Appendix (Sept.23, 2009), http://www.escholarship.org/uc/item/72t806m7.

87. Erik Eckholm, *Saying No To 'I Do,' Economy In Mind*, NEW YORK TIMES, Sept. 29, 2010, at A15, *available at* 2010 WLNR 19313508.

88. Gates, *supra* note 85, at Appendix, Table 1. *Id.* at 2.

89. *Id.* at 2.

90. Gates, *supra* note 85, at Appendix, Table 1. *Id.* at 3.

entered into a civil union, or registered as domestic partners or reciprocal beneficiaries.[91]

Despite the increase in cohabitation, cohabitating relationships do not have the longevity or stability of marriages.[92] A majority of first-time premarital cohabitants marry within five years (although this number is declining), but only ten percent of the couples who do not marry within this time frame are still together after the five-year cut-off.[93] The median duration of cohabitation is less than a year and a half.[94] By contrast, eighty percent of first marriages last at least five years, and two-thirds of that eighty percent last for ten.[95] The National Marriage Project asserts that couples who cohabitate before marriage are more likely to divorce after getting married.[96] The discrepancy in duration can be explained partially by characteristics typical of cohabitants.[97] In contrast to married couples, cohabitants are less likely to have children, less likely to become financially or emotionally dependent on each other, and place less value on commitment and fidelity.[98]

B. Rights and Obligations Of Cohabitants

A number of states have recently extended the rights and obligations typically associated with marriage to cohabitating couples.[99] They often refer to an unmarried couple's ability to make important decisions and provide for one another.[100] These rights and obligations are open to all qualifying cohabitating couples in a majority of the states, although some states limit such protections to

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91. *Id.* at i.

92. LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE 38–46 (Broadway Books 2000).

93. Martha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. Rev. 815, 839 (2004–05).

94. Martha Garrison, *The Decline of Formal Marriage*, 10 J.L. & FAM. STUD. 279, 289–90 (2007).

95. *Id.*

96. David Popenoe & Barabara D. Whitehead, *Should We Live Together? What Young Adults Need to Know about Cohabitation Before Marriage*, http://www.smartmarriages.com/cohabit.html (last vistited on Oct. 29, 2010) (citing the 1987 National Survey of Families and Households).

97. WAITE & GALLAGHER, *supra* note 93, at 39–40.

98. Garrison, *Decline of Formal Marriage*, *supra* note 95, at 290.

99. *See Marriage Equality & Other Relationship Recognition Laws*, HUMAN RIGHTS CAMPAIGN (Oct. 29, 2010, TIME), http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf (map summarizing same-sex marriage/civil union statutes).

100. *See, e.g.* OR. REV. STAT. ANN. §106.355.

same-sex couples (who are precluded from marrying).[101] Other states offer protections to all couples that meet certain qualifications.[102]

Many of the states that provide benefits to unmarried partners have an ex-ante registration system in which couples must enroll in order to be eligible for rights and obligations.[103] The New Jersey Civil Union Registry is typical of such a system.[104] To be eligible for benefits, a couple must file a form declaring that they share a common residence, agree to be jointly responsible for each other's basic living expenses during the partnership, are jointly responsible for each other's common welfare as evidenced by joint financial arrangements or joint ownership of property, are not married or in another domestic partnership, are not related by blood in a way that would prevent them from marrying, choose to share in each other's lives in a committed relationship of mutual caring, have not terminated another domestic partnership within the last 180 days, and are the same sex and both over the age of eighteen, or both over sixty-two if they are an opposite-sex couple.[105] Once registered, the extent of rights afforded to registered partners varies among states.[106]

Most states require a valid marriage for access to the marital privileges regardless of the scope of rights afforded to unmarried couples. Oregon and Washington are the only states whose domestic partnership statutes specifically declare that the rights and obligations conferred upon domestic partners include access to marital privileges.[107] Conversely, the domestic partnership laws in Maine and

101. Oregon and Hawaii have statutes that afford protections explicitly to same-sex couples; Maryland, Colorado, Maine, Rhode Island, Wisconsin, and Nevada allow any two unmarried persons who satisfy the other requirements to be eligible for marriage-like benefits; New Jersey and Washington provide protections for same-sex couples and opposite-sex couples over the age of sixty-two. OR. REV. STAT. § 106.340 (2009); HAW. REV. STAT. §572C-1 (LexisNexis 2010); MD. CODE ANN., Health – General, § 6-101 (West 2009); COLO. REV. STAT. § 15-22-104 to -105 (West 2005 & Supp. 2009); ME. REV. STAT. ANN. tit. 22, § 2710 (West 2004 & Supp. 2009); R.I. GEN. LAWS ANN. § 5-33.2-24(4) (West 2010); WIS. STAT. ANN. § 40.02 (West 2002 & Supp. 2009); NEV. REV. STAT. § 122A.100 (LexisNexis 2010); N.J. STAT. ANN. § 26:8A-1 (West 2002); WASH. REV. CODE ANN. § 26.60.030 (West 2005 & Supp. 2010).

102. *Id.*

103. *See infra* notes 106–07 and accompanying text.

104. N.J. STAT. ANN. §§ 26:8A-1; 37:1-31a (West 2002 & Supp. 2008).

105. *Id.*

106. Marriage Equality & Other Relationship Recognition Laws, *supra* note 100.

107. Mark Glover, *Evidentiary Privileges for Cohabitating Parents: Protecting Children Inside and Outside of Marriage*, 70 LOUISIANA L.R. 751, 775 (2010). *See* OR. REV. STAT. § 106.340 (2009); WASH. REV. CODE ANN. § 5.60.060 (West 2009 & Supp. 2010).

Hawaii expressly state that registered partners do not have access to martial privileges.[108]

Courts have historically denied an unmarried couple's right to marital privileges.[109] They typically dismiss an unmarried individual's request to invoke a privilege due to lack of a valid marriage.[110] The Fourth Circuit reiterated this rule in 2010 when it rejected an appellant's claim that the trial court erred in admitting his former wife's testimony.[111] The court simply held that the appellant's ATP claim failed because the parties were divorced at the time of the trial and there was no formal, legal relationship between the couple.[112]

Three United States Circuit Courts, however, have adopted an exception to the MCP's bright-line rule that a couple must be married at the time of the communication to be eligible to assert the privilege.[113] When the couple is separated at the time of the communication, the Court of Appeals for the Second, Sixth and Ninth Circuits have held that a district court should "make a factual finding as to whether the spouses were permanently separated at the time of the questioned communication."[114] If the court finds that the couple was not permanently separated, the couple has access to the MCP. The

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108. *See* ME. REV. STAT. ANN. tit. 22, § 2710 (Supp. 2008) (creating a domestic partnership registry); ME. R. EVID. 504 (providing only spouses with the marital privileges).

