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Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?

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UNMARRIED COUPLES AND UNJUST ENRICHMENT: FROM STATUS TO CONTRACT AND BACK AGAIN?

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> DEAR ABBY: Who should pay for what in a live-in type relationship?
>
> . . . .
>
> —THE FEMALE
>
> DEAR FEMALE: In any kind of relationship, the assets, liabilities and responsibilities should be shared 50-50. . . . You might consider living with this free-loading, well-to-do creep just long enough to confirm a common law status (under recent court decision), and then sock it to him![1]

In recent years, litigation over property arrangements between unmarried cohabitants has posed some old questions in a new light and has yielded some new answers. One of the most intriguing of these questions is whether a cohabitant has a right, upon dissolution of the relationship, to remuneration for household services rendered during the relationship. A spouse who contributed household services in an actual marriage, of course, may upon divorce receive a share of the property acquired by the other spouse during the marriage or may receive a monetary award as compensation for the contributions made to the other during the marriage. These are established rights of the marital status. Unmarried cohabitants, however, traditionally have had no such rights. The "status" of "concubinage" or meretricious cohabitation afforded neither party any recovery for services rendered to the other, unless the party seeking recovery was induced to provide services by a mistaken belief that the couple was validly married (the situation commonly referred to as "putative marriage") or by duress.[2] Recovery has generally been denied under quasi-contract or constructive-trust theories, since courts have reasoned that the law will not aid a wrongdoer in an illicit rela-

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1. Topeka Capital, Sept. 27, 1978, § 1, at 15, col. 4.

2. In some 13 states and the District of Columbia, the institution of common-law marriage is still in force. If the relationship qualifies as a common-law marriage in those states, the parties have, upon dissolution, the same rights as parties to a formal, ceremonial marriage. *See* H. CLARK, DOMESTIC RELATIONS, CASES AND PROBLEMS 67 (1974).

tionship such as nonmarital cohabitation[3] or that a donative intent motivated the services and thus justified the retention of any benefit deriving from them.[4] Even when couples foresightedly dealt with the problem by an express contract, courts often found such contracts, which rested in part on an illegal consideration, unenforceable.[5] The "taint" of the meretricious association thwarted virtually all attempts to recover for services—sometimes even for nondomestic services.[6]

As the force of the social stigma on "concubinage" or "meretricious" relationships abates, however, more unmarried couples cohabit.[7] And as the number of cohabitants increases, pressure mounts to ascribe to their relationships certain marriage-like incidents to protect cohabitants from hardship and injustice when death or renunciation separates them. Courts in some states have responded by expressly rejecting the "taint" doctrine.[8] As the state's interest in condemning immorality wanes, the way clears for doctrines better designed to accommodate the cohabitants' interests equitably. With "taint" rendered legally insignificant, the law's concern with unmarried cohabitation generally should be, as with other consensual transfers of economic value, to protect the parties' reasonable expectations.

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3. *See, e.g.,* Sackstaeder v. Kast, 31 Ky. L. Rep. 1304, 105 S.W. 435 (1907); Simpson v. Normand, 51 La. Ann. 1355, 26 So. 266 (1899); Brown v. Tuttle, 80 Me. 162, 13 A. 583 (1888).

4. *E.g.,* Hill v. Westbrook's Estate, 95 Cal. App. 2d 599, 602, 213 P.2d 727, 729 (1950); *In re* Estate of Louis Klemow, 411 Pa. 136, 141, 191 A.2d 365, 368 (1963); Willis v. Willis, 48 Wyo. 403, 438, 49 P.2d 670, 681 (1935).

5. *See, e.g.,* Vincent v. Moriarty, 31 App. Div. 484, 492, 52 N.Y.S. 519, 522-23 (1898). *Cf.* Brown v. Tuttle, 80 Me. 162, 165, 13 A. 583, 584 (1888) (court would not enforce even an express contract, had one been made, that furthered an illegal relationship); Traver v. Naylor, 126 Or. 193, 207, 268 P. 75, 79 (1928) (future cohabitation cannot serve as any part of the consideration for a promise).

