Principles of the Law of Relationships Among Adults

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I. Introduction

The noted political philosopher Isaiah Berlin once observed that in our world, “we are faced with choices between ends equally ultimate, and claims equally absolute, the realization of some of which must inevitably involve the sacrifice of others.” It is in part because of the difficulty of resolving these disputes that liberal democracies place such emphasis on giving individuals the right to free choice, so that they can make these decisions for themselves. Yet some societal goods cannot adequately be pursued on an individual level. In these cases, again in Berlin’s words: “[t]he extent of a man’s, or a people’s, liberty to choose to live as they desire must be weighed against the claims of many other values, of which equality, or justice, or happiness, or security, or public order are perhaps the most obvious examples.”

Berlin’s observations are particularly appropriate to the regulation of intimate relationships between adults. This issue is so difficult because so many goods and principles important to a liberal democracy and to individuals themselves are at stake and, often, in tension. To what extent should the state stay out of regulating these relationships and leave them to citizens’ own freedom of choice? Or to what extent should public goods, such as equality and justice, which cannot adequately be pursued on an individual level, justify the state’s intervention in these relationships? In this essay I consider these questions. In doing so, I argue for an approach

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2. Id. at 170.
that gives both the private and public interests in intimate relationships their due. Because tradeoffs among so many important goods and principles—including individual freedom, sex and economic equality, and ensuring that children and adults receive caretaking, to give only a partial list—are implicated in relationships between adults, any viable solution must seek compromises among these goods. I offer such a compromise in the form of six principles to serve as the framework for laws regulating relationships among adults. With apologies to the Reporters of the American Law Institute’s Principles of the Law of Family Dissolution, I model the title and form of this essay on the ALI’s Principles because of their similar purpose: like the ALI’s Principles, the principles set out here seek to navigate the tension between our tradition of individual freedom on the one hand, and the recognition of the important public values served by families on the other. Like the ALI’s Principles, I seek to set out tenents that promote the law’s better adaptation to current social needs and to securing the end of justice. I doing so, these principles constitute a viable framework for harmonizing the relevant goods at stake in a manner consistent with the best of our nation’s political ideals.


4. See id., at xiii. (“The tension between the privacy tradition and the regulatory impulse is rich because both threads are grounded in the conviction that family life is fundamental to individual happiness as well as to societal success. So we honor a firmly entrenched family privacy tradition while simultaneously seeking public policies that may presuppose a shared vision of family as they aim to strengthen it.”).

5. See id.

6. My argument in this essay is premised on the view that a viable and legitimate liberal democracy must do more than further the individualistic versions of justice, liberty, and equality often presented in liberal accounts, most prominently by John Rawls. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE (1971). Although a liberal democracy should give significant weight to these important goods, it must also pay attention to the broader range of goods necessary to a healthy polity. Because of the inevitability of dependency in the human condition, it is particularly important that the state ensure caretaking and foster human development. See MARTHA FINEMAN, THE AUTONOMY MYTH (2004); EVA FEDER KITTAY, LOVE’S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY 188 (1999); JOAN TRONTO, MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE 157–80 (1993); Eva Feder Kittay, Taking Dependency Seriously: The Family and Medical Leave Act Considered in Light of the Social Organization of Dependency Work and Gender Equality, 10 HYPERIA 8, 24–25 (1995). In my view, it is only by considering this richer range of goods, and by seeking more nuanced approaches that ameliorate the tension among them, that the appropriate relationship between families and the state can be brought into focus.
II. The Principles

A. Principle One: The State Should Ensure Individuals the Freedom to Enter into Consensual Relationships

Any theory of how the state should approach the issue of regulating relationships among adults must begin by establishing a baseline threshold of individual freedom. As Justice Kennedy declared in Lawrence v. Texas, in our tradition, “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.” 7 “This as a general rule should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.” 8 It is this same intuition on which John Stuart Mill grounded his now-famous harm principle. 9 From this deeply held respect for personal freedom comes the first of the six principles: that the state must, absent some legitimate public reason, allow adults to enter into consensual relationships with other adults.

Under this first principle, adults should be guaranteed the freedom to engage, or not engage, in consensual relationships with other adults as they please, and without interference or prohibition by the state. Accordingly, the state may not delegitimize relationships and sexual activity among consensual adults, including sex outside of marriage, based solely on the private preferences of the majority. At the very least, some public rationale for such prohibitions are required. Under this principle, for example, a citizen whose vision of the good life is to have sexual relationships with as many other citizens as possible should be able to fulfill that vision without interference by the state (barring issues such as public health concerns), regardless of whether the majority’s own private views of morality condemn such action. This would prohibit state criminal statutes still on the books in several states that outlaw fornication and cohabitation outside of marriage. 10

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8. Id. at 567.
9. See John Stuart Mill, On Liberty 80 (David Bromwich & George Kate eds., Yale Univ. Press 2003) (1859) (arguing that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his own will, is to prevent harm to others.”).
Insisting on individuals’ freedom to enter into relationships helps ensure that state power will not be used to standardize citizens. It also guards against the majority using state power to impose its own beliefs on the minority without good public reasons to do so. Finally, John Stuart Mill’s counsel that society benefits from allowing different “experiments of living” to flourish also supports the state’s interest in ensuring such freedom.11

B. Principle Two: The State Should Recognize Long-Term Care-Taking Relationships for Purposes of Assigning Default Rights and Responsibilities Between the Partners

While respect for citizens’ self-determination requires that individuals be given the freedom to enter into relationships and to order those relationships as they choose, long-term care-taking relationships should be recognized by the state for the purpose of imposing such default rights and responsibilities on their members. Imposing such rights and responsibilities helps to ensure important public goods of equality and fairness in these relationships, as well as to foster care taking. Allowing couples to alter this default set of terms by specific agreement balances these public goods against the important value of individual freedom.