109. *See* Lane v. State, 364 N.E.2d 756, 760 (Ind. 1977) (refusing to let defendant's girlfriend claim the MCP at the defendant's trial even though the couple considered themselves married).

110. *See* United States v. Acker, 52 F.3d 509, 514–15 (4th Cir. 1995). *See, e.g.*, Barajas v. State, 627 N.E.2d 437, 439 (Ind. 1994) (stating that the trial court did not err when it allowed a woman that the appellant married while he was married to his first wife to testify against him. *Id.* at 438–39. In making this decision, the court relied on a previous Supreme Court of Indiana case, *Lane v. State*, 364 N.E.2d 756 (Ind. 1977), that held that "privilege is accorded only to those who maintain the legal relationship of a man and wife." *Id.* at 760); Davis v. State, 103 P.3d 70, 82 (Okla.Crim.App. 2004) (upholding trial court's decision granting admission of statements over appellant's objection because the couple had not established "by clear and convincing evidence" that they were married).

111. United States v. Medina-Castellanos, 359 F. App'x 404, 406 (2010).

112. *Id.*

113. *See* United States v. Porter, 986 F.2d 1014, 1019 (6th Cir. 1993) (implying that privilege extends to a separation that is not permanent); In re Witness Before the Grand Jury, 791 F.2d 234, 238 (2d Cir. 1986) (proposing a permanently separated test whereby courts would be able to determine whether the couple is permanently separated and thus unable to legally assert privilege); United States v. Roberson, 859 F.2d 1376, 1381 (9th Cir. 1988) (stating that, when privilege is questionable because the married couple is separated, the district court should decide whether the couple had been separated at the time of communication, and then, if the district court finds that the couple was separated, it should investigate whether the couple could have reconciled, taking into account things such as length of separation and strength of the marriage when communication took place).

114. *Porter*, 986 F.2d at 1019 (citing In re Witness Before the Grand Jury, 791 F.2d 234, 238 (2d Cir. 1986), and *Roberson*, 859 F.2d 1376, 1381 (9th Cir. 1988)).

Sixth Circuit justified its departure from the bright-line rule by explaining that "[t]his factual determination will not place an unreasonable fact-finding burden on trial courts. It should prove to be no more difficult than the many other such fact-finding calls which district courts must make under the Federal Rules of Evidence."[115]

C. The Rights and Obligations of Cohabitating Couples vis-à-vis Third Parties

States are inconsistent in their willingness to grant unmarried couples rights and obligations with respect to third parties. A clear example of this is in loss of consortium ("LC") claims, where most courts have refused to allow an unmarried cohabitant to recover damages from a third party tortfeasor for injuries sustained by his or her partner.[116]

In *Elden v. Sheldon*,[117] the California Supreme Court denied recovery for negligent infliction of emotional distress ("NIED") and LC to a man who witnessed the tortuous injury and death of his cohabitant partner.[118] In that case, an engaged, cohabitating couple was riding together in a car when it collided with the defendant's car.[119] The decedent, Linda Eberling, was thrown from the car and killed.[120] Richard Elden, Eberling's fiancé, sued defendant Robert Sheldon for NIED and LC due to Eberling's death.[121]

The court gave three reasons for its refusal to allow Elden to recover damages based on NIED and LC claims: the state's interest in promoting marriage, the administrative burden that allowing such actions would impose on the courts, and the need to limit the consequences for negligent acts.[122] First, it explained the state's interest in marriage by emphasizing the importance of the formal marriage requirement, which is consistent with the state's abolition of common law marriage and is "rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society."[123]

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115. *Porter*, 986 F.2d at 1019.

116. *See, e.g.*, Elden v. Sheldon, 758 P.2d 582, 588 (Cal. 1988); Mega Life and Health Ins. Co. v. Superior Court, 92 Cal.Rptr.3d. 399, 403 (Cal. Ct. App. 2009).

117. 758 P.2d 582 (Cal. 1988)

118. *Elden*, 758 P.2d at 582.

119. *Id.*

120. *Id.*

121. *Id.* at 582–83.

122. *Elden*, 758 P.2d at 586–88.

123. *Id.* at 587 (quoting Laws v. Griep, 332 N.W.2d 339, 341 (Iowa 1983)).

Second, the court emphasized the administrative burden that fact-intensive inquiries would place on courts.[124] Allowing such claims "would require a court to inquire into the relationship of the partners" to determine whether the relationship was sufficiently equivalent to a marriage or other familial relationship capable of recovery.[125] The necessary investigation would include components such as sexual fidelity, financial ties, and emotional commitment to one another.[126] It would also include intangible factors that would fail to provide a "sufficiently definite and predictable test" for courts to use to ensure consistent application from case to case.[127]

Finally, the court expressed concern about a "ripple effect" of consequences for negligent defendants, absent limits on the number of persons to whom they owe a duty of care.[128] While it acknowledged the temptation to give legal rights to people with close emotional ties to the victim, it opted in favor of a bright-line rule because of the difficulty courts would face in determining which relationships were eligible for legal rights.[129] If the court was to extend liability to other types of close relationships, the "problems of multiplication of actions and damages. . .would place an intolerable burden on society."[130] The vast majority of subsequent state court decisions have relied on or used the same analysis as *Elden* in denying both NIED and LC claims brought by cohabitants.[131]

A few recent cases, however, have distinguished *Elden* and allowed unmarried partners to obtain "spousal" benefits against third parties. These holdings carry minimal weight, however, because the

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124. *Elden*, 758 P.2d at 587.

125. *Id.* (arguing a need to determine whether there was an emotional attachment between the parties and whether the relationship was stable and significant (internal citations omitted)).

126. *Id.*

127. *Id.*

128. *Id.* at 577–78.

129. *Id.* at 588.