6. *See, e.g.,* Guerin v. Bonaventure, 212 So. 2d 459 (La. App. 1968); Willis v. Willis, 48 Wyo. 403, 438, 49 P.2d 670, 681 (1935).

7. The Bureau of the Census reported that the number of persons sharing living quarters with an unrelated member of the opposite sex virtually doubled between 1970 and 1977, although the data included resident employees and roomers as well as persons living in a sexually companionate relationship. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-20, NO. 306, MARITAL STATUS AND LIVING ARRANGEMENTS, MARCH 1976, at 4 (1977). These and other data from the report are discussed in Kay & Amyx, *Marvin v. Marvin: Preserving the Options,* 65 CALIF. L. REV. 937, 975 (1977). *See also* Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services,* 10 FAM. L.Q. 101, 101 n.1 (1976).

8. *See* Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976); Tyranski v. Piggins, 44 Mich. App. 570, 205 N.W.2d 595 (1973); Carlson v. Olson, ___ Minn. ___, 256 N.W.2d 249 (1977); Beal v. Beal, 282 Or. 115, 577 P.2d 507 (1978); Latham v. Latham, 274 Or. 421, 547 P.2d 144 (1976). *But see* Rehak v. Mathis, 239 Ga. 541, 238 S.E.2d 81 (1977); Keller v. Keller, 220 So. 2d 745 (La. App. 1969).

Some couples, of course, will draft agreements expressing their understanding of and expectations about exchanges of economic value in their relationship. If a couple has agreed how to govern the property aspects of their relationship and how to dispose of their property when the relationship ends, the law ought to help carry out that agreement unless doing so would contravene rules that invalidate similar consensual arrangements between non-cohabitants. If "taint" does not invalidate them, express trust or contract agreements could solve most of the problems of allocating property interests upon the termination of a relationship and could, in particular, provide some economic return to a party who works in the home.

However, most couples do not consider the economics of their relationship paramount when their relationship begins. In fact, many fear that even mentioning such mundane matters would debase other, more important, non-economic aspects of their association. Accordingly, cohabitants rarely make comprehensive, express written agreements ordering their economic relations. And while a court should honor express oral agreements too, their existence and contents will usually be difficult to prove, and the Statute of Frauds and the Dead Man's Statute will sometimes be insurmountable barriers to enforcing them.

A court might, of course, infer an agreement, but inference can be an unreliable mechanism for ordering the economic relations of unmarried couples. Parties to a standardized commercial transaction or property transfer can establish implied-in-fact arrangements—contracts or trusts—rather easily, because a normal expectancy can be imputed to those who do commercial things in a commercial setting, even though no words pass between them. But no one has yet articulated the standard expectations of unmarried couples. This is not to say that no cases have recognized implied-in-fact contracts or resulting trusts in the arrangements of cohabitants. But decisions which do so rest on fairly firm proof of intentions.[9] Absent such proof, then, one cannot confidently assume that a court will infer an agreement concerning property from a couple's conduct until the courts have recognized

9. *See, e.g.*, McMillan v. Massie's Exr., 233 Ky. 808, 27 S.W.2d 416 (1930); Orth v. Wood, 354 Pa. 121, 47 A.2d 140 (1946); Worsche v. Kraning, 353 Pa. 481, 46 A.2d 220 (1946); Poole v. Schicte, 39 Wash. 2d 961, 236 P.2d 1044 (1951); and two cases decided after Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) (for a discussion of the significance of *Marvin*, see text at notes 10-20, *infra*): Carlson v. Olson, ___ Minn. ___, 256 N.W.2d 249 (1977); and Beal v. Beal, 282 Or. 115, 577 P.2d 507 (1978).

as standard some general features of the relationship of unmarried cohabitants.

Marvin v. Marvin,[10] the widely publicized decision of the California Supreme Court (and perhaps the recent court decision Dear Abby referred to), suggested one presumption that might become such a standard feature: that cohabitants intend to deal fairly with each other. That may sound truistic, but its implications not only could make proving implied-in-fact agreements easier, but also could significantly influence the development of restitutionary remedies.

