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CYNTHIA GRANT BOWMAN*

INTRODUCTION

Historically, illegitimate children were punished because their parents were unmarried. The children of opposite-sex cohabiting couples are disadvantaged in similar ways today,[1] and, to a lesser extent, so are stepchildren. In another article, I have discussed the impact that the current state of family law, with respect to custody, visitation, and child support, has on impact upon these children.[2] Significant problems with respect to

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1. I limit my attention here to the children of opposite-sex cohabiting couples. I have great respect for the work done by other feminist scholars concerning the problems of children of gay and lesbian couples. While they have been covering this ground, little attention has been paid to the children of opposite-sex cohabiting couples. Moreover, some of the problems confronted by the two groups are not identical and deserve separate attention. For example, the developing jurisprudence about children of lesbian couples has primarily concerned children they have intentionally and jointly brought into being and have parented together since birth. Children living with cohabiting parents who are the biological children of only one partner, by contrast, tend to be older when the stepparent-like relationship is formed.

2. Cynthia Grant Bowman, *The Legal Relationship Between Cohabitants and*

each of these issues afflict stepchildren and children who live with a cohabiting couple, especially those who are the biological children of only one partner. In this Article, I direct my attention to the effect upon these children of current American law regarding inheritance, government benefits, and standing to bring a number of tort claims.

As of the 2010 census, about 4,560,000 children lived in households headed by opposite-sex cohabiting couples, almost six percent of all children in the United States.[3] About fifty-five percent of these children are the biological offspring of both cohabitants, and about forty-five percent are children of only one of the cohabitants—typically seventy-eight percent of the woman.[4] The overall statistics differ dramatically by race and ethnic group.[5] These families are also disproportionately found among lower-income households.[6] Tellingly, many of the cases challenging laws classifying children on the basis of illegitimacy, including both *Levy v. Louisiana*[7] and *Labine v. Vincent*,[8] were brought by African American plaintiffs.[9]

The situation of biological children of only one of two cohabitants is functionally identical to that of stepchildren, except that the unmarried stepparent is not legally obligated to support the child's parent. Many scholars believe that the distinction between stepchildren whose parents are married and those whose parents are unmarried makes little real difference and should be disregarded.[10] Social scientific studies of stepchildren and cohabitants' children support this conclusion. Married or unmarried,

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Their Partners' Children, 13 THEORETICAL INQUIRIES IN LAW 127 (2012).

3. Statistics extrapolated from *America's Families and Living Arrangements: 2010*, U.S. CENSUS BUREAU, tbl.C3, http://www.census.gov/population/www/socdemo/hh-fam/cps2010.html (last visited August 26, 2011).

4. *Id*.

5. *Id.*; *see, e.g.*, Wendy D. Manning & Daniel T. Lichter, *Parental Cohabitation and Children's Economic Well-Being*, 58 J. MARRIAGE & FAM. 998, 1002-03 (1996) (reporting that eight percent of Puerto Rican children, five percent of Mexican American and Black children, and three percent of non-Hispanic white children live in cohabiting families).

6. *See* CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 106-17 (2010); *see also* Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & FAM. STUD. 1, 10-15 (2007).

7. 391 U.S. 68 (1968).

8. 401 U.S. 532 (1971).

9. *See* Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 94-96 (2003).

10. For example, at the conference at which I presented my previous paper in December 2010 in Tel Aviv, both Israeli and American participants believed that the two groups of children—those living with married stepparents and those living with cohabiting stepparents—should be treated the same. Indeed, one Israeli scholar, Daphna Hacker, remarked that she wrote a similar paper and it never even occurred to her to distinguish between the two.

stepparents are a varied group—male and female, having their own children from previous unions or not, more and less close to their stepchildren.[11] The quality of a stepparent-stepchild relationship varies with the age of the child at the time of the remarriage or beginning of cohabitation and the length of time the two have lived together.[12] Some stepparents become very involved in the lives of their stepchildren, virtually replacing the noncustodial biological parent,[13] while others remain distanced from their partner's child; the second scenario is especially common if the child was an adolescent when the stepparent moved in.[14] The relationships between children and stepparents differ in a variety of ways from the relationships children have with biological parents with whom they have lived since birth, but studies have shown that stepchildren share these differences with children of cohabitants.[15]

In my previous article, I focused on potential and probable harms experienced by some of these children if their biological parent dies or separates from the other cohabitant or stepparent. If the biological parent dies, current law would typically remove their partner's children from the household in which they have been living, and place them in the custody of their noncustodial parent or other relatives. This potentially separates the children from their primary caretaker, from the home and neighborhood with which they are familiar, and from step- or half-siblings they have regarded as family, [16] with no presumptive right to visitation. A similar result is likely to occur if the adults separate, with particularly harmful consequences if the non-biological parent has been the child's primary caretaker.[17] Moreover, if the child's parent and his or her married or

11. *See* David L. Chambers, *Stepparents, Biologic Parents, and the Law's Perceptions of "Family" after Divorce*, *in* DIVORCE REFORM AT THE CROSSROADS 103-08 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

12. *See, e.g.*, Constance R. Ahrons, *Family Ties After Divorce: Long-Term Implications for Children*, 46 FAM. PROCESS 53, 61 (2006); Chambers, *supra* note 11, at 104-06; Maria Schmeeckle et al., *What Makes Someone Family? Adult Children's Perceptions of Current and Former Stepparents*, 68 J. MARRIAGE & FAM. 595, 597-98 (2006).

13. *See* Eric G. Andersen, *Children, Parents, and Nonparents: Protected Interests and Legal Standards*, 1998 BYU L. Rev. 935, 963 (1998); *see also* LAWRENCE H. GANONG & MARILYN COLEMAN, STEPFAMILY RELATIONSHIPS: DEVELOPMENT, DYNAMICS, AND INTERVENTIONS 128-30 (2004).

14. Chambers, *supra* note 11, at 106; Susan L. Pollet, *Still A Patchwork Quilt: A Nationwide Survey of State Law Regarding Stepparent Rights and Obligations*, 48 FAM. CT. REV. 528, 530 (2010).

15. Susan L. Brown, *Family Structure and Child Well-Being: The Significance of Parental Cohabitation*, 66 J. MARRIAGE & FAM. 351, 364 (2004) (reporting that child outcomes are similar whether a parent remarries or forms a cohabiting stepfamily).

16. Sarah E.C. Malia, *Balancing Family Members' Interests Regarding Stepparent Rights and Obligations: A Social Policy Challenge*, 54 FAM. REL. 298, 304 (2005).

17. *See, e.g.*, *In re* Bruce, 522 N.W.2d 67, 71 (Iowa 1994) (holding that a common law veto power by custodial parents over visitation between child and all third parties

cohabiting stepparent separate, sudden economic disaster may befall the child, who has no right to child support from the ex-cohabitant, even if both child and parent have depended upon the cohabitant's income.[18] Social scientific studies show that this is likely to be the case, especially for children living with a married or unmarried stepfather. Women and children gain a virtually identical income premium from either cohabitation or marriage—a gain of roughly fifty-five percent in needs-adjusted total family income.[19] If the relationship ends, women cohabitants lose about one third of their household income, leaving them with levels of household income similar to that of divorced women.[20] The impact is particularly severe upon African American and Hispanic women and their children, and may stand between them and poverty.[21] In short, the economic support children receive from their parent's partner is very important to their welfare.

In this Article, I argue that a number of legal benefits—inheritance upon death of a parent or stepparent, government benefits available upon the death or disability of the family's wage earner, and a variety of tort claims that compensate for support lost as a result of a tortiously-caused death—are the functional equivalents of support and should be available to children even if their parents chose not to marry.

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except for the other biological parent prevented the court from granting visitation to the man who had served in the role of child's father and supported her for several years); *In re* Ash, 507 N.W.2d 400, 404 (Iowa 1993) (holding that there was no basis under common law or statute to grant visitation to a man who had lived with a child for one year and exercised visitation with her for four years after cohabitation ended); *In re* Marriage of Freel, 448 N.W.2d 26 (Iowa 1989) (denying visitation to cohabiting stepmother who had served as young child's primary parent for five years, thus ending child's relationship to two half-sisters as well).

18. Children receive continued support from married stepparents only in exceptional cases. *See, e.g.*, Laurence C. Nolan, *Legal Strangers and the Duty of Support: Beyond the Biological Tie—But How Far Beyond the Marital Tie?*, 41 SANTA CLARA L. REV. 1, 4 (2000); Sarah H. Ramsey & Judith M. Masson, *Stepparent Support of Stepchildren: A Comparative Analysis of Policies and Problems in the American and English Experience*, 36 SYRACUSE L. REV. 659, 666-74 (1985) (detailing when those exceptions apply); Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 43-44 (1984).

19. *See* Audrey Light, *Gender Differences in the Marriage and Cohabitation Income Premium*, 41 DEMOGRAPHY 263, 263 (2004); Donna Ruane Morrison & Amy Ritualo, *Routes to Children's Economic Recovery after Divorce: Are Cohabitation and Remarriage Equivalent?*, 65 AM. SOC. REV. 560, 570 (2000) (noting that one study reports that children of divorced parents experience an increase of about $6,000 in their median adjusted family income if their custodial parent either remarries or cohabits).

20. Sarah Avellar & Pamela J. Smock, *The Economic Consequences of the Dissolution of Cohabiting Unions*, 67 J. MARRIAGE & FAM. 315, 324 (2005).

21. *Id*. In 2000, for example, 39.7 percent of children living with cohabiting couples were reported to be living in poverty, but this fell to 20.1 percent if the cohabiting partner's income was taken into account. Daniel T. Lichter et al,, *Child Poverty Among Racial Minorities and Immigrants: Explaining Trends and Differentials*, 86 SOC. SCI. Q. 1037, 1046 (2005).