The interdependent nature of intimate relationships between adults, particularly when they are long-term, can create large economic inequities and imbalances of power in the absence of state recognition and regulation of these relationships. For example, in couples who have children, one member—generally, the woman—often assumes more household and child-rearing responsibilities. The other member—traditionally, the man—assumes the role of primary breadwinner. Under traditional rules governing property in the majority of states, in the absence of specific laws regulating intimate relationships, the breadwinner is legally entitled to his or her own earnings.12 This leaves the primary caretaker, who has generally received fewer earnings than the breadwinner, significantly disadvantaged financially by her contribution to the family. Because she has generally invested her human capital in the home rather than the labor market, and the skills she developed are not easily transferable outside of that relationship, if the relationship ends she will also be less well-positioned to rejoin the labor market compared with her partner, who will have invested his human capital in advancing his career and improving his

11. See Mill, supra note 9, at 122, 144. Mill’s defense of individuality and the benefits to society from allowing freedom and experimentation remain classic evocations of this cluster of values. See id. at 74, 120–21, 128.

salary. In the face of these inequities, a state’s failure to recognize the special vulnerabilities created by these relationships and to establish such laws would abandon the state’s interest in securing justice and equality in these relationships. It could also encourage those in these relationships to turn away from caretaking that supports their family’s welfare in order to look out for themselves financially, especially in the event that the relationship ends.

Those who argue that the state need not recognize these relationships, and that the parties to them should be held only to the terms of agreements they have negotiated gloss over serious difficulties with a straight contractual approach. Such an approach fails to take into account the ways in which those entering into relationships based on affective ties often fail to look out fully after their own interests rather than the other person’s (and the state may not want to encourage them to be solely self-regarding). As a result, some partners may agree to an unfair contract. Furthermore, the courses of lives and relationships are often so difficult to predict that contracts entered into *ex ante* may not fairly and justly resolve what occurs *ex post*. In addition, in a regime of contract, those in a weaker bargaining position—traditionally women—will likely negotiate less favorable terms for themselves that will lead to inequality both in the course of the relationship and also if and when it ends. For these reasons, the state’s establishment of a fair default position—for example, requiring that earnings by either partner during the relationship be owned jointly by the partners is a better alternative than requiring that partners bargain individually.

Moreover, in a regime governed exclusively by contract, even those who negotiate unfavorable contracts may be lucky compared to those who negotiate no contracts. For some, this will be because they cannot afford a lawyer; for others, this will be because the motivation to express one’s love publicly, which many would say is their motivation to enter marriage, would not similarly impel them to enter into a contract to protect themselves against their partner. If and when these relationships end, the partners would have no contractual claims against one another, again to the detriment of primary caretakers, since they would have no claim to

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15. *See* Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 954–55 (Mass. 2003) (quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965)) (“Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. ‘It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.’”).
income earned by their partners through the joint efforts of the family.\textsuperscript{16} A regime in which the state recognizes relationships among adults for the purpose of apportioning rights and obligations fairly among them therefore furthers the ends of fairness and justice.

\section*{C. Principle Three: The State Should Privilege (a Broad Range of) Long-Term Care-Taking Relationships}

Under the second principle, the state should recognize long-term care-taking relationships for the purpose of assigning default rights and responsibilities to partners. Can and should a state go further with respect to such relationships, however? Specifically, should a state privilege long-term care-taking relationships over other types of relationships because of the public goods they yield? The third principle answers this question affirmatively. Although respect for individual freedom requires the state to allow its citizens to enter into consensual relationships of their choice, it is simply not the case that the state has an equal interest in the success of all consensual relationships. Neither is it the case that respect for human dignity requires that the state treat all relationships in the same manner. Rather, long-term care-taking relationships contribute particular, important benefits to the polity because they satisfy dependency needs in a way that, for example, casual sex between two (or more) persons does not. For the state to have to treat all such relationships the same, or to prohibit the state from privileging those who contribute to important public benefits, recalls Robert Frost’s definition of a liberal as someone who cannot take his own side in an argument.\textsuperscript{17}

As feminist theorists have made abundantly clear during the last few decades,\textsuperscript{18} it is an inevitable feature of the human condition that all humans need care, even generally healthy adults. And as our society is organized, some large portion of the care that adults need will come, if it

\textsuperscript{16} It might be argued, however, that although some individuals who enter into conjugal relationships may fare worse in the event of a breakup, if status-based marriages were eliminated, many other individuals would fare better because, in the absence of such recognition from the state, they would cease to enter into conjugal relationships. And certainly Martha Fineman and other commentators have suggested that women as a group would fare better if they avoided entering into marriage or marriage-like relationships with men. \textit{See} Fineman, \textit{supra} note 6, at 135. Whether or not this is the case, my strong hunch is that ending civil recognition will have little effect on the numbers of people who enter into heterosexual conjugal relationships—they will simply do so without the imprimatur of the state, or its protections.