Some periodicals reported the *Marvin* case as more revolutionary than it really was.[11] The actual holding rested upon the plaintiff's allegation of an express contract. The *Marvin* court merely held that an agreement made during cohabitation to " 'combine their efforts and earnings and . . . share equally any and all property accumulated as a result of their efforts whether individual or combined' " was enforceable.[12] Thus, *Marvin* clearly rejected the view that such contracts are unenforceable, but it was hardly the first case to do so.[13] The majority opinion did say, however, that an unmarried cohabitant might also recover on theories of implied contract, implied partnership or joint venture, constructive trust, resulting trust, or, under some circumstances, quantum meruit; it did permit the plaintiff to add such claims on remand if the facts warranted.[14] The far-reaching implications that some have seen in the *Marvin* case lie mainly in that dictum.[15]

Nor is the *Marvin* opinion revolutionary if it meant by these suggestions that courts should enforce cohabitants' agreements, whether express or implied-in-fact from the parties' conduct. Other cases in other jurisdictions have taken similar positions.[16] But the opinion's tenor strongly suggests that the court was not thinking only of remedies resting on actual contract or trust, express or implied-in-fact; the court also contemplated remedies

10. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). The *Index to Legal Periodicals* shows that to date the *Marvin* case has been the subject of notes, comments, or articles in over fifteen different law reviews.

11. *See, e.g.,* TIME, Jan. 10, 1977, at 39 ("[t]he landmark decision . . . states that cohabitation without marriage gives both parties the right to share property if they separate"); Kay & Amyx, *supra* note 7, at 954 n.104.

12. 18 Cal. 3d at 666, 557 P.2d at 110, 134 Cal. Rptr. at 819 (quoting the plaintiff's complaint).

13. *See* Bruch, *supra* note 7, at 107-08 and cases cited therein.

14. 18 Cal. 3d at 675, 557 P.2d at 116, 134 Cal. Rptr. at 825.

15. *See, e.g.,* Kay & Amyx, *supra* note 7; 90 HARV. L. REV. 1708 (1977).

16. *See* Bruch, *supra* note 7, at 107-08 and cases cited therein.

implied-in-law where there had been no actual agreement. The opinion indicated that courts ought to recognize certain basic propositions concerning the relationship of unmarried couples and that "judicial barriers that may stand in the way of a policy based upon the fulfillment of the reasonable expectations of the parties to a nonmarital relationship should be removed."[17] It was in reference to the expectations courts might have about most cohabitational relationships that the majority endorsed the presumption that cohabitants intend "to deal fairly with each other."[18] The majority suggested that courts begin fashioning a law of remedies appropriate to nonmarital relationships, just as the courts had devised doctrines to deal with "putative" spouses before legislation[19] recognized such persons' rights. Significantly, the route the California courts took in constructing putative-spouse remedies traversed the field of unjust enrichment; the remedies were, for the most part, restitutionary.[20]

If judicially created remedies are made available to unmarried couples in the absence of an agreement, restitution and unjust enrichment principles will probably be the medium. The plight of a spurned cohabitant who dutifully stayed home and kept house while the other cohabitant ventured out and acquired wealth resembles other situations in which unjust enrichment has been recognized. However, it also differs significantly, and we must now ask whether those differences should bar some form of restitution where no agreement allocates property rights between the cohabitants.

The law of restitution concerns transfers of economic value from one party to another party who cannot justifiably retain the net benefit. The courts have developed several remedies in common-law and equitable actions to effectuate restitution.[21] If the plaintiff transferred to the defendant specific real, personal, or intangible property, the plaintiff may recover it in specie if the

17. 18 Cal. 3d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

18. 18 Cal. 3d at 683, 557 P.2d at 121, 134 Cal. Rptr. at 830 (paraphrasing J. Peters' dissent in Keene v. Keene, 57 Cal. 2d 657, 674, 371 P.2d 329, 339, 21 Cal. Rptr. 593, 603 (1962)).

19. 18 Cal. 3d at 677, 557 P.2d at 118, 134 Cal. Rptr. at 827.