130. *Id.*

131. *See, e.g.*, Milberger v. KBHL, Inc., 486 F.Supp.2d 1156, 1163, 1167 (D.Haw. 2007) (holding that victim's fiancé lacked standing to bring NIED and LC claims because fiancé was not "closely related" enough to the victim); Grotts v. Zahner, 989 P.2d 415, 416 (Nev. 1999) (holding that victim's fiancé lacked standing to bring NIED claim); Lindsey v. Vistitec, Inc. 804 F.Supp. 1340, 1343-44 (D.Wash. 1992) (holding that victim's fiancé was not entitled to bring a NIED claim because she was not an immediate family member); Rodriquez v. Kirchhoefel, 26 Cal.Rptr..3d 891,,892 (Cal. Ct. App. 2005) (holding that only blood or martial relatives can bring NIED claims); Trombley v. Starr-Wood Cardiac Group, OC, 3 P.3d 916, 922-23 (Alaska 2000) (holding that unmarried cohabitants cannot bring LC claims); Feliciano v. Rosemar Silver Co., 514 N.E.2d 1095, 1096 (Mass. 1987) (holding that an LC claim cannot be raised by a person who has not accepted the "correlative responsibilities of marriage").

party seeking recovery was in an easily identifiable, status-based relationship with the victim, either as a registered domestic partner or a fiancé.[132] One such court distinguished between domestic partners and couples who merely cohabitate, reasoning that "domestic partners, like 'formally married couples,' have been 'granted significant rights and bear important responsibilities toward one another which are not shared' by couples who cohabit or who have not registered as domestic partners.[133] Furthermore, the "practical considerations" favoring marriage are also served by domestic partnerships because a registered domestic partnership "provides a readily verifiable method of proof for determining eligibility for services and benefits."[134]

Some courts have allowed recovery for the parallel tort of NIED to individuals with a close relationship to the victim.[135] As in *Elden*, these two tort claims are often brought together.[136] They are different, however, in that recovery for NIED provides compensation "for the emotional shock caused when a person actually witnesses the injury of a loved one, not for the later harm to the relationship" that characterizes an LC claim.[137] A few courts have allowed people other than spouses with close family relationships to the victim to bring NIED claims.[138] Parents, siblings, and grandparents have been entitled to legal recourse, but first cousins and best friends who alleged a relationship "akin to" a sibling have been denied recovery.[139]

Most of the cases that have rejected *Elden* and granted recovery for NIED to a cohabitant partner have done so only when the partner was engaged to the victim. In the 1993 case of *Dunphy v. Gregor*, the New Jersey Supreme Court issued a landmark decision granting recovery for NIED to a woman bystander who witnessed the

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132. *See, e.g., Koebke v. Bernardo Heights Country Club*, 115 P.3d 1212, 1223–24 (Cal. 2005) (lesbian registered domestic partners entitled to club benefits previously reserved for married couples); In re Rabin, 359 B.R. 242, 248–49 (Cal. 2007) (domestic partners entitled to joint filing of bankruptcy petition and payment of single fee).

133. *Koebke*, 115 P.3d, at 1223–24.

134. *Id.* at 845.

135. *See* Dunphy v. Gregor, 642 A.2d 372, 380 (N.J. 1994); Richmond v. Shatford, CA 941249, 1995 WL 1146885, at *3 (Mass. Super. Aug. 8, 1995) (holding that a NIED plaintiff is not required to have a legally recognized familiar relationship with the victim).

136. Alisha M. Carlile, *Like Family: Rights of Nonmarried Cohabitational Partners in Loss of Consortium Actions*, 46 B.C. L. REV. 391, 404 (2004–05).

137. *Id.* at 404.

138. *See e.g.*, Leong v. Takasaki, 520 P.2d 758, 766 (Haw. 1974).

139. *See* Trapp v. Schuyler Constr., 197 Cal.Rptr. 411, 412 (Cal. Ct. App. 1983) (refusing to extend NIED to friends); Kately v. Wilkinson, 195 Cal.Rptr. 902, 906–07 (Cal. Ct. App. 1983) (refusing to extend NEID to first cousins); Walker v. Clark Equip. Co., 320 N.W.2d 561, 563 (Iowa 1982) (extending NIED to siblings); Genzer v. City of Mission, 666 S.W.2d 116, 122 (Tex.App. 1983) (extending NIED to grandparents).

death of her fiancé, with whom she cohabitated.[140] The court emphasized the importance of a marital or intimate familial relationship between the plaintiff and the injured person for a bystander-claimant to recover for NIED.[141] The court noted that the relationship between the victim and the bystander must be deep and intimate to justify compensation to the bystander.[142] Specifically, "the genuine suffering which flows from such harm" must be significantly greater to the bystander than "the setbacks and sorrows of everyday life, or even to the apprehension of harm to another, less intimate person."[143]

In contrast to *Elden*, the *Dunphy* court rejected the bright-line rule limiting recovery to bystanders who are spouses or blood relatives of the victim.[144] Instead, it held that tort law principles require an analysis of the duty of care owed by the defendant based on the facts, and that such a duty rests on fairness, not on the legal status of the relationship.[145] It held that "one can reasonably foresee that people who enjoy an intimate familial relationship with one another will be especially vulnerable to emotional injury resulting from a tragedy befalling one of them."[146] The standard for foreseeability, therefore, supports the conclusion that "persons engaged to be married and living together may foreseeably fall into that category of relationship" that is "deep, lasting and genuinely intimate," which makes the bystander partner capable of suffering "indelibly stunning emotional injuries."[147]

The *Dunphy* court agreed with the dissent in *Elden*, holding that "a standard based on the significance and stability of the plaintiff's relationship is workable and fair," and maintained that the courts are "capable of dealing with realities, not simply the legalities of relationships" to determine whether a cohabitating partner's emotional injury is "genuine and deserving of compensation, and the task of the inquiry into the relationship 'poses no special obstacles' in

140. 642 A.2d 372, 380 (N.J. 1994). Eileen Dunphy and her fiancé Michael Burwell were changing a tire on the side of the road when a car negligently driven by defendant Gregor hit Burwell and dragged him hundreds of feet. *Id.* at 373. Burwell died a short time later, and Dunphy filed a claim for NIED for having witnessed the accident that caused his death. *Id.*

141. *Id.* at 380.

142. *Id.*

143. *Id.* at 374 (quoting Partee v. Jaffee, 84 N.J. 88, 98–99 (1980)).

144. *Dunphy*, 642 A.2d at 374.

145. *Id.* at 377 (citing Carey v. Lovett, 132 N.J. 44, 57 (1993)).

146. *Id.* at 377.

147. *Id.* (quoting Dunphy v. Gregor, 642 A.2d 372 (N.J. 1994)).

a bystander liability case."[148] It criticized the *Elden* court for choosing administrative simplicity over fair results, noting that "to foreclose such a plaintiff from making a claim based upon emotional harm because her relationship with the injured person does not carry a particular label is to work a potential injustice, not only in this case but also in too many others."[149]

The *Dunphy* opinion identifies factors that a jury should consider in order to determine the intimacy and familial nature of a cohabitation relationship.[150] These factors include the duration of the relationship, degree of mutual dependence, extent of common contributions to a life together, extent and quality of shared experience, cohabitation living arrangements, emotional dependence on each other, particulars of their day-to-day relationship, and the manner in which they related to each other in attending to life's mundane requirements.[151] The court found that Dunphy indeed shared an intimate, familial-type relationship with Burwell that entitled to her to recovery for NIED even though she was not legally related to him.[152] A small number of courts have followed *Dunphy* and allowed a fiancé to make a claim for NIED.[153]

The outlier *Dunphy* case helped set the stage for the 2003 decision in *Lozoya v. Sanchez*, where New Mexico became the first and only state to date to allow an unmarried cohabitant to bring a claim for LC.[154] Sarah Lozoya sought compensation for injuries suffered in a car accident by her cohabitant partner, Ubaldo Lozoya.[155] At the time of the accident, the couple had been together for thirty years and had three children.[156] They owned their home jointly and

148. *Id.* at 377–78 (quoting Elden v. Sheldon, 758 P.2d 582, 593 (Cal. 1988) (Broussard, J., dissenting)).