I. INHERITANCE

If a person does not make a will, his or her heirs are dictated by the state's intestacy statute. These laws provide, almost without exception, that the dead person's estate shall go to any surviving spouse and children but do not mention cohabitants or their stepchildren.[22] Even if a person does make a will and that will makes inadequate provision for his or her spouse, the spouse can claim an elective share prescribed by statute against the will. But the United States is one of very few countries in which a person may disinherit his or her own children, so they do not receive protection similar to that given a spouse.[23] Stepchildren are mentioned in the intestacy statutes of a few states, but they stand to inherit only if there are no other heirs left to do so, including collateral heirs from the person's family of origin, and thus the property would escheat to the state.[24]

Of course, a cohabitant may make a will in favor of his or her children or partner's children, but most people fail to make wills. People do not make wills for a variety of reasons—their youth, reluctance to think about death, dislike of lawyers, or the expense, for example.[25] The disposition to make a will has been shown to vary with wealth, age, and occupation, with more educated, wealthier, and older persons more likely to do so. Sixty-five percent of those whose family income is below $75,000 did not have wills in one survey; 65.4 percent of those under the age of forty-six had no will, and 67.8 percent had no will even though they had minor children.[26] As one would expect, based on the distribution of groups who cohabit, who tend to be younger and of lower income than other couples,[27] cohabitants are especially likely to die intestate.[28] Because so few people make wills—

22. *See* LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 2-7 to 2-9 (4th ed. 2006).

23. RALPH C. BRASHIER, INHERITANCE LAW AND THE EVOLVING FAMILY 90-91 (2004).

24. *See* Lynn D. Wardle, *The Evolving Rights and Duties of Step-parents: Making New Rules for New Families*, *in* PARENTHOOD IN MODERN SOCIETY: LEGAL AND SOCIAL ISSUES FOR THE TWENTY-FIRST CENTURY 375, 382 (John Eekelaar & Petar Sarcevic eds., 1993); Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917, 920-21 (1989); Kim A. Feigenbaum, Note, *The Changing Family Structure: Challenging Stepchildren's Lack of Inheritance Rights*, 66 BROOK. L. REV. 167, 169 (2000).

25. *See* BRASHIER, *supra* note 23, at 70.

26. *See* Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 336-38 (1978); WAGGONER ET AL., *supra* note 22, at 2-1 to 2-2.

27. *See* BOWMAN, *supra* note 6, at 102-111.

28. *See* Catherine Williams et al., *Cohabitation and Intestacy: Public Opinion and Law Reform*, 20 CHILD & FAM. L.Q. 499, 500-01 (2008) (finding low rates of will making among cohabitants and persons in low socio-economic groups, blacks, and minorities in the United Kingdom). Another British study showed that only twelve percent of cohabitants made wills or changed prior wills to reflect the fact that they

or fail to change them when their living situation changes—intestacy statutes provide for post-mortem distribution to the persons generally assumed to be those to whom the decedent would have wanted to leave his or her property. Yet one should not assume from the failure of a deceased cohabitant to execute a will that he or she would prefer to leave the estate to blood relatives rather than to the surviving partner.[29]

In the absence of a will, even the biological child of a cohabiting parent may have difficulty inheriting, if that parent happens to be the father. In *Labine v. Vincent*,[30] for example, a male cohabitant died after living with a woman for seven years, during which time they had a daughter, whom he acknowledged and supported during his lifetime. When he died without a will, however, neither his cohabitant nor his child could inherit from him.[31] While the Supreme Court subsequently held, in a case involving inheritance from an unmarried mother, that a state could not preclude an illegitimate child from inheriting,[32] one year later the same court (indeed, Justice Powell wrote both opinions) held in *Lalli v. Lalli*, a case involving inheritance from an unmarried father, that a state could nonetheless require that there have been an adjudication of paternity according to some state-prescribed procedure during the father's lifetime.[33] *Lalli v. Lalli* is still good law,[34] and a number of states prescribe procedures that must have been followed during the lifetime of the father for a child of unmarried parents to inherit from him.[35] Yet in cases like *Labine* and *Lalli*, where the

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were cohabiting, even though two-thirds of the respondents to the survey thought that, after two years of living together, cohabitants should have the same intestacy rights as married spouses, even if they had no children. *See* Anne Barlow et al., *Cohabitation and the Law: Myths, Money and the Media*, *in* BRITISH SOCIAL ATTITUDES: THE 24TH REPORT 29, 43, 46 (Alison Park et al. eds., 2008). Of course, in the U.K., with its more generous welfare provisions and a provision allowing cohabitants to apply for financial provision even in the face of a will, *see infra* text accompanying note 81, cohabitants may not need to worry as much about what their loved ones will do in the event of their death as they would in the United States.

29. *See* BRASHIER, *supra* note 23, at 71.

30. 401 U.S. 532 (1971).

31. *Id.* at 537-40.

32. Trimble v. Gordon, 430 U.S. 762, 776 (1977).

33. 439 U.S. 259, 275 (1978).

34. However, the intestacy law in New York, the state where the *Lalli* case arose, has been changed to allow inheritance if there was clear and convincing evidence of paternity from genetic testing or other clear and convincing evidence and the father had openly and notoriously acknowledged the child as his own in some fashion. *See* N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(a)(2)(C) (McKinney 2010).

35. *See* Browne Lewis, *Children of Men: Balancing the Inheritance Rights of Marital and Non-Marital Children*, 39 U. TOL. L. REV. 1, 21-27 (2007); James R. Robinson, *Untangling the "Loose Threads": Equitable Adoption, Equitable Legitimation, and Inheritance in Extralegal Family Arrangements*, 48 EMORY L.J. 943, 952 (1999); *see also* Mills v. Edwards, 665 S.W.2d 153, 155 (Tex. Ct. App. 1984) (denying inheritance to daughter who had been recognized by father but not legitimated by court decree).

father was living with and supporting the non-marital child, there is little motivation to seek a formal adjudication of paternity while he is alive.

The historical reason for special rules limiting inheritance from a child's father if the parents never married was the difficulty of proving who the father was, but this rationale has been undermined by the development of modern means of genetic testing, which can determine paternity to a high degree of certainty, even after death.[36] A desire to protect the estate of a decedent's legitimate children and family was also a factor; the fear was that a hitherto unknown illegitimate child could show up and delay settlement of an estate by making a claim against the decedent's widow and legitimate children.[37] This rationale does not apply, however, in cases involving stepchildren or cohabitants where the father was in fact living with the child and mother at the time of his death.[38] Although the Uniform Probate Code regards the marital status of a child's parents to be irrelevant to the child's right to inherit, most states have not adopted its provisions in this respect.[39] Rules specifically applicable to inheritance by children of cohabiting couples need to be developed.[40]

If the child's mother were entitled to inherit, this would presumably alleviate the problem in most cases, because we could assume that the mother will use the estate to take care of the needs of her child. In this respect, stepchildren are differently situated than children of cohabitants because their biological parents are heirs. The intestacy rules of most states divide the estate between a surviving spouse and the decedent's children, who may of course not be related to one another, apparently out of fear that surviving spouses may change their minds about the objects of their bounty after their partner's death, for example, if they remarry.[41] By contrast, when a couple is unmarried, the surviving cohabitant is not entitled to

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36. Combining DNA profiling with genetic marking tests yields an accuracy of 99.999999 percent. Karen A. Hauser, *Inheritance Rights for Extramarital Children: New Science Plus Old Intermediate Scrutiny Add Up to the Need for Change*, 65 U. CIN. L. REV. 891, 946-47 (1997). However, it may be difficult to obtain an order of exhumation. BRASHIER, *supra* note 23, at 142-43.

37. *See, e.g.*, Taylor v. Hoffman, 544 S.E.2d 387, 388-89 (W. Va. 2001) (noting that a nonmarital son sued decedent's widow and daughters six months after his death).

38. *See* Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination against Nonmarital Children*, 63 FLA. L. REV. 345, 356 (2011) (pointing out the gendered nature of the assumption involved, "that nonmarital fathers who have not sought legal recognition of parental rights and responsibilities . . . are generally absent" and have no relationship to their children).

39. Lewis, *supra* note 35, at 31.

40. A very few persistent courts, nonetheless, have eventually reached a just resolution of some of these cases. *See, e.g.*, *In re* Estate of Davis, 250 S.W.3d 768, 770-71 (Mo. Ct. App. 2008) (describing how the body of the father was disinterred in 2005 to take and test DNA samples against other relatives of his father, who had died 50 years earlier).

41. *See* BRASHIER, *supra* note 23, at 97.

inherit in the absence of a will: "the law grants the survivor no share at all; the omission treats the surviving partner as no more a natural object of the decedent's bounty than a complete stranger."[42] This is true in the United States today everywhere but in a few jurisdictions, and the exceptions in those jurisdictions—common law marriage, a statute imposing a quasi-common law marriage only at death, domestic partnerships, and the committed relationships doctrine in Washington—are inadequate to address the situation of most cohabitants.