20. *See* Schneider v. Schneider, 183 Cal. 335, 191 P. 533 (1920); Coats v. Coats, 160 Cal. 671, 118 P. 441 (1911) (the theory of recovery in the preceding two cases is predicated on the idea that property held in the man's name was in part the product of the woman's contribution, and it would therefore be unjust to allow him to retain all); Sanguinetti v. Sanguinetti, 9 Cal. 2d 95, 69 P.2d 845 (1937) (quasi-contract); Lazzarevich v. Lazzarevich, 88 Cal. App. 2d 708, 200 P.2d 49 (1948) (quasi-contract). *See generally* 4 G. PALMER, LAW OF RESTITUTION § 18.3 (1978).

21. *See generally* D. DOBBS, LAW OF REMEDIES § 4.4 (1973).

defendant cannot justify his retention of it. The plaintiff may resort to the familiar common-law remedies of replevin and ejectment (or their statutory counterparts) for this purpose. If the plaintiff cannot recover the object in specie, or perhaps even if he can, he may alternatively recover a money judgment for its value, or for the proceeds of its sale, through the common counts of "money had and received," "goods sold and delivered," or the like. If the defendant has transferred the object and used the proceeds to acquire another asset, the plaintiff may in some circumstances claim the substitute asset in specie, an interest in it, or its proceeds, through equitable principles of "tracing" and the remedies of constructive trust, equitable lien, or accounting. The plaintiff may also be able to recover the value of the use of his property by the defendant.

If the defendant obtained value from the plaintiff in the form of services, restitution in specie, of course, is not possible. The plaintiff may, however, recover the reasonable value of his services through the common count of work and labor performed (quantum meruit). Services, too, may sometimes be traced into a specific asset, in which case the plaintiff's restitution may take the form of an interest in that asset or an accounting for its proceeds.

The decisions in cases granting or withholding these remedies may be couched in terms of contract or trust: a contract may be "implied-in-law" or a constructive trust may "arise." But in modern analysis, such terms really mean that the court has found a remediable unjust enrichment. In short, if a court allows restitution, it does so because the defendant has received a cognizable benefit; the benefit was at the plaintiff's expense; and the defendant's retention of it was unjustified. The modern law of restitution is, in the main, the elaboration of these three fundamental elements.[22]

In examining the first of these three elements—"benefit"—in the relations of unmarried couples, we must assume that it cannot include sexual companionship. The courts have uniformly held that sexual services cannot supply the consideration for even an express contract.[23] Certainly, then, courts will not treat sexual services as the benefit in an unjust enrichment claim. Household services, however, are economically valuable, and despite the dif-

22. *See* 1 G. PALMER, *supra* note 20, §§ 1.7-.8.

23. Some courts have reasoned that such a contract, no matter how described, is essentially one of prostitution. *See, e.g.*, Naimo v. LaFianza, 146 N.J. Super. 362, 370-72, 369 A.2d 987, 991-93 (Ch. Div. 1976).

ficulty of precisely assessing that value, its transfer can certainly supply the benefit.[24]

As to the second element, the plaintiff in a cohabitation case may have trouble establishing that the benefit was supplied at his expense or detriment. If the services were only what the plaintiff would have done had he not lived with the defendant, one might argue that the defendant did not acquire the benefit at the plaintiff's expense, since the plaintiff received full value in the form of the benefits he himself received. However, it normally is more burdensome to keep house for two than for one, and so, in most cases where the plaintiff's role in the relationship was to keep house, the plaintiff can probably show a real expenditure of services for the defendant's benefit. If the value of those beneficial services exceeds the value of the benefits received from the defendant—in goods or services—a court may appropriately allow the plaintiff to recover for the defendant's net benefit.

The most troublesome problem in applying restitution principles to the situation of unmarried couples lies in the third—"unjustness"—element. Not all uncompensated benefits are unjust enrichment. If one confers a benefit with donative intent, the recipient's retention of it cannot, of course, be called unjustified. Basically, our law deems an enrichment unjust if neither the terms of a valid contract or other legal transaction, nor any overriding social policy, can explain its retention.[25]

In most restitution cases, the defendant has acquired his benefit tortiously,[26] in breach of contract,[27] through a contract or gift which subsequently was rescinded,[28] under an unenforceable contract (*e.g.*, because of the plaintiff's breach or the Statute of Frauds),[29] or through certain mistakes by the plaintiff (such as paying the defendant a debt not owed or a debt owed to a third

24. *See* Bruch, *supra* note 7, at 110-14; Havighurst, *Services in the Home*, 41 YALE L.J. 386, 398-99 (1932).