149. *Id.* at 378.

150. *Dunphy*, 642 A.2d at 378.

151. *Id.*

152. *Id.* at 380.

153. *See, e.g.*, Yovino v. Big Bubba's BBQ, LLC, 896 A.2d 161, 165 (Conn. Super. Ct. 2006) ("the relationship between an engaged couple may be the basis of a claim" for bystander NIED); Graves v. Estabrook, 818 A.2d 1255 (N.H. 2003) (allowing fiancé of motorcyclist killed in accident to bring a NIED claim). *But see* Richmond v. Shatford, No. CA941249, 1995 WL 1146885, at *3 (Mass. Super. Aug. 8, 1995) (acknowledging that a woman who lived with but was neither engaged to, nor a registered domestic partner of the victim could not recover on a claim for NIED).

154. 66 P.3d 948, 954 (N.M. 2003); Alisha M. Carlile, *Like Family: Rights of Nonmarried Cohabitational Partners in Loss of Consortium Actions*, 46 B.C. L. REV. 391, 409 (2004–2005).

155. *Lozoya*, 66 P.3d at 951–52.

156. *Id.* at 952.

filed joint tax returns.[157] Both Sarah and Ubaldo testified about how their physical and emotional relationship worsened dramatically after the accident.[158]

The *Lozoya* court held that legal status should not be the dividing line for LC claims.[159] Accordingly, Sarah Lozoya's relationship with Ubaldo entitled her to bring an action for compensation.[160] The court considered cases from other states that held that an unmarried partner could not sue for LC, but ultimately decided that "[e]ase of administration. . .does not necessarily further the interests of justice" and the court must "consider the purpose" behind the claim.[161] Moreover, the person bringing the cause of action seeks recovery for injury to a "*relational* interest, not a legal interest."[162] Dependence on a strict legal standard excludes from recovery many people who have suffered a loss to their relationship interest equally devastating as a loss suffered by a legal spouse.

The *Lozoya* opinion agreed with *Dunphy* in rejecting a bright-line rule in favor of a factual investigation determining whether a claimant is owed a duty of care.[163] If the claimant proves she is in an "intimate familial relationship" with the victim, then it is foreseeable that the defendant would owe her a duty of care.[164] The court found that Ubaldo and Sarah's relationship was "very similar, if not identical, to that of the typical married couple."[165] The court also mentioned that while New Mexico does not recognize common law marriage, the couple would have easily met the test for it, which strengthened Sarah's position for an LC claim.[166]

The Supreme Court of New Mexico, however, recently limited the application of *Lozoya*. It declined to follow *Lozoya* in holding that domestic partners are not included in the definition of "family members" for automobile insurance contracts;[167] New Mexico does not have a registration system for domestic partners. It reasoned that

157. *Id.*

158. *Id.*

159. *Id.* at 954–55 (agreeing with the court in Dunphy v. Gregor, 642 A.2d 372, 376, 378 (N.J. 1994), that it should not be guided by a 'bright-line' rule when deciding loss of consortium claims).

160. *Id.* at 961.

161. *Id.* at 954–55.

162. *Id.* at 955.

163. *Id.* (citing Dunphy v. Gregor, 642 A.2d 372, 376, 378 (N.J. 1994)).

164. *Id.* at 958.

165. *Id.*

166. *Id.* at 957–58.

167. Hartford Ins. Co. v. Cline, 139 P.3d 176, 178 (N.M. 2006).

even though its holding in *Lozoya* "recognizes an important relational interest," that decision "was not intended to confer general contractual rights to domestic partners similar to those contractual rights enjoyed by married couples."[168]

IV. RECOMMENDATIONS

The differences between the MCP and the ATP have led this author to make different recommendations for the two privileges. The following section concludes that the MCP should be extended to unmarried cohabitants, and the ATP should not be extended to unmarried cohabitants unless they are registered partners.

A. The Marital Communications Privilege Should be Extended to Unmarried Cohabitants.

The MCP should be extended to unmarried cohabitants. Doing so is consistent with the purpose behind the privilege, the tendency among states to extend rights and obligations between cohabitating couples, and does not create a significant administrative burden on courts.

1. Public Policy Rationale Supports Extending the MCP to Unmarried Cohabitants.

The policy arguments that support an MCP for married couples apply equally to cohabitants. Both types of relationships benefit from the purpose behind the MCP, which is to protect the harmony of a relationship throughout its duration. States have an interest in protecting cohabitating relationships because, as the New Jersey legislature explained, "[t]hese familial relationships assist the State by establishing a private support network for the financial, physical, and emotional health of their participants." Cohabitants make "important material and non-economic contributions. . .to each other, and to the State."[169]

States that have an established registration system for cohabitants are sending a strong signal that they have an interest in protecting these relationships.[170] The Washington domestic partnership statute, for example, states that "the rights granted to state registered

168. *Id.* at 179.

169. Domestic Partnership Act, N.J. STAT. ANN. §26:8A-1 (West 2007) (effective July 10, 2004).

170. *See supra* note 102 (listing states with registration systems).

domestic partners. . .will further Washington's interest in promoting family relationships and protecting family members[.]"[171] Furthermore, the fact that the majority of state statutes do not specify a sexual orientation requirement for cohabitants suggests that these states view cohabitation as an option that is as equally desirable as marriage, not as a subpar alternative for those who cannot marry.

The MCP allows couples to communicate freely and intimately with one another without fear of future backlash. It is more conducive to change with respect to its scope than the ATP because the purpose of the MCP is rooted in maintaining meaningful relationships. By contrast, the purpose behind the ATP is wholly status-based, a characteristic that makes changing the scope of the ATP more difficult.

Additionally, invocation of the MCP does not have as far-reaching implications as the ATP. A witness who holds this privilege may still be required to take the stand; however, he or she may not disclose confidential communications.[172] The defendant cannot stop the witness from testifying about matters other than the privileged statements. The MCP does not infringe on the search for truth the way the ATP does as a total bar to testimony.