If an unmarried couple has held themselves out to be husband and wife and has that reputation, they may be found to have had a common law marriage in the jurisdictions that still recognize that status.[43] A common law spouse would qualify as an heir in those jurisdictions, and also in one state that no longer recognizes common law marriage but provides for a kind of common law marriage status applicable only at death. In New Hampshire, the relevant statute provides that "[p]ersons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of 3 years, and until the decease of one of them, shall thereafter be deemed to have been legally married."[44]

Most cohabitants today, however, do not feel the need to hold themselves out as husband and wife but, instead, openly acknowledge that they are unmarried and thus would not qualify as common law spouses. Yet case law under the New Hampshire statute shows that the statutory elements are strictly enforced.[45] A recent New Hampshire case illustrates how the elements required to establish a common law marriage or quasi-common law marriage do not fit the situation of modern cohabitants. In that case, a woman who cohabited with the decedent for over six years, shared domestic responsibilities, and gave birth to his child was denied a spousal share of his estate under the New Hampshire statute because the two had not referred to one another as husband and wife and did not represent themselves as such within the community; she said "she associated the word 'wife' with 'servant' and refused to be anyone's servant . . . [or] anybody's wife."[46]

In states that allow opposite-sex couples to register as domestic partners

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42. Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 63 (1994).

43. Alabama, Colorado, Iowa, Kansas, Montana, Oklahoma, Rhode Island, South Carolina, Texas, Utah (only if the marriage has been validated by a court or administrative order), and the District of Columbia recognize common law marriage. *See Common-Law Marriage*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/default.aspx?tabid=4265 (last visited Oct. 31, 2011).

44. N.H. REV. STAT. ANN. § 457:39 (2011).

45. *See, e.g.*, De Lisle v. Smalley, 63 A.2d 240 (N.H. 1949); Hilliard v. Baldwin, 80 A. 139 (N.H. 1911).

46. *In re* Estate of Bourassa, 949 A.2d 704, 707 (N.H. 2008).

under state statutes that include inheritance as one of the benefits of domestic partnership, a cohabitant and his or her child would be protected.[47] Most opposite-sex cohabitants do not live in states where they may register as domestic partners. At present, only Illinois, Maine, Nevada, and the District of Columbia allow opposite-sex cohabitants of childbearing age to register.[48] Moreover, the majority of cohabitants, both of the same and opposite sex, fail to register for a variety of reasons over which their children have no control.[49] Indeed, the most vulnerable groups of cohabitants are the least likely to register, making domestic partnerships an inadequate remedy for handling inheritance among cohabitants.[50]

In the state of Washington, cohabitants may be awarded an equitable share of their partner's property upon death if they qualify under the factors set forth for what were previously called "meretricious relationships" but are now called "committed relationships."[51] Washington recognizes couples who are in marital-like relationships for purposes of property distribution both upon dissolution of their union and upon the death of one partner.[52] Recent case law demonstrates, however, that it is difficult to qualify as partners for this purpose, especially in the inheritance context. Cohabitants are required to show that they satisfy a number of factors,

47. Nonetheless, domestic partners would not receive the unlimited marital deduction for property passing at death, so long as the federal Defense of Marriage Act is not declared unconstitutional. *See* Thomas P. Gallanis, *The Flexible Family in Three Dimensions*, 28 LAW & INEQ. 291, 302 (2010).

48. *See* Illinois Religious Freedom Protection and Civil Union Act, H.B. 2234, 96th Gen. Assemb., Reg. Sess. (Ill. 2011) (providing procedures for the certification and registration of a civil union); ME. REV. STAT. ANN. tit. 22, § 2710 (2011) (setting up domestic partnership registration); ME. REV. STAT. ANN. tit. 18-A, § 2-102 (2011) (giving registered domestic partners the status of a surviving spouse as an intestate share); NEV. REV. STAT., tit. 11, § 122A.200(1)(c) (2009); D.C. MUN. REGS. tit. 29, § 8000 (2011) (establishing domestic partnerships to allow cohabitants access to the rights provided by the Health Care Expansion Act); Domestic Partnership Equality Amendment Act of 2006, 53 D.C. Reg. 1035 (Feb. 17, 2006) (codified as amended in scattered sections of D.C. Code) (granting domestic partners similar rights and responsibilities to those currently held by spousal couples). Although California has domestic partnerships open to some opposite-sex couples, one member of the couple must be age sixty-two or over. CAL. FAM. CODE §§ 297-299.6 (West 2004 & Supp. 2011).

49. For example, if one partner wants to register and the other does not, there is no protection.

50. *See* BOWMAN, *supra* note 6, at 226-29; *see also* Reg Graycar & Jenni Milbank, *From Functional Family to Spinster Sisters: Australia's Distinctive Path to Partnership Recognition*, 24 J.L. & POL'Y 121, 131 (2007) ("[T]hose most vulnerable are also those least likely to formally register their relationships and legal affairs, . . .").

51. Vasquez v. Hawthorne, 33 P.3d 735, 739 (Wash. 2001) (en banc); Olver v. Fowler, 168 P.3d 348, 354 (Wash. 2007) (en banc).

52. *Olver*, 168 P.3d at 355; Connell v. Francisco, 898 P.2d 831, 837 (Wash. 1995) (en banc) (establishing the status of and setting the standard for a "meritorious" relationship in a case involving heterosexual cohabitants).

including that they pooled their resources for joint projects.[53] Recent cases have made clear that one cannot show a committed relationship in the absence of pooling resources.[54] Thus, although a cohabitant does not have to refer to his or her partner as a wife or husband in Washington, the couple still needs to have behaved economically like a couple in a traditional marriage.

Nonetheless, a child of cohabiting parents may be protected by this provision of Washington law if both cohabitants die at the same time. In *Olver v. Fowler*, a cohabiting couple died simultaneously in an auto accident, and another victim of the accident sued the father's estate for damages.[55] The Washington Supreme Court, sitting *en banc*, held that the cohabitants' surviving child should inherit the fifty percent share that would have been awarded to his mother under its case law on committed relationships.[56] Although that child would have inherited the estates of both parents in any event, holding that half of the father's estate had passed to the parent who was not driving the car shielded that money from claims in the tort action. In most cases, though, children of cohabitants will benefit only if the surviving cohabitant shares the inheritance with them.

With these few exceptions, children living in cohabiting families are virtually never able to inherit from the cohabitant who stands in the position of a stepparent to them.[57] I have only been able to locate one case in which this occurred. In a 1959 case, the Ohio Supreme Court considered the question whether the term "stepchildren" in the state's probate act included illegitimate stepchildren as well.[58] The only reason this question arose was that Ohio's probate act includes stepchildren as possible heirs in situations where a decedent has no other heirs and the estate would otherwise escheat to the state. In this situation, the court found no distinction between legitimate and illegitimate stepchildren; in either case, it said, they would be related by affinity, either by marriage to or cohabitation with their parent, and that affinity was not terminated by the

53. *Connell*, 898 P.2d at 834.

54. *See* Seven v. Stoel Rives, LLP, No. 64117-4-I, 2010 Wash. App. LEXIS 2785, *11 (Ct. App. Dec. 20, 2010) (holding that a cohabitant of ten years standing who took care of the decedent until he died did not qualify because they had not pooled their resources for joint projects). I hasten to add that this case was probably rightly decided, if on the wrong ground, because he had provided quite generously for her in a will.

55. *Olver*, 168 P.3d at 351.

56. *Id.* at 357 (holding that "when a committed intimate relationship is terminated by the death of both parties, the couple's jointly acquired property can be equitably divided between the partners' estates").

57. *See* Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 158 (1996).

58. *See* Kest v. Lewis (Kest II), 159 N.E.2d 449 (Ohio 1959); *see also* Kest v. State (Kest I), 146 N.E.2d 755 (Ohio Prob. Ct. 1957).

fact that the mother had predeceased her partner.[59] The court was obviously stretching the meaning of the word "affinity" to reach this conclusion.

If there are any other heirs available, even stepchildren whose parents are formally married are not eligible to inherit in the absence of a will or unless they have been adopted by the stepparent.[60] Stepparent adoption is rare, for a variety of reasons.[61] Adoption requires terminating the parental rights of the child's noncustodial parent, who is likely to object; and a stepparent may not wish to put the child in a position of choosing between him or her and the child's natural parent, and may not feel the need to do so.[62] One state, California, attempts to address this problem by providing in its probate law for inheritance by stepchildren who have been "equitably adopted."[63] This doctrine requires that stepchildren show that they would have been adopted in the absence of legal obstacles to doing so, such as the refusal of the other parent to consent.[64] But the doctrine is interpreted very narrowly, with California courts refusing to extend it to cases where the stepchild is an adult and the adoption could thus have been effectuated without parental consent during the decedent's lifetime after the stepchild reached the age of majority.[65] Moreover, even second-parent adoption, under which stepparents may adopt without terminating the parental rights of their own spouse or partner, is difficult, costly, and only available in some jurisdictions.[66]

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59. *Kest II*, 159 N.E.2d at 450-51 (holding that the Ohio probate code does not distinguish between stepchildren based on legitimacy).

60. BRASHIER, *supra* note 23, at 156-58.

61. Kathleen A. Lamb, *"I Want to Be Just Like Their Real Dad": Factors Associated with Stepfather Adoption*, 28. J. FAM. ISSUES 1162, 1183 (2007) (finding that only 26 of 378 stepfathers in the study finalized a stepparent adoption, citing various reasons, including the time and emotional commitment that adoption entails, the need for the child to cut ties with their non-custodial parent, and the stepparent having other nonresidential children).

62. *See* Feigenbaum, *supra* note 24, at 180 ("Even if a biological parent is deceased, the subject of adoption may create psychological dilemmas for stepchildren who will not want to reject their deceased biological parents or offend their stepparents.").

63. CAL. PROB. CODE § 6454 (West 2011); BRASHIER, *supra* note 23, at 156-57 (noting that California allows a stepchild to inherit if the relationship began during and continued since the child's minority and if the stepparent would have adopted the child but for a legal barrier).

64. CAL. PROB. CODE § 6454(b).

65. *In re* Estate of Joseph, 849 P.2d 472 (Cal. 1998) (denying use of the equitable adoption doctrine to an adult stepchild).