\textsuperscript{18} \textit{See} Fineman, \textit{supra} note 6; Kittay, \textit{supra} note 6; Tronto, \textit{supra} note 6.
comes at all, from other adults with whom we share close relationships. These relationships are, at their best, marked by what might be called “reciprocal dependency,” in which each person sometimes performs caretaking activities for the other and meets the other’s dependency needs; in turn, his or her partner does the same at other times. These affiliations, when they function well, involve countless small acts in which each adult takes care of the other: one partner makes the other a cup of coffee when they get up; the other picks up groceries on the way home from work; one runs to the store for cold medicine when the other is sick; and so on. This sort of caretaking produces a society in which adults are knit into webs of care that help them to support one another. In these webs, one partner’s cold does not develop into something worse because the other partner insists on taking them to a doctor. Moreover, this care taking helps keep families stable so that partners are there for one another at times when one of them has greater needs, such as during periods of disability. The state has an important interest in these relationships because of its interest in the dignity of its citizens, not to mention their health and well-being.

The state also has an interest in these relationships because they promote the welfare of children. All other things being equal, stable family relationships are better for children than unstable or nonexistent relationships. Further, while many of the greater difficulties associated with single-parent families can be attributed to lack of adequate legal and social supports, having the emotional and financial resources of two loving adults available to a child, again, all other things being equal, is better than having the resources of just one. This should not be taken to mean that the state should not support parents’ care taking in single-parent families: the state’s obligation to children and other dependents requires it to support care taking in whatever family forms caretaker–dependent relationships occur. Yet this duty to support the well-being of all children does not necessarily require that the state treat all family forms the same in all respects. Instead, a liberal democracy may legitimately decide that its interest in the well-being of its young citizens justifies privileging family forms that involve stable relationships among adults because these forms generally promote the capacity to meet family members’ dependency needs. The state may, in such a case, legitimately take some measures to encourage the rearing of children in these family forms, so long as it does not jeopardize the well-being of children not raised in these families.

Given that the primary reason for the state to privilege adults’ intimate relationships is care taking, the state has an interest in supporting a con-

siderably broader range of relationships than the hetero sexual couples who now enter into formal marriage. All humans, whether hetero sexual, homosexual, or asexual, need caretaking. In addition, many same-sex couples, like many heterosexual couples, have children. And the children of these same-sex parents, like the children of opposite-sex parents, are benefited by the stability of their parents’ relationships. Accordingly, it makes sense for the state to seek to stabilize and support all these types of relationships. The state has an interest in supporting, for example, long-term relationships of nonmonogamous couples, or, at the opposite end of the spectrum, those whose relationships are not sexual. By the same token, the state also has an interest in supporting care taking in family groupings that involve more than two adults. Thus, the state has valid reasons to support all of the following relationships involving care taking: two elderly sisters who live together and take care of one another, a nonmonogamous homosexual couple, a commune of five adults who live together with their children, and a heterosexual married couple.

Without minimizing the violence and other harm that sometimes occurs in relationships between adults, or ignoring the sex inequality that has marked heterosexual relationships among adults, the crux of the matter is that dependency is an inevitable fact of life for adults as well as for children, and the state must contend with that fact. Because of its interest in the health, well-being, and dignity of its citizens, the state has a vital interest in the success of relationships that foster care taking and should provide these relationships with the institutional support that will help them flourish. Given their importance, a vigorous polity can and should be able to encourage the norms of commitment and responsibility that foster caretaking.

D. Principle Four: The State Should Limit the Privileges Available to Long-Term Care-Taking Relationships

While the third principle allows the state to privilege care-taking relationships, the fourth principle limits the type and extent of privileges that the state can extend on this basis. This principle recognizes that promoting the health and stability of relationships among adults is only one goal that a flourishing society should pursue, and only one of many principles that should affect the state’s decision-making. State distribution of privileges in favor of these relationships therefore should be limited to give appropriate scope to other important principles.