25. J. DAWSON, UNJUST ENRICHMENT 127-28 (1951).

26. Restitution has been recognized as an alternative remedy for some torts since the concept of "waiving the tort and suing in assumpsit" was recognized in the early English case of Lamine v. Dorell, 2 Ld. Raym. 1216, 92 Eng. Rep. 303 (K.B. 1705). *See generally* 1 G. PALMER, *supra* note 20, ch. 2.

27. *See* Comment, *Restitution—Availability as an Alternative Remedy Where Plaintiff Has Fully Performed a Contract To Provide Goods or Services*, 57 MICH. L. REV. 268 (1958). *See generally* 1 G. PALMER, *supra* note 20, ch. 4.

28. A contract may be rescinded for such causes as misrepresentation, mistake, duress, fundamental breach, or incapacity of one of the parties. *See* D. DOBBS, *supra* note 21, at 254-56. Restitution in cases involving inter vivos gifts and testamentary transfers is throughly covered in 4 G. PALMER, *supra* note 20, chs. 18-20.

29. *See generally* 2 G. PALMER, *supra* note 20, ch.6.

party).[30] Sometimes the plaintiff can recover a benefit which should have gone to him but which the defendant acquired from a third party.[31] In some situations the plaintiff may even recover for benefits he voluntarily conferred upon the defendant without the latter's request.[32]

Most of these common kinds of cases clearly manifest the facts that tend to make the defendant's retention of benefits unjust. If in acquiring the benefit the defendant acted in a way the law independently characterizes as wrongful (*e.g.*, tortiously or in breach of contract of fiduciary duty), the unjustness is easily established. The unjustness of a benefit conferred in part performance of a validly rescinded contract or gift is also readily apparent. The law requires the parties to restore the status quo ante, and so the defendant cannot justify retaining the benefit.

By drawing from these common restitution cases analogies to claims for services rendered to a cohabitant, we should in some situations easily find indicia of unjustness. If, for instance, the defendant induced the plaintiff to enter the relationship—or to remain in it—by a broken promise (*e.g.*, of marriage), by a misrepresentation of material facts (*e.g.*, present marital status), or by duress, then the defendant could not justly retain benefits obtained through that actively wrongful conduct.[33] If, for another instance, the defendant did not knowingly misrepresent material facts, but a mistaken belief regarding such facts induced the plaintiff to enter the relationship, the enrichment of the defendant by the plaintiff's services can still be called unjust without departing far from analogous precedents relating to the rescission of mistaken gifts. A unilateral mistake on the donor's part will usually warrant a rescission if the donor would not otherwise have made the gift.[34] Upon rescission, the donee's retention of the gift becomes unjustifiable, and if the gift was of services, the donee can be required to pay a reasonable value. That approach to the question of unjustness underlies the cases allowing one putative spouse to recover from another or from his estate upon discovering the invalidity of the marriage.[35]

However, we are considering couples who know they are not

30. *See* 3 *id.* § 14.8.

31. *See* 4 *id.* § 21.5.

32. *See* 2 *id.* ch. 10.

33. *See, e.g.*, Marsh v. Marsh, 79 Cal. App. 560, 250 P. 411 (1926); Mixer v. Mixer, 2 Cal. App. 227, 83 P. 273 (1905); Higgins v. Breen, 9 Mo. 497 (1845); Saunders v. Ragan, 172 N.C. 612, 90 S.E. 777 (1916); *In re* Fox's Estate, 178 Wis. 369, 190 N.W. 90 (1922).

34. *See* 4 G. PALMER, *supra* note 20, § 18.2, at 8.