Extending the MCP to cohabitants is consistent with the public policy supporting communication-based privileges. Courts have expressed a willingness to expand communication-based privileges that serve public goals and will not hamper the truth-finding process in an unacceptable way.[173] Just as the *Jaffee* Court reasoned that counseling services provided by psychotherapists and social workers "serve the same public goals" and distinguishing between them "serves no discernible public purpose," extending the MCP to unmarried cohabitants is a logical next step.[174] Similarly, distinguishing between married and unmarried individuals "who share an important, personal, emotional, and committed relationship with another adult"[175] likewise serves no discernible public purpose.[176] In sum, extending the MCP to unmarried cohabitants is consistent with the purpose of the MCP to preserve relationships, and the policy

171. WASH. REV. CODE ANN. § 26.60.2010 (West 2007).

172. *See, e.g.*, MD. CODE ANN., CTS & JUD. PROC. § 9-105 (West 2002).

173. Jaffee v. Redmond, 518 U.S. 1, 9-10 (1996); *see supra* Part II.

174. *Id.* at 16.

175. Domestic Partnership Act, N.J. STAT. ANN. §26:8A–1 (West (2007) (effective July 10, 2004).

176. *Jaffee*, 518 U.S. at 16.

behind doing so is analogous to circumstances where other communication-based privileges have been expanded.

2. Extension of the MCP is Consistent with the Trend Among States to Extend Rights Between Unmarried Couples.

Extension of the MCP privilege also aligns with the trend among states to grant rights and obligations to cohabitants. State-granted rights and obligations imply a sense of mutual support between a couple where, like spouses, partners can make important decisions for one another.[177] The MCP furthers this notion, as it fosters mutual support between parties in a relationship by allowing them to openly exchange information throughout the relationship.

3. Extension of the MCP Would Place a Minimal Administrative Burden on Courts.

The absence of a substantial administrative burden that would result from factual inquiries tips the scales in favor of extending the MCP to cohabitants. Certain areas of criminal law, family law, and tort law demonstrate that courts can, and do, inquire into the nature of the relationship in order to determine the appropriate outcome of an action.

Criminal courts already conduct factual investigations with respect to the MCP. They must conduct a factual inquiry to determine whether a marital communication was "communicative" in nature and whether it was "confidential" in order to apply the MCP.[178] In addition, they must examine the individual facts of a relationship to determine application of the MCP in situations where the reconcilability of the marriage is questionable.[179] The factors a judge uses to determine irreconcilability, including duration of the relationship and stability at the time of the communication, could also be used to determine an unmarried couple's eligibility for the privilege.[180] The *Elden* dissent emphasized this point in rejecting a bright-line rule for third party tort injuries.[181] It argued that courts and juries regularly make sensitive factual determinations, and they are

177. *See supra* Part III.B.

178. *See, e.g.*, United States v. Lewis, 433 F.2d 1146, 1150–51 n. 22 (D.C. Cir. 1970) (explaining that in "particular contexts," *Id.* at 1150, acts can be communicative, and that to resolve the issue of whether the communication was confidential, "a preliminary examination of the spouse-witness . . . .is wholly in order." *Id.* at 1151 n. 22 (quoting Sacks v. Sacks, 124 F.2d 527 (D.C. Cir. 1941))).

179. *See supra* Part I.B.

180. *See supra* note 33.

181. Elden v. Sheldon, 758 P.2d 582, 592-93 (Cal. 1988) (Broussard, J., dissenting).

perfectly capable of doing so in other situations, such as in LC cases.[182] Even for a married couple, the judge and jury must consider evidence "concerning the quality and nature of the plaintiff's relationship with his or her partner before and after the injury."[183] Therefore, the same inquiry is necessary whether or not the couple possesses the legal status of marriage.[184]

Granted, courts only conduct these inquiries when there is doubt as to the validity of the marriage, and they would have to conduct them more regularly in order to determine whether an unmarried couple qualifies. The key fact, however, is that these judges know how to conduct such inquiries. The number of MCP investigations will undoubtedly increase, but it will not require a judge to learn a new skill, as would be the case with the ATP. An elaborate inquiry will not be necessary when a couple has registered as domestic partners.

Areas of family law provide guidance that can help ease administrative concerns over a MCP extension. For example, states could require that a couple prove a "marital-type relationship" [185] to be eligible for the privilege. In *Devaney v. L'Esperance*, a judge considered numerous factors when deciding whether an unmarried partner had a valid claim for palimony.[186] Palimony would be justified in a situation where there existed a promise to support, and a "marital-type relationship," as opposed to "a dating relationship."[187] To establish a "marital-type relationship," the judge considered the extent of cohabitation, time spent together, commingled property, shared living expenses, and whether the couple held "themselves out to the public as husband and wife."[188] The American Law Institute ("ALI") provides factors similar to the *Devaney* factors in its proposed principles to determine rights and obligations of unmarried partners upon dissolution of the relationship.[189]

182. *Id.*

183. *Id.* at 592.

184. *Id.* at 593–94.

185. Devaney v. L'Esperance, 949 A.2d 743, 744 (N.J. 2008).

186. *Id.* at 750–51. "Palimony" refers to a right to financial support arising from cohabitation. *See* Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 315 (2008-2009).

187. *Id.* at 744.

188. *Id.* at 750.

189. *Compare Principles of the Law of Family Dissolution: Analysis and Recommendations*, 2002 A.L.I. § 6.03 *with* Devaney v. L'Esperance, 949 A.2d 743, 750–51 (N.J. 2008).

The factors articulated in *Dunphy* and *Devaney* provide a framework for a cohabitant's ability to invoke the MCP.[190] Given that the purpose behind the MCP is more relationship-focused than the ATP, the *Dunphy* and *Devaney* factors provide applicable guidance favoring extension of the MCP to unmarried couples.

The growing number of cohabitating couples and the willingness of courts to accommodate their relationships in various areas of the law suggest that they should also be recognized in the criminal law context of the MCP. States that have registration systems for cohabitants should use an individual's status as a registered partner as a basis for access to the MCP. Courts in states that do not have such a system should adopt the *Dunphy*, *Devaney*, or ALI factors to guide their factual inquiries to determine which cohabitants may invoke the MCP.

B. The Adverse Testimonial Privilege Should Not be Extended to Unmarried Cohabitants.

Extending the ATP to unmarried cohabitants will not serve an interest so important that it overrides the public interest in every man's evidence.[191] The stakes in criminal trials are higher than in the civil realm due to the risk of the guilty going free, and, as public policy compels, states must proceed with extreme caution when meddling with the fair administration of justice.[192] Arguments analogous to the majority view in the third party tort cases,[193] domestic violence concerns, and administration burdens tip the scales against extending this privilege to unmarried couples. While compelling spousal testimony might seem contrary to our societal values that promote familial preservation, the Supreme Court is correct when it contends that "it may just be the cost of doing justice."[194]

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190. *See Devaney*, 949 A.2d at 750–51 (N.J. 2008); Dunphy v. Gregor, 642 A.2d 372, 375–80 (N.J. 1994).

191. Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting) (stating that the rule governing admissible evidence in federal courts is that deep need of society to be entitled to every man's evidence).

192. *See, e.g.* Jaffee v. Redmond, 518 U.S. 1, 19 (1996) (Scalia, J., dissenting) (stating it is "our duty to proceed cautiously when erecting barriers between us and the truth").

193. *See supra* Part III.C.

194. Dan Markel et al., *Criminal Justice and the Challenge of Family Ties*, 4 U. ILL. L. REV. 1147, 1205 (2007).

1. The Problems with Extending the ATP to Unmarried Couples are Analogous to Third Party Tort Cases.

The issues associated with extending the ATP parallel the issues considered in the cases that disfavor extending rights to third-parties. In those cases, courts were reluctant to grant rights to cohabitants where there was significant third party interest involvement.[195] The *Elden* line of cases represents the vast majority viewpoint among states, which gives *Elden* substantially more weight than the few cases that have granted rights to third parties.

The reasoning in *Elden* applies directly to the ATP. Two of the arguments made by the *Elden* court are particularly analogous to the privilege debate: the need to limit consequences for defendants, and the need to avoid placing additional administrative burdens on courts.[196]

Just as the *Elden* court refused to extend a duty of care owed to someone not foreseeable to the driver, a witness should not be entitled to invoke the ATP where such invocation is not foreseeable by the public. Cohabitation itself is a relatively new cultural trend and its numbers are small in comparison to the married population.[197] With cohabitation still in its infancy, an unmarried cohabitant's claim of access to the ATP is neither widely understood in society nor intuitive to the public. Prosecutors and law enforcements officers are unlikely to anticipate use of the privilege by an unmarried witness when preparing cases and should not be blindsided by a court extending a right to an unforeseen third party.

Most of the cases that purport to distinguish *Elden* by holding that a fiancé or a registered domestic partner satisfies the foreseeability standard nevertheless maintained a status-based standard.[198] These cases suggest that the engagement or registered partnership was a key component in the decision to grant rights to the bystander fiancé, and that the holding would have been different if the couple had not been engaged at the time of the accident.[199] The *Dunphy* court explained that "[p]ersons engaged to be married and living together may foreseeably fall into that category of relationship" that is "deep, lasting, and genuinely intimate," and thus eligible for third party

195. *See supra* Part III.C.

196. *See infra* Part IV.A.3 for discussion on administrative burdens.

197. *See supra* Part III.A.

198. *See* Dunphy v. Gregor, 642 A.2d 372, 375–80 (N.J. 1994). *See* Koebke v. Bernardo Heights Country Club, 115 P.3d 1212, 1223 (Cal. 2005); In re Rabin, 359 B.R. 242, 247 (B.A.P. 9th Cir. 2007); Yovino v. Big Bubba's BBQ, LLC, 896 A.2d 161, 164–67 (Conn.Super.Ct. 2006).

199. *See Dunphy*, 642 A.2d at 377

rights.[200] The high break-up rate and short duration of cohabitating relationships indicate that non-engaged cohabitants are unlikely to be considered as having such a relationship.[201]

A Connecticut court provided an explanation similar to *Dunphy*, but added that giving a fiancé standing to make an emotional distress claim "does not open up the floodgate for litigants."[202] Rather, "the 'closely related' condition remains an exacting requirement that still bars" other strangers, friends and relatives.[203] Similarly, a California court granted third party rights to unmarried partners in a discrimination suit, but emphasized that the couple's registration as domestic partners was an important factor in its analysis.[204] Such decisions that distinguish *Elden* are narrow in scope and ultimately rely on a couple's status as engaged or registered. They minimize *Dunphy's* weight and limit its application to *Lozoya*.[205]

The decisions of the courts that have granted third party rights to unmarried partners in tort cases are distinguishable from the criminal cases in which the ATP applies. In the tort cases, the judge can make the factual determination about the relationship at the same time he or she considers the factual issues related to liability.[206] Extending an evidentiary privilege, on the other hand, requires a separate fact-intensive determination that delays a trial.[207] Thus, the impact of extending the ATP is likely greater than the impact of extending third party rights to unmarried partners in tort cases.

2. Prevalence of Domestic Violence in Unmarried Relationships Cuts Against Extension.

One of the areas where the ATP has the most dramatic effect is in domestic violence cases.[208] Victims of domestic abuse often drop

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200. *Id.*

201. *See supra* notes 87–92 (providing statistics on the length of cohabitating versus marital relationships).

202. Yovino v. Big Bubba's BBQ, LLC, 896 A.2d 161, 166 (Conn.Super. Ct. 2006).

203. *Id.* at 166–67.

204. Koebke v. Bernardo Heights Country Club, 115 P.3d 1212, 1216, 1225–27 (Cal. 2005).

205. Lozoya v. Sanchez, 66 P.3d 948, 955 (N.M. 2003). An unreported Massachusetts case also follows *Dunphy*. *See* Richmond v. Shatford, No. CA941249, 1995 WL 1146885, at *2–3 (Mass. Super. Aug. 8, 1995).

206. *See supra* Part I.c.

207. *See supra* Part I.b.

208. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE L.J. & FEMINISM 3, 15 (1999) (explaining that prosecutors believed they could not convict a defendant if the victim refused to testify and cooperate).

charges or invoke the ATP and refuse to testify against the defendant spouse for reasons including intimidation, fear of retaliation, and fear of loneliness.[209] In these situations, a prosecutor is likely to drop the case entirely because he or she believes it will not result in a conviction without the victim's cooperation.[210] Given that domestic violence "is rarely a one-time event" and often "increases in frequency and severity over time," a victim's use of the ATP and the prosecutor potentially dropping the case encourages the already-likely recurrence of domestic violence.[211]

High domestic violence rates among unmarried couples cut strongly against the argument to extend the privilege to such couples.[212] Rights and obligations for unmarried cohabitants are more easily justified in a civil context, where the consequences of such rights have a minimal impact on society. In the criminal venue, however, society pays a higher price if a victim's invocation of the privilege enables a guilty defendant to go free and commit a subsequent act of violence.

Studies have shown that incidents of domestic violence are significantly higher among unmarried cohabitants than among spouses.[213] A survey conducted by the National Crime Victimization Survey reported that two-thirds of "acts of intimate violence against women" were committed by boyfriends rather than husbands.[214] Boyfriends, ex-boyfriends, or ex-spouses committed twenty-one percent of all rapes against women in 1992–93, while husbands committed five percent.[215] In 2008, thirty-one percent of domestic violence victims in Maryland were married (primarily wives), while forty-three percent were females assaulted by male cohabitants.[216]

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209. *Id.*

210. *Id.*

211. *Id.* at 7.