20. There may be administrative rather than theoretical reasons to limit the number of persons that the state should recognize. There is, however, no necessary reason that two persons should be the limit.
One of the most important of these principles for distributing public resources is based on need. Because of economies of scale, adults in live-in relationships generally have an easier time financially than those who live alone.\(^\text{21}\) Distributing resources to adults in relationships therefore is generally a regressive measure based on need. Further, insofar as two-parent families have particular advantages that make them more conducive to rearing healthy, stable children than single-parent families, distributing privileges to dual-parent families is also regressive based on need.\(^\text{22}\) As Judith Stacey argues, “The more eggs and raiments our society chooses to place in the family baskets of the married, the hungrier and shabbier will be the lives of the vast numbers of adults and dependents who, whether by fate, misfortune, or volition, will remain outside the gates.”\(^\text{23}\)

Another principle that cautions in favor of restricting the privileges awarded based on relationships is recognition of the limits on the institutional competence of the state to encourage citizens to acquire and formalize healthy care-taking relationships. While the state can establish certain institutional preconditions and incentives to encourage couples to make relationships work, ultimately whether or not healthy relationships will develop and be sustained has a great deal to do with characteristics of the individuals involved and sheer chance, which are beyond the state’s ability to affect. Ignoring these limits on the state’s competence can cause the state to invest resources above the level at which it will have positive effects. Furthermore, awarding incentives above this level can cause citizens to enter into and remain in relationships that are truly dysfunctional and in which little care taking occurs; these are not relationships that the government has an interest in supporting.

The state’s limited competence in this area also raises the question of fairness to children who, through no fault of their own, are born or are raised outside of wedlock,\(^\text{24}\) particularly where the state’s lack of support will only make a limited difference in moving future children into marital families. Along the same lines, it raises the issue of fairness to adults. It


\(^{22}\) Distributing resources generally to families with children, however, accords with distribution based on need. As Elizabeth Warren and Amelia Warren Tyagi demonstrate, “having a child is now the single best predictor that a woman will end up in financial collapse.” Elizabeth Warren & Amelia Warren Tyagi, *The Two-Income Trap: Why Middle-Class Mothers and Fathers Are Going Broke* 6 (2003) (emphasis omitted). In their words, “married couples with children are more than twice as likely to file for bankruptcy as their childless counterparts.” Id. They are also 75% more likely to be late in paying their credit card bills than a family with no children and far more likely to face foreclosure on their homes. Id. at 6–7.


\(^{24}\) See Fineman, *supra* note 6, at 67, 110–12.
should be recognized that even if eligible citizens seek to marry, for many, entering and remaining in this institution will be beyond their control. For example, one partner may simply decide that he or she no longer loves the other partner and leave, with no fault on the part of the other partner. The state’s investing its resources only in marriage means that this wider group of citizens will, through no fault of many of its members, be ineligible for these benefits.

These considerations should cause the state to limit privileges awarded to adult–adult relationships in three specific ways. First, the state’s seeking to aid caretaking relationships between adults cannot undercut the state’s responsibility to ensure that all of its citizens have the means and opportunity to pursue dignified lives. This means, at a minimum, as Martha Fineman argues, that a just society should seek to deliver basic social goods such as health care to everyone in society, regardless of family membership. Insofar as the state distributes these goods based on marital or familial status, it neglects its most basic responsibilities. When it comes to children, the state’s duty to ensure that children have the caretaking and other resources necessary to support their well-being and develop their capabilities exists, whether or not the state believes that parents have made a wise choice about their family form. It exists even if the state fears that ensuring that today’s children have necessary resources will send the wrong signals about better and worse family forms and therefore hurt future children: the duty to support existing children is paramount. Based on this rationale, for example, it is illegitimate for the state to withhold welfare benefits to low-income families based on the mother’s having additional children out of wedlock, if doing so would deprive the children in these families of necessary resources.

Second, the state should limit privileges for relationships to those tied to the specific public goods in which the state has a legitimate interest—for example, care taking or sex equality. Singling out families for more generalized favorable treatment—while it might still further the goal of encouraging and supporting families—stands in tension with principles of fairness and equal regard among all citizens, both those within and those not in such families, particularly insofar as it redistributes economic resources to those who are, on average, better off. Under this principle, the state could allow care-taking leaves of absence from work or special immigration privileges for the partners of citizens, but not general tax breaks for those in care-taking relationships that are unrelated to the extra expenses incurred in care taking. Thus the state would have little justification for funnelling general economic support to those in adult–adult relationships,

25. See id. at 284–85.
given that these adults, on average, do better financially due to the economies of scale of living together. In contrast, economic redistribution to caretaker-dependent relationships could be better justified by the consideration of the cost to caretakers of caring for dependents, including the interruption from working continuously in the paid work force.

Third, the state should seek to promote relationships among adults in ways that, as far as possible, do not create a “zero-sum game” in which some important values and principles are traded off against others. Developing such policies will, however, require careful attention to the ways in which relevant goods may conflict. By this criterion, the state’s seeking to further two-parent families by awarding them economic resources not awarded to single-parent families is a peculiarly poor tool to harmonize these goods. Not only would doing so keep resources from the very families who need them most, it also risks stigmatizing the very children who are most vulnerable. The state would do better to seek measures that do not pose such a stark tradeoff among goods. For example, the state could encourage multiple-parent families through job training programs and educational subsidies for youths who are at risk of becoming parents, since studies show that increasing the prospects for young adults’ futures makes it significantly less likely that they will bear children while they are young and single.26 Such programs do not pit the important interests of current children against the important interests of future children, and they also have the virtue of increasing equal opportunity.