66. Second-parent adoption assumes that the child has only one legally recognized parent and is being adopted by a second parental figure who has a non-marital relationship with the child's parent. *See* Peter Wendel, *Inheritance Rights and the Step-Partner Adoption Paradigm: Shades of the Discrimination Against Illegitimate Children*, 34 HOFSTRA L. REV. 351, 374-804 (2005) (concluding that the courts' distinction between second-parent adoption and stepparent adoption "constitutes shades

It is even more difficult for an unmarried cohabitant to adopt his or her partner's child. Some states—New York, for example—do allow second-parent adoption by heterosexual cohabitants, although the doctrine was initially recognized to address the somewhat different problems of lesbian co-parents.[67] For example, second-parent adoption does not resolve the barrier raised if the noncustodial biological parent refuses to consent to the adoption, an unlikely obstacle in a lesbian co-parent case where the other biological parent is an anonymous sperm donor. Moreover, some states outright prohibit adoption by opposite-sex cohabitants, either to effect a second-parent adoption or even to jointly adopt an unrelated child.[68] Although most adoption statutes provide that a single person or a married couple may jointly adopt, they say nothing specific about joint adoptions by unmarried couples, leaving it to judges to decide whether "single person" includes its plural and thus includes unmarried couples by inference.[69] A few states have revised their statutes to make it explicit that

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of the discrimination the law used to practice with respect to the inheritance rights of illegitimate children"); Susan E. Dalton, *Protecting Our Parent-Child Relationships: Understanding the Strengths and Weaknesses of Second-Parent Adoption*, *in* QUEER FAMILIES, QUEER POLITICS: CHALLENGING CULTURE AND THE STATE 214 (Mary Bernstein & Renate Reimann eds., 2001) (comparing the cost of a marriage certificate ($50) and the costs of second-parent adoption ($4,000-$6,000 per child)).

67. *See In re* Jacob, 660 N.E.2d 397, 398 (N.Y. 1995) (holding that the unmarried partner of a child's biological mother, whether heterosexual or homosexual, who is raising the child with the biological parent, can become the child's second parent through adoption); *see also In re* Adoption of Carl, 709 N.Y.S.2d 905 (Fam. Ct. 2000) (relying on "the best interests of the child" test to uphold an adoption by unmarried man and woman of a child who is biologically not related to either); *In re* Adoption of Joseph, 684 N.Y.S.2d 760 (Surr. Ct. Oneida Co. 1998) (finding no reason not to extend the right to adopt to unmarried foster parents).

68. *See, e.g.*, *In re* Meaux, 417 So. 2d 522, 522 (La. Ct. App. 1982) (ruling that two single people jointly applying to adopt did not qualify as "a single person" under the statute); *In re* Jason C., 533 A.2d 32, 33-34 (N.H. 1987) (finding that the domestic circumstances of people who are neither single and living alone nor married and applying jointly are too disruptive for the child to be adopted). Arkansas has recently joined this group, causing considerable controversy. ARK. CODE ANN. § 9-8-304 (West 2009) (stating that a minor cannot be adopted if the individual seeking to adopt them is "cohabitating with a sexual partner outside of a marriage that is valid under the Arkansas Constitution"); *see* Catherine L. Hartz, *Arkansas's Unmarried Couple Adoption Ban: Depriving Children of Families*, 63 ARK. L. REV. 113, 118-24 (2010) (arguing that the ban is unconstitutional because it violates the Equal Protection Clause of the U.S. Constitution, the Arkansas Constitution, and the Due Process Clause of the Fourteenth Amendment, because its main purpose is to exclude homosexual couples from becoming adoptive parents, not the best interest of the child); Mark Strasser, *Adoption, Best Interests, and the Arkansas Constitution*, 63 ARK. L. REV. 3, 21-29 (2010) (arguing that, although the statutory ban is neutral on its face, it was in fact motivated by animus given that the justifications presented by the government are implausible and not rationally related to any state interest); Lynn D. Wardle, *Comparative Perspectives on Adoption of Children Cohabiting, Nonmarital Couples and Partners*, 63 ARK. L. REV. 31, 32-33 (2010) (defending the ban as "socially responsible, legally well-accepted, and scientifically well-justified public policy").

69. See *In re* Jacob, 620 N.Y.S.2d 640, 641-42 (App. Div. 1994) (Green & Balio, JJ., dissenting), *rev'd*, 660 N.E.2d 397, 405-06 (N.Y. 1995).

unmarried couples are eligible to effect second-parent adoptions, but only a few have done so.[70] In any event, a successful second-parent adoption by cohabitants would result in a family in which each cohabitant is related to the child but the co-parents are legal strangers to one another, while many family benefits depend upon spousal status.[71]

In short, the children of cohabitants, and stepchildren in most cases, are not included as heirs under state intestacy laws. Whether their parents are married or not, there is clearly a need for law reform in this area to bring the law into line both with family structures that have become increasingly common and with the purposes of intestacy law.[72] Intestacy law is intended to direct the distribution of property upon death to the persons assumed to be those to whom it would have been bequeathed if the decedent had made a will. In every state, that person's spouse and children are assumed to be first in line. This is not just a matter of assumed affection; it is inextricably tied to the nature of the family as an economic unit, one in which the members depend upon one another for support—support that is replaced upon death by the transfer of property. For this reason, if a testator tries to disinherit a spouse, the elective share prevents this from happening because, as one scholar states, "[h]istorically the principal purpose of the elective share (and its predecessor, dower) was to support or protect the surviving spouse and the couple's young children."[73] In short, inheritance is intended to provide posthumous support, and this

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70. *See, e.g.*, CONN. GEN. STAT. § 45a-724(a)(3) (West 2011) ("[A]ny parent of a minor child may agree in writing with one other person who shares parental responsibility for the child with such parent that the other person shall adopt or join in the adoption of the child, if the parental rights, if any, of any other person other than the parties to such agreement have been terminated.").

71. Dalton, *supra* note 66, at 212-13 (pointing out that a vast majority of legal benefits and protections afforded to families are "funneled through the spousal relationship").

72. Other students of this issue have reached a similar conclusion. *See, e.g.*, Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 200-04 (2001) (arguing that inheritance law continues to define people in terms of the traditional family structure, thus failing to recognize the full range of today's family units, and therefore that reformers should confront and reconsider the family paradigm itself); Peter J. Harrington, Note, *Untying the Knot: Extending Intestacy Benefits to Non-Traditional Families by Severing the Link to Marriage*, 25 J. CIV. RTS. & ECON. DEV. 323, 323-24, 327 (2011) (citing the 2000 Census, which found 11 million people, same sex and opposite sex, living with an unmarried partner (a seventy-two percent increase) and arguing that, if the trend continues, non-traditional family structures will comprise the majority of American households; thus the UPC should be amended to add "committed partner" near the top of the intestacy hierarchy); Marissa J. Holob, Note, *Respecting Commitment: A Proposal to Prevent Legal Barriers from Obstructing the Effectuation of Intestate Goals*, 85 CORNELL L. REV. 1492, 1493-1495 (2000) (arguing that the UPC categories should be extended to include domestic partners because U.S. law is biased towards the traditional family and "[u]nless . . . voluntary protections have been created, the survivor of . . . an unmarried couple, homosexual or heterosexual, stands completely without inheritance rights").

73. BRASHIER, *supra* note 23, at 74.

yields a substantial benefit to society at large, protecting family members who might otherwise need state support.[74]

We have by now considerable empirical evidence that cohabitants in fact desire that their property should devolve to their cohabitants and children if they fail to make wills. Mary Louise Fellows' 1998 study convincingly demonstrated that both opposite- and same-sex cohabitants and the general public think that the majority of a cohabitant's estate should go to his or her surviving cohabitant and their children.[75] Seventy-five to eighty percent of opposite-sex cohabitants in the study would give at least half or more of the estate to the surviving partner if there were no children; and a substantial number (twenty to thirty percent) would give the entire estate.[76] As an additional indication that the surviving cohabitant was the natural object of their bounty, over fifty-eight percent of those who had made wills and had no children indicated that they had named their partner as sole beneficiary.[77] Moreover, if a cohabiting couple in the scenario presented to respondents had children in their household, the prevalent pattern was to split the estate between partner and children, including a partner's child from a previous relationship.[78]

Empirical studies carried out in Britain report similar findings. A large majority of the British public believes that surviving cohabitants should inherit, especially if they have children.[79] A British Attitudes Survey in 2008 indicated that two-thirds of respondents believed that cohabitants of two years or longer should have the same rights in this respect as spouses, even if they had no children.[80] Yet another study confirmed that the length of relationship and presence of children were more important to people's attitudes on this issue than the marital status of the partners.[81] Notably, the

74. *See* Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 11-12 (2000) (describing succession laws as "an attempt to express the family in terms of property," strengthen family ties, and provide incentives to remain connected with family members, thus carrying both economic and psychological benefits).

75. *See* Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 3-4, 89 (1998) (discussing a 1994 study of approximately seven percent of couples in the United States who were in unmarried, committed relationships).

76. *See id*. at 36-45.

77. *See id*. at 44.

78. *See id*. at 73-76.

79. Williams et al., *supra* note 28, at 514-17.

80. Barlow et al., *supra* note 28, at 46 (comparing this result based upon a duration of two years with a result based on ten years of cohabitation, in which 94% of respondents believe that cohabitants should have the same rights as spouses, especially in terms of inheritance rights); *see also* Gillian Douglas et al., *Enduring Love? Attitudes to Family and Inheritance Law in England and Wales*, 38 J.L. & SOC'Y 245, 250 (2011).