212. *See infra* notes 218-223 and accompanying text.

213. WAITE & GALLAGHER, *supra* note 93, at 155 (citing 1987-88 National Survey of Families and Households; emphasizing that this fact is consistent throughout various types of research "regardless of methodology").

214. *Id.* at 155. The National Crime Victimization Survey's definition of "intimate violence" excludes "violence committed by those casual dating partners a woman considers 'friends' or 'acquaintances,' rather than boyfriends." *Id.* While this study is somewhat outdated (conducted in 1992-1993), it is cited because it is the only legitimate study this author could find that differentiates between married and unmarried victims of domestic violence. Current studies almost exclusively cite rates of "intimate partner violence," a term that includes both married and unmarried individuals.

215. *Id.*

216. *Domestic Violence*, CRIME IN MARYLAND: 2008 UNIFORM CRIME REPORT 53, 57 (2009), *available at* http://www.mdsp.org/downloads/2008_Crime_In_Maryland.pdf (last visited Oct. 29, 2010). In 2008, 18,926 domestic violence crimes were reported, but these

Approximately three percent of the cohabitant victims were involved in same-sex relationships.[217] Another study concluded that "married people are much less likely than cohabitating couples to say that arguments between them and their partners had become physical in the past year."[218]

There are various explanations as to why domestic violence is more prevalent in cohabitating relationships. One theory holds that a cohabitant's place in society fuels physical aggression.[219] Researcher Jen Stets argues that cohabitants feel a sense of social isolation where they are "less integrated into networks of kin and community."[220] Under these circumstances, the roles and expectations of cohabitants "are particularly ill-defined[,] as are social expectations about the nature and purpose of their relationship."[221] A partner's ambivalence about the societal expectations he is expected to meet could provide him with an excuse to be less committed, or more violent, than if he were a spouse.[222]

Another theory contends that a boyfriend or girlfriend might be more violent than a spouse because he or she has less to lose.[223] The knowledge that a cohabitating relationship is not considered by society to be as serious and committed as a marriage suggests that aggression is not as costly for cohabitants as it is for spouses.[224] If the aggression causes the relationship to terminate, "they will not suffer as much as married people, who have a greater long-term interest and may lose

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numbers could be much higher in reality because only an estimated twenty-five percent of domestic violence incidents are reported to the police. *Domestic Violence in Maryland*, MARYLAND NETWORK AGAINST DOMESTIC VIOLENCE, *available at* http://www.mnadv.org/DV_Stats/ucr_stats.html (last visited on Oct. 29, 2010). *See also* MD. CODE ANN., FAM. LAW § 4-501 (West 2006) for the definition of abuse.

217. *Domestic Violence*, *supra* note 217, at 57. *But see* Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Share While Risking Negative Stereotypes*, 8 TEMP. POL. & CIV. RTS. L. REV. 325, 330 & n.23 (1999) (asserting that while there is limited empirical work on the issue, domestic violence rates among same-sex couples are similar to the rates for heterosexual couples: an estimated twenty-five percent to thirty-three percent of "same-sex relationships involve physical or psychological abuse"). Knauer notes that these numbers indicate "that an individual in a same-sex relationship is more likely to be abused by his or her partner than beaten in an act of anti-gay violence." *Id.*

218. WAITE & GALLAGHER, *supra* note 93, at 155 (citing 1987–88 National Survey of Families and Households).

219. *Id.* at 156.

220. *Id.* at 156–57.

221. *Id.* at 157.

222. *Id.*

223. *See* Jan E. Stets, *Cohabiting and Marital Aggression: the Role of Social Isolation*, 53 JOURNAL OF MARRIAGE AND THE FAMILY, 669, 677 (1991).

224. *Id.*

more materially, socially, and psychologically if the relationship ends."[225]

A third theory holds that lack of a firm commitment to the relationship may increase domestic violence as a result of sexual jealousy.[226] Women in a cohabitating relationship are eight times more likely to be unfaithful than married women, and cohabitating men are four times more likely to cheat on a partner than a spouse.[227] An unwed woman's infidelity often triggers domestic violence, as doubts about paternity cause boyfriends to become violent towards their pregnant girlfriends.[228] This cycle helps to explain "the enormously high levels of violence directed at unwed pregnant women by their boyfriends."[229]

Regardless of why domestic violence is more prevalent in cohabitating relationships than in marriages, the statistics reflect the potential cost of extending marital privileges to unmarried cohabitants. Allowing unmarried couples in abusive relationships to assert a marital privilege means that prosecutions will be more difficult and, arguably, significantly more abusers will go free. Furthermore, an abuser's knowledge that he is unlikely to be convicted because he can convince the victim to invoke the privilege, could increase domestic violence incidents among unmarried cohabitants, while decreasing convictions.[230]

Some states have amended their ATP statutes to weaken or eliminate the ATP in domestic violence cases by including provisions that compel a witness spouse to adversely testify if the defendant is charged with domestic violence.[231] In Connecticut, a victim/witness spouse "may. . .be compelled to testify in the same manner as any other witness."[232] In Maryland, such a victim spouse may be compelled to testify if: (1) the defendant was previously charged with assault of the spouse; (2) the spouse was sworn to testify at the previous trial; and (3) the spouse refused to testify at the previous trial

225. *See id.*

226. DAVID M. BUSS, THE EVOLUTION OF DESIRE: STRATEGIES OF HUMAN MATING 129–31 (1994).

227. Stets, *supra* note 224, at 679.

228. WAITE & GALLAGHER, *supra* note 93, at 157.

229. *Id.*

230. *See, e.g.*, Louise Ellison, *Prosecuting Domestic Violence without Victim Participation*, 65 MOD. L. REV. 834, 846 (2002).

231. *See generally*, Debra T. Landis, "Crimes against spouse with an exception permitting testimony by one spouse against other in criminal prosecution," 74 A.L.R. 223 (1989).

232. CONN. GEN. STAT. ANN. § 54–84a (West 2009).

based on the ATP.[233] The Maryland provisions are problematic, however, because they require specific circumstances that likely exclude many victims of domestic violence. Where mandated spousal testimony is so narrow in application, it does little to combat the problem of the ATP serving as a mechanism to keep domestic violence victims silent.