The state should deal in a similar manner with proposals to shore up the institution of marriage (or whatever categories of adult–adult relationships the state recognizes). Proponents of marriage have proposed a number of policies recently to strengthen the institution, including making divorce more difficult through a return to fault-based divorce laws, adopting covenant marriage provisions, requiring premarital counseling, and even awarding bonuses for marriages where no premarital abortions occurred.27 In choosing policies to strengthen the health and permanence


27. See, e.g., Marriage Restoration Fund, H.B. 1917, 89th Gen. Assem. (Mo. 1999) (proposing that couples who marry after attaining the age of twenty-one, without having had any children or (in the woman’s case) any premarital abortions, and having tested negative for sexually transmitted diseases, be paid $1,000 from a fund, that would be raised by assessing a $1,000 fee against parties whose actions provided the grounds for a divorce); Ariz. Rev. Stat. § 25-901 to 25-906 (2000 & Supp. 2004) (covenant marriage provision); Ark. Code Ann. § 9-
of adults’ relationships, the state should here, too, seek to avoid policies that require large tradeoffs among important goods. In this light, tightening up divorce laws through a return to fault-based divorce, despite furthering the state’s interest in promoting marriage, severely infringes on citizens’ autonomy interests.28 The state would therefore do better to adopt proposals such as premarital counseling requirements that would avoid this stark tradeoff of goods. By the same token, as Linda McClain argues, many marriage promotion policies risk perpetuating sex inequality within marriage.29 Given that women more often seek divorces than men, as Katharine Bartlett points out, the state could usefully support such relationships by encouraging men to be better partners through assuming an equal share of housework and care work.30 Such measures would infringe less on individual’s autonomy than stricter divorce laws and, at the same time, increase sex equality. These also better recognize the limits of the state’s institutional competence to deal with the complexities of these relationships. By restricting divorce, the state can make it more difficult for individuals to get out of marriage, it cannot, however, keep affection and care taking alive within such relationships.

E. Principle Five: The State Should Provide Routes to Formalize Long-Term Care-Taking Relationships

The fifth principle recognizes that one important way that the state can

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28. Covenant marriage laws, in which individuals getting married can choose whether or not heightened standards will apply at divorce, pose less of a conflict among important goods. See supra note 27. Given the small number of couples who choose to enter into covenant marriage where it is available, though, as well as the problems with requiring parties to remain in a marriage that one party wants to exit, the state would be wise to seek alternative policies. In Louisiana, 2%, in Arizona, 0.25%, and in Arkansas, only seventy-one out of approximately 38,000 marrying couples elected covenant marriage. See Scott Drewianka, Civil Unions and Covenant Marriage: The Economics of Reforming Marital Institutions 3 (2003), http://www.uwm.edu/~sdrewian/MEApaper2003.pdf.


legitimately foster long-term care-taking relationships among adults, in accordance with the limits established in the fourth principle, is through a civil route by which adults can formalize their commitments. Formal commitments increase the likelihood that a relationship will last. They also serve as an expressive vehicle through which the state can announce its support for stable care-taking relationships without redistributing tangible privileges in favor of such relationships and, hence, away from those who might need them more.

The state’s making available a route through which citizens can formally commit to the permanency and depth of their relationship furthers the state’s interest in increasing the stability of familial care-taking relationships. As Elizabeth Scott explains:

The social norms and conventions surrounding marriage influence spousal behavior in a variety of ways that reinforce the stability of the relationship. For example, the wedding ceremony and accompanying traditions can be understood as a public announcement of an important change in status. The ceremony usually includes the couple’s exchange of vows and declaration of commitment before friends and family. Symbolically at least, this represents an expression of each spouse’s willingness to be held accountable for the faithful performance of marital duties, not only by the other spouse, but also by the broader community. Marital status also signals to the community that spouses are not available for other intimate relationships, and thus discourages outsiders interested in intimacy from approaching married persons.

The formality of marital status, together with the requirement of legal action for both entry into marriage and divorce, clarifies the meaning of the commitment that couples are making and underscores its seriousness. The package of substantive legal obligations that goes with the formal status of marriage serves independently to promote stability in the relationship.

Providing a route for couples to formalize their commitments therefore increases the likelihood that members of couples will provide one another with the care that each needs, establish a stable relationship in the event of children, and try hard to weather the difficult times with their partners.

31. The Law Commission of Canada’s important report argues that there are a broad range of relationships that could benefit from the stability and certainty provided by state formalization of their relationships. See Law Commission of Canada, Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships, available at http://www.lcc.gc.ca/about/conjugality_toc-en.asp (last modified Feb. 7, 2005). It argues that the government should “provide an orderly framework in which people can express their commitment to each other, receive public recognition and support, and voluntarily assume a range of legal rights and obligations.” Id. at 113.


The state’s endorsement of formal commitments is still not, of course, without cost to those who do not enter them: to the extent that the state endorses such commitments, those who take other paths may feel a lack of societal respect, or even societal disapprobation. However, given the importance of care-taking relationships, the stability that such formalization contributes to these relationships outweighs the costs of this potential stigmatization.