81. Williams et al., *supra* note 28, at 517.

"inheritance family" still included a narrow range of persons—a spouse or partner and their children.[82] Interviewees' responses revealed that the values underlying their choices, in addition to blood ties, were: the sharing of a common life, emotional closeness, dependency, need, and support.[83]

Studies such as these have supported scholars' recommendations for reforming intestacy law to take account of the reported preferences. Lawrence Waggoner's proposed intestacy statute would set up an intestate share for a de facto partner based on a presumption that cohabitants have the necessary marriage-like relationship if they lived together for five out of the six years preceding the decedent's death, were registered as domestic partners, or were the parents of a minor child living in their household.[84] Gary Spitko proposes that unregistered committed partners accrue inheritance rights over time, beginning with eighteen percent of the intestate estate after three years and reaching 100 percent at fifteen years of cohabitation.[85] Another scholar suggests that the law should presume testamentary intent to benefit any child who has been living with a cohabiting couple during the child's minority for a period long enough to establish a parent-child bond, if the decedent had supported the child and treated it as his or her own.[86] This proposal is somewhat similar to the provision for family maintenance in the U.K., under which any person living with and being supported by a decedent at the time of his or her death may apply for an award of maintenance.[87] Under this provision, a decedent's cohabitant and any children living with the cohabiting couple for two years prior to his or her death may ask the court for a reasonable financial allowance if the intestacy rules or a will have left them without reasonable means of support. This remedy is more than cohabitants currently have in the United States, but it is still inferior to reforming the intestacy laws to take account of cohabitants, because the family

82. Douglas et al., *supra* note 80, at 263.

83. *Id.* at 263-68.

84. Waggoner, *supra* note 42, at 78-84.

85. E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255, 345 (2003); *see also* Jennifer Seidman, *Functional Families and Dysfunctional Laws: Committed Partners and Intestate Succession*, 75 U. COLO. L. REV. 211, 232-52 (2004) (discussing a variety of proposals for including unmarried partners in intestate succession).

86. Gary, *supra* note 74, at 71-77 (creating a functional approach to defining the parent-child relationship by looking at the following factors: (1) the relationship began during the child's minority; (2) the duration of the relationship; (3) the decedent was married to or the committed partner of the biological or adoptive parent of the child; (4) the decedent held the child out as his/her child; (5) the decedent provided economic and emotional support; (6) treatment of the child was comparable to the decedent's legal children; and (7) the decedent named the child or parent as a beneficiary to receive property upon death).

87. Inheritance Act, 1975, c. 63, § 1 (Eng.).

maintenance provision in the U.K. is limited to reasonable needs, is highly discretionary, and is costly to obtain.[88]

I propose instead that the intestacy laws be amended to add cohabitants, their children, and stepchildren as potential heirs after they have lived together for two years or a child is born—the preconditions I set in my previous work as appropriate to assume economic interdependence.[89] An elective share for cohabitants should also be provided, one that is comparable to the elective share given a spouse. Although omitted from Waggoner's proposed statute, it is inconsistent to treat a cohabitant differently from a spouse based on whether the decedent left a will or not.[90] Any biological children will inherit from him or her anyway, and cohabiting stepchildren will presumably be taken care of by the surviving cohabitant, who is their biological parent, or eventually inherit that parent's share.

It is still necessary to determine the size of the intestate share to be assigned to children of the decedent's partner. Mary Louise Fellows' study indicated that, although there was substantial support for treating a partner's child who has lived in the household as an heir, most people were not inclined to treat that child precisely as if it were their own biological child.[91] One alternative would be to establish some test to decide whether a particular stepchild should be included and leave it to the judge to determine the share according to some guidelines, as Margaret Mahoney suggests with respect to inheritance by stepchildren of married parents.[92] This would result in case-by-case determinations involving the type of uncertainty and unpredictability loathed by probate judges, who prefer easily determinable heirs. Mahoney argues that the courts' desires in this respect are inconsistent with the complexity of modern families and do not respect the central role of inheritance within family law: "[r]ecognition of family relationships in the wealth transmission process is an important aspect of the protection that the legal system extends to families."[93] While

88. Williams et al., *supra* note 28, at 504-05.

89. BOWMAN, *supra* note 6, at 224-26. If the remedies proposed in my book were adopted, reform of the intestacy law would be unnecessary because cohabitants would be treated as though they were married after two years or the birth of a child. Since those reforms do not seem to be imminent, short-term fixes are in order.

90. *See* BRASHIER, *supra* note 23, at 78.

91. *See* Fellows et al., *supra* note 75, at 83.

92. Mahoney, *supra* note 24, at 928-36 (proposing a test similar to the *in loco parentis* doctrine, including voluntary assumption of parental duties beginning during minority and lasting through the joint lifetimes of stepparent and stepchild).

93. *Id.* at 949. Ralph Brashier believes that stepchildren will continue to be excluded from inheritance "as long as the drafters of American inheritance law continue to shun individualized, discretionary probate determinations of what constitutes a family." *See* BRASHIER, *supra* note 23, at 158.

agreeing with her conclusion that stepchildren—to which I would add those living with unmarried parents—should be recognized, I favor a balancing of interests that avoids costly legal proceedings to make the determination about a particular child. I would thus provide a strong presumption that all children living in the decedent's family be treated equally, to be rebutted only by clear and convincing evidence that the decedent would have had a different intent. To counteract this rule, any cohabitant may make a will distinguishing among his or her children and stepchildren and may, in any states but Louisiana and Massachusetts, make no provision at all for some of them.[94] My rule simply shifts the default in favor of protecting all children living in the decedent's household.

II. GOVERNMENT BENEFITS WHEN A PARENT DIES

Inheritance is not the only mechanism by which the welfare of dependent children is protected upon the death of a parent. Social security survivors' benefits and workers' compensation statutes provide additional protections that operate as posthumous support for children who have been dependent upon a wage earner. In this section, I describe the ways in which children of cohabitants and, to a lesser extent, stepchildren are treated in a discriminatory fashion by both of these benefit systems and make suggestions for legal reform to address these problems.

A. Social Security

The primary government benefits payable upon the death or disability of a wage earner are those available under the Social Security Act.[95] A

94. A forced share is provided for children under twenty-four or disabled in Louisiana. *See* BRASHIER, *supra* note 23, at 98-99; *see also* NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 188 (2008) (stating that every state except Louisiana and Massachusetts places protection of the spouse above protection of the child under intestacy law).

95. Because this discussion is limited to benefits payable upon death, I omit the many other ways in which cohabitants' children and stepchildren may be treated differently than legitimate children under federal law. For information about their current treatment under the tax law, TANF, food stamps, and immigration, see Stephen D. Sugarman, *What Is a "Family"? Conflicting Messages from Our Public Programs,* 42 FAM. L.Q. 231, 236-44, 252-55 (2008) (discussing how Social Security and tax law now include stepchildren and children born out of wedlock, Food Stamps is by far the most inclusive of non-traditional families, and immigration law still narrowly defines family as including only biological and adoptive children); Wendell E. Primus & Jennifer Beeson, *Safety Net Programs, Marriage, and Cohabitation*, *in* JUST LIVING TOGETHER: IMPLICATIONS OF COHABITATION ON FAMILIES, CHILDREN, AND SOCIAL POLICY, 191, 196-210 (Alan Booth et al. eds., 2002) (comparing treatment of married, cohabiting, and single-parent families under Medicaid, food stamps, federal housing programs, and taxation); Anne E. Winkler, *The Complexity of Tax and Transfer Program Rules Regarding Cohabitation: Challenges and Implications*, *in* JUST LIVING TOGETHER: IMPLICATIONS OF COHABITATION ON FAMILIES, CHILDREN, AND SOCIAL POLICY 237, 239, 242-43 (Alan Booth et al. eds., 2002) (recommending that a new tax filing status be created to include cohabitants with children in common, thus placing

cohabitant is not eligible for benefits under the act unless he or she would be considered a spouse under the state law where the decedent was domiciled, excluding all but common law spouses domiciled in states that recognize that status.[96] Widows or widowers, including common law widows or widowers, and even divorced spouses who were married to the wage earner for ten years and have not remarried are all entitled to survivors benefits for themselves and also for "mother's insurance benefits" as well.[97] While conceding that mother's insurance benefits were meant to allow a surviving parent to stay home and look after the decedent's surviving child, the Supreme Court held in *Califano v. Boles*,[98] by a five-to-four vote, that the mother of an illegitimate child was not eligible for these benefits, largely on grounds of administrative convenience.[99] Justice Rehnquist, for the majority, saw mother's insurance benefits as accruing to the mother and only incidentally to her child, who had received benefits in his own right.[100] The four dissenting judges, by contrast, saw denial of these benefits to illegitimate children as discrimination against them: denying benefits to enable their caretaker to stay home and care for them constituted a denial of assistance to the children themselves and penalized them for their parents' marital status.[101] Moreover, they argued, using "marital status as an index of dependency on a deceased wage earner" did not bear a sufficient—in their description, "substantial"—relationship to the purposes of the provision for mother's

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these non-traditional families on equal footing with married couples).

96. Social Security Act § 216(h)(1)(A)(i), 42 U.S.C. § 416(h)(1)(A)(i) (2006). Same-sex couples are currently excluded from this protection by the federal Defense of Marriage Act, 1 U.S.C. § 7, an exclusion currently being challenged in federal court. *See, e.g.*, Gill v. Office of Pers. Mgmt., 699 F. Supp. 374 (D. Mass. 2010) (holding, in case challenging this and other exclusions, that DOMA was unconstitutional under the rational basis test).