The problem of *married* victims refusing to testify is already so great that prosecutors are attempting to create ways to convict an abuser without relying on witness testimony, a daunting task considering most episodes of domestic violence take place in the privacy of a home without other witnesses.[234] Some states have attempted to shift their domestic violence conviction strategies in favor of "victimless prosecutions," [235] but these strategies have remained limited in use and marked by criticism.[236]

Alaska and California have revised their rules of evidence to admit evidence of a defendant's prior acts of domestic violence for propensity purposes.[237] The other 48 states, however, have adhered to the historical ban on admitting such evidence. Therefore, this alternative method of proof is of little use in most domestic violence cases.

Prosecutors have also pressured state legislatures to adopt new hearsay exceptions that make admissible prior out of court statements of an absent complainant in a domestic violence case. Again however, only a small minority of states have made such a change.[238]

Some states have adopted a no-drop policy in domestic violence prosecutions.[239] Under this policy, prosecutors "view intimate violence as a crime against the state and seek to vindicate the government's interests regardless of the individual victim's wishes."[240] While the policy increases the number of annual prosecutions, critics

233. MD. CODE ANN., CTS. & JUD. PROC. § 9-106 (LexisNexis 2006). There are no comparable domestic violence provisions for the MCP in Maryland.

234. See *infra*, notes 240–42 and accompanying text.

235. Louise Ellison, *Prosecuting Domestic Violence without Victim Participation*, 65 MOD. L. REV. 834, 834, 840–41 (2002).

236. *See infra* notes 242–45 and accompanying text.

237. Andrea M. Kovach, *Prosecutorial Use of Other Acts of Domestic Violence for Propensity Purposes: A Brief look at its Past, Present, and Future*, U. ILL. L. REV. 1115, 1117, 1132–32, 1140–41 (2003).

238. Ellison, *supra* note 236, at 846–48 (referring to California Evidence Code Section 1370 states include California and Oregon).

239. Epstein, *supra* note 209, at 16.

240. *Id.*

worry that it makes victims more reluctant to call the police to a domestic abuse scene out of fear that they too will be arrested.[241]

These new approaches prosecutors are using demonstrate the need for alternative methods of proof because victims commonly refuse to testify, thereby posing a challenge to securing a domestic violence conviction.[242] From a domestic violence standpoint, expanding the ATP to unmarried couples will escalate a problem to which there is no effective solution. If extended, both victims and prosecutors will experience an additional barrier to the pursuit of justice.

3. Extension of the ATP to Unmarried Cohabitants Would Place Significant Administrative Burdens on Courts.

Extension of the Adverse Testimonial Privilege would generate significant administrative challenges to court systems. Unlike the MCP, courts do not currently conduct factual inquiries of any sort to determine whether the testimonial privilege may be invoked.[243] Extending the ATP to unmarried cohabitants would require a detailed factual inquiry focusing on the nature of the relationship.[244] Such an investigation to determine privilege-worthy relationships would both delay a trial and derail it into unfamiliar territory. Criminal judges would have to pause the prosecution of the defendant in order to probe intimate aspects of a witness' relationship to the defendant. In Maryland, where the court system handles over 3,000 criminal trials per year, there are not enough resources to accommodate such individualized, fact-based detours.[245] Conducting factual inquiries could create a judicial backlog that would jeopardize a defendant's constitutional right to a speedy trial.[246] From a practical standpoint, a bright-line rule for the testimonial privilege provides the only way to keep busy criminal courts running efficiently.

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241. Laurie Kohn, Note, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 217–18 (2008).

242. *See* Epstein, *supra* note 209, at 15 (explaining the common practice among prosecutors to drop charges "at the victim's request" because the prosecutors believed "that convictions could not be obtained without victim cooperation and testimony").

243. *See supra* Part I.b-c.

244. *See supra* Part I.c (describing the status-based nature of the ATP).

245. *2006 – 2007 Annual Statistical Abstract*, MARYLAND JUDICIARY Table CC-18 (2008), *available at* http://www.courts.state.md.us/publications/annualreport/reports/2007/2007_annual_report.pdf (last visited Oct. 29, 2010).

246. U.S. CONST. amend. VI.

The declining number of states that recognize common law marriage reflects the reluctance of courts to accept the burden of determining the existence of a relationship comparable to marriage. In the heyday of common law marriage, most states held a common law marriage valid if the parties (1) lived together, (2) held themselves out as married, and (3) mutually intended to be married.[247] Today, less than twelve states permit common law marriage.[248] One of the reasons for the trend away from recognizing common law marriage is the lack of a bright-line rule. States that abolish it indicate that they are not willing to expend judicial resources on such case-by-case factual investigations.[249] In 2003, a Pennsylvania court supported the abolition of common law marriage, expressing the need "to abandon a system that allows the determination of important rights to rest on evidence fraught with inconsistencies, ambiguities and vagaries."[250] Allowing unmarried cohabitants to exercise the ATP would resurrect the problems that courts hoped to bury by eliminating common law marriage.

A state with an ex-ante registration system for cohabitants, however, can minimize administrative concerns. The existence of such a system provides a stronger argument for extending the privilege to registered couples. Where a couple has gained domestic partner status through an ex-ante registration system, the investigatory burden no longer falls on the courts to determine if a witness may invoke a privilege as a threshold matter, thus maintaining consistency and efficiency in the court system. While only a handful of jurisdictions have expressly stated whether evidentiary privileges apply to registered domestic partners, an ex-ante system gives a judge a basis on which to hold that the mere existence of a registration is akin to the existence of a marriage. Allowing registered partners to access the privilege essentially extends the bright-line rule to include these couples without placing an additional burden on the courts.

247. *See* Douglas E. Abrams et al., CONTEMPORARY FAMILY LAW 160-61 n. 3–4 (West 2006) (providing examples of elements that courts use to determine common law marriages).

248. *See* Staudenmayer v. Staudenmayer, 714 A.2d 1016, 1020 n.3 (Pa. 1998) (collecting authorities).

249. *See* PNC Bank Corp. v. Workers' Comp. Appeal Bd., 831 A.2d 1269, 1279, 1280–81 (Pa. Commw. Ct. 2003).

250. *Id.* at 1279. Pennsylvania formally abolished common law marriage in 2005. *See* 23 PA. CONS. STAT. ANN § 1103 (West 2008).

V. CONCLUSION

The strong public policy against testimonial privileges conflicts with the purpose behind the marital privileges aimed at family preservation. When weighed against each other, the disadvantages of extending the MCP to unmarried couples are minimal. The MCP should be extended to unmarried cohabitants because it will not place undue administrative burdens on courts and is consistent with societal trends. By contrast, the costs of extending the ATP to unmarried cohabitants exceed the benefits. Administrative burdens and domestic violence concerns tip the scales against extension. These concerns, however, are minimized when cohabitants are registered partners under an ex-ante state registration system, and the ATP should be extended to these individuals.