A more difficult issue regarding formalization concerns the form or forms that the state should make available to formalize intimate relationships. Specifically, should the state make available a single status, such as “domestic partnership,” for all formalized adult intimate relationships? Or should the state make available a number of different formalized statuses for different types of relationships? In the latter case, the state would presumably continue to formalize some relationships as “marriages,” (which, out of justice and fairness, as well as for the goods associated with them, would need to be expanded to same-sex couples), while also formalizing other types of relationships, such as domestic partnerships between friends who cohabit.

Each of these two courses has significant benefits and costs. Grouping all adult–adult relationships into a single legal status for purposes of state recognition has the advantage of guarding against the possibility that any particular subcategory of relationship, particularly marriage, would be unfairly privileged in the political process as against other such relationships. By the same token, clustering different types of relationships together into the same legal category would send a strong message that marriage occupies no paramount place in the legal hierarchy, announcing clearly that there are a number of ways that care-taking relationships can be forged and maintained in society, all of which should be equally respected.

Yet this approach comes with two significant downsides. First, it would keep the state from tailoring the particular obligations and benefits assigned to that status to the type of care-taking relationship at issue. For example, when a child is born to or adopted by one of the parties within a conjugal relationship, it makes sense to accord a presumption of parent-hood and right to adopt to the other partner. There is less reason to accord such a presumption in a nonconjugal caretaking relationship, however. The same is true for inheritance rights: as a default matter, it makes sense to assign a presumption that conjugal partners intend their partner to inherit (in the absence of agreements to the contrary), since most individuals in such relationships leave their estates to their partners.34 It may

34. See J. Thomas Oldham, What Does the U.S. System Regarding Inheritance Rights of
make less sense to apply this presumption to other types of long-term caretaking relationships.

Second, although moving away from the category of marriage has the benefit of eliminating marriage as the privileged category, it has the related disadvantage that much of the positive cultural resonance associated with marriage—the notion that the institution is a serious, long-term bond of commitment based on love between two people who come together and take one another permanently as family—will also be lost. Eliminating marriage as a recognized category may therefore weaken the resolve of those in relationships to work through rough periods. It could also dissuade those who would otherwise have married from formalizing their relationships, since the new form of formalization the state adopts will not have the same cultural resonance that swearing one’s love through marriage does. This could leave many of those made vulnerable by intimate relationships without the legal protection of the default rules that could otherwise apply.

The alternative of retaining a conjugal status such as marriage, but also recognizing other formalized categories of relationships has the benefit of retaining the cultural and legal force associated with marriage and the accompanying benefits of stabilizing this category of relationships through the relevant social and legal norms. This alternative would also allow the state to tailor a specific bundle of rights to the particular type of relationships at issue. For example, the state could adopt a formalized legal status for partners (not necessarily limited to two) who live together but are not involved in a sexual relationship, including adult siblings; for couples who do not live together but are in a long-term, committed care-taking relationship; and more. The downside of this approach, however, is that it runs the risk that marital relationships will continue to be perceived as superior to other relationships and disproportionately assigned privileges.

At the level of theory, in my view, there is no clear winner between these two alternatives—each has its own set of benefits and costs. At the level of political reality, though, our society is so invested in the value of marriage that eliminating civil marriage is well nigh impossible. As a result, those who seek to topple marriage from its pedestal as the preferred family form and to increase the regard for a broader category of relation-

35. See Scott, supra note 32, at 241–45.
36. See id.
ships would likely do better to focus their attention on decentering marriage by proliferating other categories of status relationships among adults, rather than seeking to eliminate marriage as a civil status and replacing it with a civil partnership category. This strategy of broadening the categories of relationships that receive legal protections and support and distributing a subset of the bundle of rights now received by marriage among these different relationships is not only the most pragmatic course to take, given existing political realities, but a course that serves the interests of freedom and diversity. Disaggregating the privileges awarded based on the ranges of goods at issue also helps deconstruct the monolithic notion of “The Family” and the orthodoxy surrounding it. This approach makes clear that there are many kinds of relationships that contribute many different public goods, and that no one-size-fits-all family is the ideal.

F. Principle Six: The State Should Guard Against Negative Consequences Associated with Supporting Relationships

The sixth, and final, principle states that in privileging caretaking relationships between adults, the state must also seek to remedy the negative consequences to important public goods associated with these relationships. Three of these possible consequences bear particular attention: increased sex inequality, increased inequality of wealth and opportunity, and disengagement from civic life. I discuss each in turn.

1. Sex Inequality

Any proposals that the state should promote intimate care-taking relationships must deal with the fact that heterosexual relationships, particularly in their sanctioned form of marriage, have been deeply intertwined with women’s inequality. At common law, marriage was an institution premised on the hierarchical ordering of husband and wife, in which different rights and responsibilities were assigned based on gender. Over time, this institution has gradually been stripped of its explicit gender

40. William Blackstone, who wrote an authoritative treatise on the laws of England, described the institution of marriage at common law in the following way: “By marriage,” he wrote, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing . . . . Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabili-ties, that either of them acquire by the marriage.
ordering. Yet both the cultural resonance still attached to marriage and the failure to adjust societal norms that reward only those so attached to the workplace that they require partners at home who will take care of their households continue to place women in heterosexual relationships at a disadvantage to men. The outmoded gender roles associated with marriage are also reinforced by those states that retain marriage’s gender-based entry requirements—now all but Massachusetts.