35. *Id.* § 18.3.

married and whose mistake differs from that in the putative-marriage cases. Moreover, in a putative marriage, there will be additional indicia of unjustness. Either the putative husband will have known the wife's mistake and have taken advantage of it, or he will have thought himself validly married and accordingly will have expected to incur financial obligations from the relationship. Either possibility more clearly evinces the unjustness of an uncompensated retention (or an accrual to the estate) of the cohabitant's beneficial services than does the situation of a couple who knew they were not married. A comparable fundamental mistake may have induced the plaintiff to enter a nonmarital relationship, but the defendant, unlike the putative husband, may have had no reason to anticipate financial obligations. Nevertheless, the donee of any voidable gift who cannot return the gift in specie and who must therefore return its value may similarly have anticipated no obligations.[36] Analogous precedent, then, supports the conclusion that retaining the benefit of services may be unjust if one cohabitant performed them for the other because of a fundamental mistake.

However, the typical modern cohabitation probably more closely resembles the relationship envisioned in the letter to Dear Abby. The parties cohabit fully aware of the relevant facts, and the indicia of unjustness found in the fraud, duress, and mistake circumstances are therefore absent. Even if the parties did not actually agree about the transfer of benefits from one to the other, they probably contemplated that the benefits they would receive—material and non-material—would offset the burdens they undertook. Neither party anticipated paying for the material benefits received from the other except by contributing to the relationship. Each party understood that the material benefit received would depend upon what the other chose to contribute. Under those assumptions, neither party's contributions could unjustly enrich the other. Fully aware, they chose not to undertake the obligations of formal marriage, thus foregoing the legal rights of marriage as well. They chose not to specify their mutual rights and obligations in an actual contract or a partnership or

36. The court in Pickslay v. Starr, 149 N.Y. 432, 44 N.E. 163, 27 N.Y.S. 616 (1896), in denying restitution to the donor, expressed concern that the recipient of a mistaken gift might have already spent the money and might therefore find it a hardship if ordered to repay. This concern, however, seems more appropriately analyzed as a ground for avoidance of liability rather than as indicating the absence of "unjustness" in the enrichment. *Cf.* 4 G. PALMER, *supra* note 20, § 18.2, at 9 (the possible prejudice to the donee of a voidable gift who must make restitution necessitates that clear proof be given that the gift resulted from a mistake, but does not invalidate mistake as a ground for rescission).

trust agreement. If one party becomes dissatisfied with the arrangement or feels that he is giving more than receiving, the remedy is to give less, or simply to stop giving—to end the relationship.

That solution is not always easy, however. When one party works in the marketplace and the other in the home, they may not be free—or equally free—to end their association. Breaking off the relationship normally would not seriously harm the breadwinner economically, but the one who keeps house could lose all economic support. That might well deter him from ending, or even jeopardizing, the association, even if he considers the support he receives disproportionate to his contribution. But without a contract or unconscionable conduct by the other party, how could he, when the relationship ends, call the other's enrichment unjust?

The *Marvin* court apparently felt that the presumption "that the parties intend to deal fairly with each other"[37] answers that question. That presumption implies that if, as the relationship develops, one party regularly receives economic benefits disproportionate to his contributions, the imbalance will somehow be corrected. At some point in such a situation, the person keeping house may abandon his essentially donative motivation and expect some tangible recompense for continuing to perform beneficial services. If the imbalance is substantial, the other party should realize that the one at home serves with that expectation even if the couple never actually agreed to it. As to indicia of unjustness, the cohabitants' situation at that point begins to resemble some unsolicited-benefit situations in which the plaintiff, without a donative intent and without any request from the defendant, knowingly confers a benefit on the latter.

In unsolicited-benefit cases, unjustness is most elusive, for while the defendant will have received a windfall at the plaintiff's expense, that alone does not make the retention of the benefit unjustified when the plaintiff knowingly and intentionally made the transfer. Anglo-American courts have resisted obligating a defendant to pay someone he did not deal with—and may not have wanted to deal with—for something he did not order, may not have wanted, and perhaps could not afford.[38] The courts have

37. *See* 18 Cal. 3d at 683, 557 P.2d at 121, 134 Cal. Rptr. at 830 (paraphrasing J. Peters' dissent in Keene v. Keene, 57 Cal. 2d 657, 674, 371 P.2d 329, 339, 21 Cal. Rptr., 593, 603 (1962)).