97. By contrast, the surviving partner of an unmarried cohabitant in a meretricious relationship in the state of Washington was denied social security benefits; she did not qualify as a "widow," despite twenty years of continuous cohabitation, because the Washington Supreme Court held that she was not an heir under the state's intestacy laws, despite the fact that she was eligible for property division at the end of the relationship. *See* Peffley-Warner v. Bowen, 778 P.2d 1022, 1027 (Wash. 1989) (en banc).

98. 443 U.S. 282 (1979) (holding that, under the rational basis test, Congress could rationally choose to concentrate limited funds where it has determined need to be the greatest, thereby limiting the class of individuals to receive said benefits).

99. *Id. at* 283-86, 288-89 (placing particular emphasis on the legislative and administrative problems inherent in designing such a nation-wide program such as Social Security).

100. *Id.* at 294 (claiming that the program was "not designed to be, and we think it is not now, a general system for the dispensing of child-care subsidies").

101. *See id.* at 297-304 (Marshall, J., dissenting) (arguing that "the entire structure of the statute belies the Court's determination that Congress intended to aid a wage-earner's spouse rather than his children").

insurance.[102] Because these arguments lost by a narrow margin, the surviving parent of a cohabitant's child is deprived of benefits to allow caring for them. This would not be so with respect to stepchildren.

Although a cohabitant's partner is ineligible for social security upon the death or disability of an insured wage earner, their biological children may receive benefits. Illegitimate children were originally excluded from coverage, but the act was amended in 1965 to include them.[103] The Supreme Court has said that the purpose of social security survivors' benefits for children is to replace the support of the wage-earner parent.[104] An illegitimate child, however, must first provide sufficient proof of the parent-child relationship. To qualify, the child must be eligible to inherit under the state's intestacy law, or the parent-child relationship must have been acknowledged in writing by the decedent prior to death or established in a court order of paternity or child support, or the decedent must have been "shown by evidence satisfactory to the Commissioner of Social Security to have been the mother or father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died."[105]

In addition to paternity, children of unmarried parents are required to demonstrate actual dependency upon the wage earner at the time of death, which is presumed in the case of legitimate children who are minors.[106] This is more than a procedural hurdle because, if cohabitants separate prior to the wage earner's death, their children are no longer eligible. This was the situation, for example, in *Mathews v. Lucas*, where the unmarried couple lived together for eighteen years and had two minor children who were supported by their father up until the parents separated two years before his death.[107] Because the children were unable to establish actual dependency at the time of death, they were unable to collect survivors' benefits, despite the fact that, as the dissent pointed out, they were entitled

102. *Id.* at 297-98.

103. Sugarman, *supra* note 95, at 237-38 (describing how since the 1950s the scheme has been amended to recognize some non-traditional family types, such as including nearly all stepchildren and illegitimate children).

104. *See, e.g.*, Jimenez v. Weinberger, 417 U.S. 628, 634 (1974) (stating, in case holding that denying disability benefits to illegitimate child born after the onset of disability violates the equal protection clause, that "the primary purpose . . . is to provide for dependents of a disabled wage earner"); *see also* Gomez v. Perez, 409 U.S. 535, 538 (1973) (holding that natural father is liable for child support for child born out of wedlock because "there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother").

105. 42 U.S.C. § 416(h)(3)(C)(ii) (2006).

106. *Id.* § 402(d)(3)(A).

107. *See* 427 U.S. 495, 497 (1976).

to support from him even if they were not actually receiving it.[108]

The early cases on the constitutionality of classifications based upon illegitimacy were decided on the assumption that the appropriate constitutional level of scrutiny was the rational relationship test.[109] The Court repeatedly rejected an argument that strict scrutiny be applied, with the *Mathews* Court specifically stating that "discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes."[110] While rejecting strict scrutiny, the Supreme Court described the appropriate level of scrutiny for classifications based on illegitimacy as nonetheless higher than mere rational relationship, describing it initially as "not toothless"[111] and later as requiring that the classification be "substantially related to permissible state interests."[112] This is not exactly the "substantial relation to an important state interest" test for intermediate scrutiny set out in *Craig v. Boren*,[113] but it is close. Ultimately, in 1988, in considering a case about the statute of limitations for proof of paternity, Justice O'Connor proclaimed that intermediate scrutiny was indeed the standard applied in cases involving classifications based on illegitimacy, which must therefore be substantially related to an important governmental interest, not just rationally related to some legitimate state interest.[114] One wonders if the distinctions upheld in *Mathews* would have been upheld as substantially related to an important governmental objective, rather than as merely not arbitrary. Is requiring that an illegitimate child *actually* be receiving support from his or her insured parent at the time of death *substantially related* to the government's goal of replacing parental support to which the child was in fact entitled? Is administrative convenience an adequate governmental interest to uphold such a requirement?[115] Given the absence of legal aid attorneys able to litigate all these issues as they did in the 1970s, we may never know the answers to these questions.

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108. *Id.* at 517-18 (Stevens, J., dissenting).

109. *See, e.g.*, *id.* at 515-16 (majority opinion); Levy v. Louisiana, 391 U.S. 68, 71-72 (1968) (stating that the court's role is merely to decide whether Congress's assumptions are so inconsistent as not to be reasonably supportive of its justification for the classification).

110. *Mathews*, 427 U.S. at 506.

111. *Id.* at 510.

112. *See* Lalli v. Lalli, 439 U.S. 259, 265 (1978). *See generally* Hauser, *supra* note 36.

113. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

114. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988).

115. Administrative convenience was found not to be a sufficiently important state interest in, for example, *Craig*, 429 U.S. at 199-202 (striking down gender difference in age at which beer could be purchased), and Orr v. Orr, 440 U.S. 268, 278-83 (1979) (striking down gender-specific alimony payments).

Stepchildren of married parents are also disadvantaged under the social security statute, unless they have been adopted.[116] In addition to being required to prove that they were actually dependent on the decedent at death, which may be presumed if they were living in the same household, stepchildren's parents must have been married at least twelve months earlier and nine months in the case of disability benefits.[117] According to the Supreme Court in *Weinberger v. Salfi*,[118] Congress intended this durational requirement to prevent sham marriages for the sake of conferring benefits – even though, as the dissent pointed out, this had never been shown to be a problem and, in any event, could easily be remedied by allowing rebuttal by a showing of good health at the time of marriage.[119] The *Weinberger* Court nonetheless upheld the requirement as rationally related to Congress' intent, a bright line rule chosen in the interest of efficiency in adjudicating the millions of social security claims each year.[120] A cohabitant's stepchild, by contrast, is ineligible for benefits, no matter how dependent he or she has been upon the decedent, because of inability to establish the necessary relatedness.[121]

In sum, a child living with an unmarried couple is eligible for social security survivors' benefits from his or her biological parent's account so long as he or she jumps through the right procedural hoops and is actually dependent at the time the insured person dies. An unadopted stepchild is eligible so long as his or her parents have been married long enough at the time of the insured's death or disability and they do not divorce before then.[122] Stepchildren lose their eligibility if the couple divorces, no matter how long the marriage or period of support and without regard to whether they are still dependent on the former stepparent.[123] Nonetheless, many, perhaps most, stepchildren and children living with their biological but unmarried parents will be eligible for social security benefits because application of the statute turns primarily upon being a dependent of the insured person.[124] By contrast, stepchildren of unmarried parents, like

116. 42 U.S.C. § 416(e)(2) (2006).

117. *See id.* § 416(e).

118. 422 U.S. 749 (1975).

119. *See id.* at 803-04 (Brennan, J., dissenting).

120. *See id.* at 781-83.

121. §§ 402(d), 416(e).

122. *Id.* § 402(d)(1)(H).

123. *See* Mary Ann Mason & David W. Simon, *The Ambiguous Stepparent: Federal Legislation in Search of a Model*, 29 FAM. L.Q. 445, 475-77 (1995) (arguing that a stepchild *should* receive a deceased's benefits despite divorce); *see also* Margaret M. Mahoney, *Stepfamilies in the Federal Law*, 48 U. PITT. L. REV. 491, 531-34 (1987) (supporting use of a continuing marital relationship as a reasonable objective test of actual dependency).

124. *See* Sugarman, *supra* note 95, at 237-38.

cohabitants themselves, are never eligible, despite their dependence on the decedent. In short, although federal law is often praised as following a functional model based on dependence,[125] this is not always the case.

I recommend that the social security act be amended so as to treat the children of cohabitants similarly to children of married parents, with respect to benefits to them and to mother's insurance benefits. Stepchildren living with both married and unmarried parents should receive benefits if they either were actually dependent upon the insured person at the time of his or her death or had a right to support from the decedent that was not being fulfilled.

B. Workers' Compensation

Like social security, workers' compensation statutes typically adopt a dependency-based standard that may result in payments to functional families. Workers compensation' benefits are paid by the employer, not the government, but they are administered by the state and give benefits to dependents upon the death or disability of an employee in a workplace accident according to a set schedule.[126] Awards are set by state law at a particular amount for a particular injury (including death), which is then split among the eligible dependents; thus one person's share diminishes that of another.[127]

One of the first in the line of cases challenging classifications based on illegitimacy was *Weber v. Aetna Casualty & Surety Co*.,[128] a challenge to a Louisiana workers compensation statute that discriminated against dependent unacknowledged illegitimate children. In *Weber,* the employee had four older and legitimate minor children from a marriage which had never been dissolved, and also four children by the woman with whom he cohabited up until the time of his death, two of whom were acknowledged, one of whom had never been acknowledged, although there was no dispute about paternity, and one born posthumously.[129] The Louisiana statute provided that unacknowledged illegitimate children were not to participate in workers compensation awards if the maximum had been exhausted by

125. *See, e.g.*, Sarah E. C. Malia, *Balancing Family Members' Interests Regarding Stepparent Rights and Obligations: A Social Policy Challenge*, 54 FAM. REL. 298, 301 (2005) (noting that federal social welfare regulations focus on family needs).