Leaving current political realities aside, the state might deal with the troubling association between sex inequality and heterosexual relationships by privileging only nonheterosexual relationships, such as homosexual relationships or platonic relationships. Alternatively, and far more palatable politically, the state could privilege heterosexual relationships along with other relationships, at the same time that it seeks to increase the equality within these relationships. One way to pursue this latter course would be for the state to adopt policies that encourage the shared caretaking of children within families, since much gender inequality is associated with women assuming the greater portion of childrearing responsibilities. To accomplish this goal, the state could adopt models of public support for care taking that in fact as well as form, encourage men to take an equal role. For example, the state might require that employers adopt family leave and flextime policies that give each parent separate leave time, rather than cumulative leave time, which would be lost if the parent failed to take leave. Public schools, too, could play a role in this endeavor, teaching children that both fathers and mothers should have equal roles in nurturing their children and helping them to understand the importance of these care-taking tasks. In Anita Shreve’s words, “the old home economics courses that used to teach girls how to cook and sew might give way to the new home economics: teaching girls and boys how to combine work and parenting.”

William Blackstone, 1 Commentaries on the Laws of England 430 (1825); see also Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (Bradley, J., concurring) (“So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state . . . .”).

41. See, e.g., Stanton v. Stanton, 421 U.S. 7, 10, 14, 15 (1975) (rejecting the “notion” that “generally it is the man’s primary responsibility to provide a home and its essentials” and noting that “[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas”) (citation omitted).

42. See Scott, supra note 32, at 237.

43. See Bartlett, supra note 30, at 844–45.

2. **INEQUALITY OF WEALTH AND OPPORTUNITY**

Second, the state’s encouragement of tighter family ties runs the risk that wealth will be more tightly held within particular families’ hands, therefore increasing disparities of wealth and consequently, opportunities across families.\(^{45}\) What this threat to equality calls for is not state efforts to loosen family ties, but rather efforts to lessen the disparities of wealth and opportunity that result from these ties through mechanisms such as taxation. In doing so, the state should ensure that all citizens have the financial means and education to achieve (at the very least) some basic threshold of opportunity, even when their families cannot provide this without aid. It also means, at the other end of the income spectrum that the state should seek to reduce, although probably not completely eliminate, disparities in wealth continuing between generations. As Michael Walzer argues, there are significant reasons to allow family members to express their love through bequests to family members, as well as significant reasons to tax these bequests for reasons of equality and funding legitimate state expenditures.\(^{46}\) Walzer concludes, rightly, in my view, that the state should moderate between these goals by giving some weight to each when determining the extent of taxation of such gifts.\(^{47}\)

3. **FAMILIES AS A RESPITE, NOT AN ISLAND**

Finally, the state should also seek to encourage intimate partners to serve as a source of support, but not be islands unto themselves. The social circles of adult Americans have narrowed dramatically in the past decades. Increasingly, adults are turning toward their families and away from developing the close ties with friends and broader social networks in neighborhoods and communities that a healthy liberal democracy requires.\(^{48}\)


\(^{47}\) Id.

\(^{48}\) A study by sociologists at Duke University and the University of Arizona, comparing data from 1985 and 2004, found that the mean number of people with whom Americans can discuss matters important to them dropped by nearly one-third, from 2.94 people in 1985 to 2.08 in 2004. Miller McPherson, Lynn Smith-Lovin & Matthew E. Brashears, *Social Isolation in America: Changes in Core Discussion Networks Over Two Decades*, 71 Am. Soc. Rev. 353, 353 (2006). The study shows that citizens have turned away from close ties formed in neighborhood or community contexts and toward relationships with close kin, especially spouses. *Id.* at 358, 371. In the same time period, the percentage of people who talk to at least one person outside of their family about important matters decreased from about 80% to about 57%, while the number of people who depend totally on their spouse has increased from about 5% to about 9%. *Id.* at 359. The studies’ authors suggest that this narrowing of interpersonal relationships poses risks for the health of the polity given links, emphasized by scholars such as Robert Putnam, between interpersonal ties, membership in voluntary associations, civic participation, and levels of trust among citizens. *Id.* at 354, 366. See also Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community* (2000).
Some substantial part of this change appears to be fueled by the increasing time bind in which American families find themselves. Mothers’ increased labor-force participation, combined with the increasing hours that all employees work, as well as longer commutes, place American families under far greater time constraints than their European counterparts. The influx of women into the workforce in the last four decades means that families have added ten to twenty-nine hours working outside the home per week. However, recent time-analysis studies suggest that adults in families still spend roughly the same number of hours each week caring for children. This leaves parents far less time for socializing with other adults and for community activities than they once

49. See McPherson, Smith-Lovin & Brashears, supra note 48, at 373.

50. Between 1960 and 2000, employment of married mothers nearly tripled overall, with the employment rates for mothers with children under six increasing the most rapidly. See Janet C. Gornick & Marcia K. Meyers, Families That Work: Policies for Reconciling Parenthood and Employment 27–28 (2003). All told, women’s participation in the labor market rose from 28% in 1940 to 60% in 2000. Id. at 27.

51. In 2002, men worked forty-nine paid and unpaid hours per week at all jobs, an average of two more hours than men worked in 1977. Families and Work Institute, Generation & Gender in the Workplace 27 (2002), available at http://familiesandwork.org/eproducts/gendergender.pdf. Women’s increase in work has been even greater. Id. Women now work an average of 43.5 paid and unpaid hours per week at all jobs, compared with thirty-nine hours in 1977. Id. Americans report the longest annual work hours of any in the industrialized world, 1966 hours, compared to Sweden at 1552, France at 1656, Germany at 1560, and the United Kingdom at 1731. Gornick & Meyers, supra note 50, at 59.

52. According to the Bureau of Labor Statistics, United States workers spend an average of 3.7 hours per week commuting to and from the job. Gornick & Meyers, supra note 50, at 322 n.8.

53. Janet Gornick & Marcia Meyers report that American parents in two-earner families together spend an average of eighty hours a week at their jobs, compared with seventy-one hours for dual-earner couples in the United Kingdom, and sixty-nine hours per week in Sweden. Gornick & Meyers, supra note 50, at 60. They also find remarkable the high percentages of American couples with children working very long hours: “Nearly two-thirds of American dual-earner couples with children report joint workweeks of eighty hours or more.” Id. at 60–61. They note that in all eleven countries, except for Canada, no more than one-third of couples spent this much time in the workplace. Id. at 61.


55. A recent study of parents’ weekly hours reached the unexpected conclusion that since 1965, when 60% of all children lived in families with a breadwinner father and a stay-at-home mother, compared with 30% of all children today, the hours that married and single parents spend teaching, playing, and caring for children actually has risen. Pear, supra note 30. For married mothers, the time spent on child-care activities increased to an average of 12.9 hours a week in 2000, from 10.6 hours in 1965. Id. For married fathers, that time more than doubled, to 6.5 hours a week, from 2.6 hours. Id. Single mothers, too, reported an increase in child-care hours—11.8 hours a week on child care, up from 7.5 hours in 1965. Id.
This time crunch is particularly evident among the highly-educated middle class, which is the group that most contributes to voluntary community associations.

To foster the strong ties that a healthy polity requires, the state should seek to ensure strong bonds among citizens and communities in conjunction with supporting familial caretaking relationships. Some part of this goal could be accomplished through measures that are both family and community friendly, in the form of policies that support reducing workers’ long work hours and commuting times. These include regulations to shorten the workweek for all workers, measures to ensure that part-time workers receive wage and benefit parity (including health insurance) with full-time workers, minimum mandatory vacation time, more generous—and paid—family leave, and affordable high-quality child care. They also include public transportation and zoning policies that discourage urban sprawl and its attendant long commute times.

At the same time, the state should seek to foster at least some deprivatization of the nuclear family form, as it has taken shape in the United States. The pattern of childrearing in which parents have sole responsibility for child care inside a private home isolates children and care-taking parents from the larger community. In privileging care-taking relationships, the state should seek to construct institutional arrangements that incorporate parents and dependents into the life of the community and share care-taking responsibilities within the community. Tax subsidies for co-housing developments, in which some cooking and child care are performed cooperatively, and supports for child-care cooperatives, are two measures by which the state can pursue this end.

Finally, the state should investigate means to encourage alternative care-taking networks to supplement family relationships, as well as to support care taking for those who are not, either through chance or choice, members of intimate relationships. Thus the state might support “mothers’ houses,” where single parents can raise their children more communally. It might also seek to bolster the type of informal networks among friends that helped provide caretaking for men in the gay community stricken

56. See McPherson, Smith-Lovin & Brashears, supra note 48, at 373.
57. Id.
58. These measures and more to ease work–family conflict, as well as discussions of their increased availability in Europe, are discussed in detail in Janet Gornick & Marcia Meyer’s excellent book. See Gornick & Meyers, supra note 50.
59. Co-housing is a cooperative living arrangement where a group of people band together to buy property, then design and build a cluster of single-family homes around a “common house” for shared meals, child care, recreation, overnight guests, and laundry.
60. Delores Hayden, Redesigning the American Dream 181–82 (2002).
with AIDS in San Francisco and New York City at the height of the epidemic. For example, the state could protect such care giving through protections to caregivers outside of the family similar to those offered family members under the Family Medical Leave Act (FMLA), and might subsidize such care taking through programs similar to those now used to fund foster care.

### III. Conclusion

Determining the stance that the state should take with respect to adult intimate relationships is so difficult because these relationships implicate a number of important goods that, at best, coexist uneasily with, and, at worst, conflict outright with one another. Each of these goods—individual liberty, ensuring the care taking necessary for human dignity and human development, sex and economic equality, civic fellowship—is too important to be sacrificed wholesale to any of the others. By the same token, none ranks so supreme that it should be deemed completely to trump the others. What is called for is a family policy that assembles the relevant goods together into a more nuanced set of principles that allows each of these goods to be given their due. The principles set out in this essay constitute a viable framework for achieving this goal.