126. *See, e.g.*, MARC A. FRANKLIN, ET AL., TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 834 (8th ed. 2006).

127. *See* POLIKOFF, *supra* note 94, at 201. David Chambers has said that workers compensation and social security survivors' benefits were the least controversial areas in which to award benefits to cohabitants because the award of benefits does not take anything away from anyone else. *See* Chambers, *supra* note 11, at 110. This is generally true with respect to social security but not workers compensation awards.

128. 406 U.S. 164 (1972).

129. *See id.* at 165.

awards to the legitimate and acknowledged illegitimate children, thus leaving out two of his children.[130] The Supreme Court held that it was unconstitutional to treat the decedent's children differently based upon the circumstances of their birth, distinguishing this case from *Labine v. Vincent*,[131] in which the father could have legitimated or formally acknowledged his child before he died, whereas in *Weber* the decedent was never divorced from his wife and thus could not marry the mother of his younger children.[132]

The *Weber* case illustrates an interesting anomaly about this line of jurisprudence. Children of someone who is in effect bigamous may receive better treatment, as in *Weber,* where the Court used the decedent's marriage to someone else to excuse his failure to legitimate them, than children of cohabiting couples who could in fact marry.[133] Of course, there may be other reasons why the early cases on illegitimacy were decided the way they were. The facts in these cases were attractive in a way that may have caused the Court to overlook bigamy. In *Weber,* the husband was in a *Jane Eyre* situation—that is, his wife was in a mental institution.[134] And the disabled cohabitant claiming social security benefits on behalf of his two after-born children in *Jimenez v. Weinberger* had been abandoned by their mother and was in fact caring for all of their children by himself, despite his disability.[135] Moreover, the favorable decisions reflected the Burger Court, while the newly-appointed Justice Rehnquist was waiting in the wings, dissenting.[136]

Whether the child of a cohabitant will qualify for a workers compensation award depends on the language of the statute in the state

130. *See id.* at 166 n.2, 167.

131. 401 U.S. 532 (1971).

132. *See Weber*, 406 U.S. at 170-71. Despite the mandate of *Weber*, there are indications that Louisiana may have treated unacknowledged illegitimate children differently for some years, relegating them to the class of "other dependents" under the statute, who receive a lower amount. *See* Winn v. Thompson-Hayward Chemical Co., 522 So. 2d 137, 141-44 (La. Ct. App. 1988) (holding that unacknowledged illegitimate child must be treated exactly like other children rather than as "other dependents" but that cohabitant who was child's mother was entitled to receive lower benefits as an "other dependent").

133. For example, the child's father in *Jimenez v. Weinberger* was also married to someone else but living with another woman at the time he became disabled; the cohabitants had one child at that time, whom he was supporting, and subsequently had two more, all of whom he acknowledged as his own. *See* 417 U.S. 628, 630 (1974). The Supreme Court held that those children must be allowed to prove their dependency in the face of the statute's plain language that illegitimate children born after the onset of the disability are barred from receiving disability benefits. *See id.* at 634-37.

134. 406 U.S. at 165.

135. 417 U.S. at 630.

136. *See generally id*. at 638-41 (Rehnquist, J., dissenting); *Weber*, 406 U.S. at 177-85 (Rehnquist, J., dissenting).

where the accident occurs. Many of these statutes are written so as to cover "dependents" of a worker who has died or been injured in a workplace accident; they are clearly intended to provide for family members who have lost the wage earner upon whom they depend. This legislative intent would seem to dictate that a dependent cohabitant would qualify for benefits, but many courts have refused recovery by cohabitants on grounds of public policy.[137] In New York, for example, except for surviving cohabitants covered by the special 9/11 compensation statute, unmarried couples do not qualify for workers' compensation benefits.[138] By contrast, in California, opposite-sex cohabitants and others who are members of the decedent's household have been eligible for workers' compensation benefits since 1979 if they can show that they were dependent upon the worker at the time of his or her death.[139] Oregon reaches a similar result under its statute, which provides that unmarried opposite-sex couples and their children may claim workers' compensation benefits if they lived together for more than one year prior to the accident and children were born to them as a couple.

> In case an unmarried man and an unmarried woman have cohabited in this state as husband and wife for over one year prior to the date of an accidental injury received by one or the other as a subject worker, and children are living as a result of that relation, the surviving cohabitant and the children are entitled to compensation under this chapter the same as if the man and woman had been legally married.[140]

Instead of asking the court to determine if the cohabitant and children were in fact economically dependent on the worker, Oregon has opted to rely on the duration of the relationship and the birth of children as proof that this is probably so. I favor a similar approach, consistent with that recommended in my book, treating cohabitants as eligible to receive workers compensation benefits after two years of cohabitation or as soon as a child is born, and the couple's children as eligible from birth.

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137. *See* Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1141 & n.93 (1981) (describing cases denying workers compensation benefits to cohabitants).

138. *See* POLIKOFF, *supra* note 94, at 201.

139. *See* Dep't of Indus. Relations v. Workers' Comp. Appeals Bd., 156 Cal. Rptr. 183, 186 (Ct. App. 1979) (holding that claimant who was unmarried to but living with decedent qualified as a dependent for worker's compensation purposes); *see also* Winn v. Thompson-Hayward Chemical Co., 522 So. 2d 137, 143 (La. Ct. App. 1988) (requiring proof of actual dependency from cohabitant classified as an "other dependent").

140. OR. REV. STAT. ANN. § 656.226 (West 2011); *see also* Cato v. Alcoa-Reynolds Metals Co., 152 P.3d 981, 984-85 (Or. Ct. App. 2007) (holding that the child must still be a minor for cohabitant to qualify under this provision).

III. TORT CLAIMS AGAINST THIRD PARTIES

A number of tort claims, such as a wrongful death suit or a suit seeking damages for loss of consortium, can also be important means of compensating for the loss of a parent—and another example of post-mortem support. The first two in the line of cases challenging classifications based on illegitimacy involved claims for wrongful death. *Levy v. Louisiana*[141] and *Glona v. American Guarantee & Liability Ins. Co.*[142] were companion cases decided on the same day in May 1968, the first striking down a Louisiana statute denying illegitimate children the right to sue for the wrongful death of a mother,[143] and the second holding that denial of a mother's right to sue for the wrongful death of her child was similarly unconstitutional.[144] The *Levy* Court held that:

> Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would.[145]

Wrongful death suits are intended to compensate a victim's survivors for the economic benefit they would have received if the deceased person had not died as a result of the defendant's conduct.[146] The right to sue for wrongful death is derived entirely from statute and, thus, depends upon the wording of the state's wrongful death law; traditionally that language—"heir," for example—ruled out recovery by cohabitants.[147] In some states, a wrongful death action may be available to cohabitants if the language of the state statute and its interpretation by the courts define the parties entitled to sue to include persons dependent upon the deceased person at the time of his or her death more generally.[148] For example, in Hawaii, the

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141. 391 U.S. 68 (1968).

142. 391 U.S. 73 (1968).

143. *Levy*, 391 U.S. at 68.

144. *Glona*, 391 U.S. at 81-82.

145. *Levy*, 391 U.S. at 72.

146. *See* Anne E. Simerman, *The Right of a Cohabitant to Recover in Tort: Wrongful, Death, Negligent Infliction of Emotional Distress and Loss of Consortium*, 32 U. LOUISVILLE J. FAM. L. 531, 532 (1994).

147. *See, e.g.*, Garcia v. Douglas Aircraft Co., 184 Cal. Rptr. 390, 392 (Ct. App. 1982) (holding that California statute's use of the term "heir" did not include a fiancé); Harrod v. Pacific Sw. Airlines, Inc., 173 Cal. Rptr. 68, 69-70 (Ct. App. 1981) (holding that exclusion of meretricious spouse from recovery as not an "heir" did not violate equal protection).

148. *See, e.g.*, ALASKA STAT. ANN. § 09.55.580 (West 2011) (providing that personal representatives may maintain action for the benefit of "a spouse or children, or other dependents"); W. VA. CODE ANN. § 55-7-6 (West 2011) (noting that beneficiaries of action may be "any persons who were financially dependent upon the decedent at the

wrongful death statute provides for recovery "by any person wholly or partly dependent upon the deceased person."[149] That state's supreme court has held that a decedent's cohabitant of 16 years' standing and her minor child who lived with them, though not adopted by him, were the appropriate recipients of a wrongful death award upon his death, despite the fact that he was legally married to someone else, because they were dependent on him and had suffered the loss of his care and affection, protection, comfort, and financial support.[150] Thus, in Hawaii, both a decedent's cohabitant and stepchildren are eligible to claim wrongful death awards. This is the most generous treatment I have been able to locate. A cohabitant's biological but illegitimate children are protected by *Levy*, and courts have interpreted that protection to extend to posthumous children as well, even though they had never actually been dependent on the deceased person.[151] A number of states, however, which link eligibility to their intestacy laws, still require not only proof of paternity but also acknowledgement or adjudication prior to the father's death in order to recover for wrongful death.[152]

Many states do not allow wrongful death recovery by stepchildren, even those of married parents.[153] Again, it depends upon the language of the state statute. If the statute limits recovery to "heirs," an unadopted stepchild will not qualify.[154] Some states require that a stepchild establish equitable adoption to recover in wrongful death—the doctrine that considers a stepchild adopted if they would have been but for some legal obstacle.[155] This is not easy to do. In one Missouri case, for example, a girl who grew up living with her mother's husband, was close to him, referred to him as father (he referred to her as his daughter as well), and had always believed that he was in fact her biological father was not allowed to recover upon his death because she was unable to prove that she

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time of his or her death"); *see also* Simerman, *supra* note 146, at 533.

149. HAW. REV. STAT. ANN. § 663-3 (West 2011).

150. *See* Lealaimatafao v. Woodward-Clyde Consultants, 867 P.2d 220, 224-26 (Haw. 1994).

151. *See, e.g.*, Robinson v. Fiedler, 870 F. Supp. 193, 200-01 (W.D. Mich. 1994) (awarding an equal share to the after-born child and his illegitimate sister, who had been acknowledged during the decedent's lifetime).

152. *See* Davis, *supra* note 9, at 84-86 (arguing generally that all sex-specific illegitimacy rules should be abolished).

153. *See* Wardle, *supra* note 24, at 383; *see also* Robyn L. Meadows, *Recovery by Stepchildren in Wrongful Death Actions*, 40 U. KAN. L. REV. 777, 795-98 (1992) (discussing the many cases denying wrongful death recovery to dependent stepchildren).

154. *See, e.g.*, Steed v. Imperial Airlines, 524 P.2d 801, 804-05 (Cal. 1974) (en banc) (denying wrongful death action to stepchild under statute that at that time limited recovery to heirs).

155. *See supra* notes 63-64 and accompanying text.

had been equitably adopted.[156]

A claim for loss of consortium, by contrast, is not statutory. Loss of consortium is a common law tort action for damages for being deprived of the companionship of a family member; it is derived from an old English action to recover for the economic loss of a servant, then extended to the loss of a spouse, and reinterpreted as one for loss of companionship.[157] The only state that has extended this claim to cohabitants is New Mexico.[158] In *Lozoya v. Sanchez,* Sara Lozoya had lived with Ubaldo Lozoya for at least fifteen years in a relationship that would have qualified as a common-law marriage if the state still recognized that status; they had three children and all shared the same surname.[159] The New Mexico Supreme Court held in 2003 that Sara could bring a claim for loss of consortium despite the fact that they were not married, stating that:

> We must consider the purpose behind the cause of action for loss of consortium. A person brings this claim to recover for damage to a *relational* interest, not a legal interest. To use the legal status as a proxy for a significant enough relational interest is not the most precise way to determine to whom a duty is owed. Furthermore, the use of legal status necessarily excludes many persons whose loss of a significant relational interest may be just as devastating as the loss of a legal spouse.[160]

Every other state to consider whether to extend the cause of action for loss of consortium to unmarried partners has refused to do so.[161] A California appellate court did approve a loss of consortium claim for an unmarried cohabitant in 1983,[162] but was overruled by the California Supreme Court in 1988 in *Elden v. Sheldon* on grounds of administrative

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156. *See* Weidner v. American Family Mut. Ins. Co., 928 S.W.2d 401, 402, 403-04 (Mo. Ct. App. 1996).

157. *See, e.g.*, Alisha M. Carlile, Note, *Like Family: Rights of Nonmarried Cohabitational Partners in Loss of Consortium Actions*, 46 B.C. L. REV. 391, 395-96 (2005).

158. *See* Lozoya v. Sanchez, 66 P.3d 948, 958 (N.M. 2003) (holding that New Mexico recognized a claim for loss of consortium brought by a cohabitant).

159. *Id.*

160. *Id.* at 955 (emphasis in original).

161. *See, e.g.*, Gurliacci v. Mayer, 590 A.2d 914, 930-31 (Conn. 1991) (holding that no cause of action existed for loss of consortium for cohabitant engaged to victim); Medley v. Strong, 558 N.E.2d 244, 244 (Ill. 1990) (holding that cohabitant of ten years may not recover for loss of consortium); Laws v. Griep, 332 N.W.2d 339, 340 (Iowa 1983) (holding that there was no cause of action for loss of consortium for cohabitant in a "stable and significant relationship" in which the couple were raising two children of the cohabitant claiming damages); Feliciano v. Rosemar Silver Co., 514 N.E.2d 1095, 1095 (Mass. 1987) (denying cause of action for loss of consortium for couple who had lived together "as a *de facto* married couple" for twenty years before the workplace accident causing injury).

162. *See* Butcher v. Super. Ct., 188 Cal. Rptr. 503, 503 (Ct. App. 1983) (holding that unmarried cohabitant may state a cause of action for loss of consortium by showing that nonmarital relationship is both significant and stable).

convenience, the need to protect marriage (a ground that is becoming increasingly shaky with the progress of same-sex marriage cases), and fear of extending liability—that is, of opening the oft-cited floodgates to litigants.[163] The New Mexico court in *Lozoya,* however, opined that trial courts would be able to discern what were appropriate familial relationships for loss of consortium claims in the absence of marriage without a limitless extension of liability and listed a number of factors to determine such a relationship.[164] If a surviving cohabitant were able to prove the quality of their relationship according to these factors, that cohabitant's child would receive the benefit of an award to his or her remaining caretaker parent. Despite the urging of law review commentators,[165] this is possible at present only in New Mexico.

In many states, moreover, a child, even a legitimate one, may not recover for loss of consortium of a parent at all.[166] The same California Supreme Court that decided *Elden v. Sheldon* held that an action for loss of consortium was not available to children in general, even though parents could recover with respect to their children, so ruling in order to limit liability (whereas the number of parent-claimants are limited by nature, Mrs. Borer had nine children).[167] When Massachusetts recognized such a claim for children in 1980, it was one of the first states to do so; Massachusetts limits the cause of action to children who were dependent on the parent.[168] The Supreme Judicial Court has also refused to extend the

163. 758 P.2d 582, 586-88 (Cal. 1988).

164. The factors included duration of the relationship, degree of mutual dependence, extent of common contributions to a life together, extent and quality of shared experience, membership in the same household, emotional reliance, and the like. *See* Lozoya, 66 P.3d at 957.

165. *See generally* Carlile, *supra* note 157, at 420-21 (arguing for extension of loss of consortium claims to cohabitants); Jonathan D. Hurley, *Loss of Consortium Claims by Unmarried Cohabitants in the Shadow of* Goodridge: *Has the Massachusetts SJC Misapprehended the Relational Interest in Consortium as a Property Interest?*, 39 NEW ENG. L. REV. 163, 206 (2004) (arguing for legal protection of all stable and significant familial relationships under the loss of consortium tort); Simerman, *supra* note 146, at 531 (emphasizing that, as the traditional family changes, the legal system must also change, including by recognizing loss of consortium claims by cohabitants).

166. *See Child's Right of Action for Loss of Support, Training, Parental Attention, or the Like, against a Third Person Negligently Injuring Parent*, 11 A.L.R.4th 549 §§ 4-5 (1982) (describing the many cases in which loss of consortium claims have been denied to children and their rationales).

167. *See* Borer v. Am. Airlines, Inc., 563 P.2d 858, 863-64 (Cal. 1977) (noting also that loss of a parent's company cannot be compensated monetarily and that damages would be very difficult to measure). *See generally* Cynthia Grant Bowman & Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy*, 109 HARV. L. REV. 549, 573 (1996) (discussing the California courts' rationale for limiting liability, including their refusal to recognize child loss of consortium claims).

168. *See* Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690, 703 (Mass. 1980) (holding as a matter of first instance that children may sue for loss of consortium of parent); Morgan v. Lalumiere, 493 N.E.2d 206, 211-12 (Mass. App. Ct. 1986) (holding that an adult but disabled child may sue for loss of consortium of mother).

cause of action to unadopted stepchildren.[169]

In short, although cohabitants and their children may qualify as dependents in many states under their wrongful death statutes, both may be barred from bringing an action for loss of consortium. In some jurisdictions, the biological child of a cohabitant may be able to sue, but the cohabitant can sue only in New Mexico and the cohabitant's stepchild cannot sue in any jurisdiction. Given the underlying purposes of tort actions for wrongful death and for loss of consortium, both of these causes of action should be available to any child living in the tort victim's household, whether a biological child or stepchild, without regard for the marital status of the child's parents.

CONCLUSION

The legal treatment of children of unmarried parents and stepchildren must be changed if they are not to be disadvantaged in comparison with children of married parents. With respect to the areas of law discussed in this Article, legal reform is necessary in a variety of situations in which legitimate children receive what is the functional equivalent of posthumous support—that is, inheritance in the absence of a will, social security survivors benefits, workers' compensation, and tort suits for wrongful death and loss of consortium. Cohabitants and stepchildren of both married and unmarried parents should be added to the persons listed as the natural objects of a decedent's bounty under state intestacy law after they have lived together for two years or the adult cohabitants have had a child in common. The social security act should be amended so as to treat illegitimate children genuinely as equal to legitimate children, by not requiring proof of actual dependency at the time of the death of the insured if they had a right to support at that time. Stepchildren of both married and unmarried parents should also be eligible for social security benefits if they were minors and dependent upon the insured stepparent when he or she died. Under workers' compensation laws, wrongful death statutes, and in common law loss of consortium cases, awards should be available to cohabitants' children and stepchildren on the same terms as to children of married parents; in most cases, this will involve dependency at the time of death. In the absence of legal change in all these areas, children will continue to be punished for their parents' failure to marry.

Much of *Ferriter* was repealed by the Massachusetts legislature, however, when it subjected recovery for loss of consortium in the employment context to the Worker's Compensation Act. *See* MASS. GEN. LAWS ch. 152 § 24 (2005).

169. *See* Mendoza v. B.L.H. Electronics, 530 N.E.2d 349, 350 (Mass. 1988) (holding that unadopted stepchild may not recover for loss of consortium of stepparent).