38. *See generally* 2 G. PALMER, *supra* note 20, ch. 10; Dawson, *Negotiorum Gestio: The Altruistic Intermeddler* (pts. 1-2), 74 HARV. L. REV. 817, 1073 (1961); Hope,

not regarded sympathetically a plaintiff's voluntary intrusion into the defendant's affairs, even when an altruistic concern for the defendant's welfare motivated the plaintiff. Only where the reason the plaintiff bestowed the benefit warrants interfering with the defendant's autonomy will the courts consider the enrichment unjust and grant restitution. In analyzing unjustness, then, courts inspect the plaintiff's motivation and the extent to which restitution would infringe the defendant's freedom of choice.[39]

If the defendant can reject an unsolicited benefit without harming himself, his accepting and keeping it without paying for it may be unjustified even if he did not request it.[40] Whether a court will find his retention unjust turns on the plaintiff's motivation and the defendant's understanding of that motivation. If the plaintiff intended a gift, of course, the defendant incurs no obligation by accepting the benefit. If, on the other hand, the plaintiff intended that the defendant pay for the value transferred, and the defendant knew that when he accepted the benefit, the defendant normally cannot justify appropriating it to his beneficial use without paying anything.[41] If the defendant did not understand that the plaintiff expected payment, courts must take other facts into account. Those facts would include the reason the plaintiff acted as he did and the prejudice to the defendant that restitution would entail. If the plaintiff acted officiously, recovery is unlikely;[42] if he acted to protect his own interests, recovery may be permitted. A junior lienor who pays a defendant's debt to a senior lienor to preserve property from loss, for instance, usually can claim restitution in the form of subrogation.[43] In such a case, the law can hardly disparage the junior lienor's motive, and allowing him restitution imposes no new burden on the defendant. Although the defendant may have had no chance to refuse the benefit, he cannot justify retaining it at the plaintiff's expense.

The benefit in the cohabitants' situation, of course, often consists of services, and the defendant may be unable to refuse the benefit once the service has been rendered. And it is true that

Officiousness (pts. 1-2), 15 CORNELL L.Q. 25, 205 (1929-1930); Wade, *Restitution for Benefits Conferred Without Request,* 19 VAND. L. REV. 1183 (1966).

39. *See* D. DOBBS, *supra* note 21, § 4.9.

40. 2 G. PALMER, *supra* note 20, § 10.10.

41. A federal statute, 39 U.S.C. § 3009 (1976), specifically permits the recipient of unordered merchandise received through the mail to use it without obligation.

42. *See* the sources cited in note 38 *supra.* In particular, see Hope, at 27-29; Wade, at 1184.

43. *See* 2 G. PALMER, *supra* note 20, § 10.5(a).

courts are less likely to regard a retention of the benefit as unjust in such cases than where the defendant had a choice.[44] But where the defendant would inevitably have purchased the same service anyway, requiring the defendant to pay for it simply obligates him to pay the plaintiff an unavoidable expense. That situation resembles the case of the junior lienor. Such an obligation may interfere with the defendant's autonomy relatively slightly.

These principles might resolve the problem of unequal contributions in a modern cohabitation. Economic necessity does not inhibit the marketplace laborer, as it does the party who works at home, from leaving a relationship. Thus, by remaining in the relationship and continuing to accept its material benefits, the marketplace laborer can be said to have implicitly agreed to compensate the other or can be called unjustly enriched if he does not. Even if the worker outside the home does not understand (as he should) that the worker in the home expects more than he has received, to the extent that the latter provides services which satisfy basic human needs—food, clothing, shelter—the former receives benefits that he himself would otherwise have to provide. Requiring him to make restitution, therefore, would not force him to pay for something he did not want and would not have procured from some source.

Requiring the marketplace laborer to make restitution for his cohabitant's services, however, would force him to buy something he might have supplied himself or been given by another source. By analogy to unsolicited benefits, that he incurs an obligation to pay without a choice among alternatives weakens the claim that he has been unjustly enriched, for the plaintiff in an unsolicited-benefit case generally may not recover if he could have allowed the defendant to choose someone else to supply the service.[45] For example, while a physician who, unrequested, renders necessary medical aid in an emergency may recover the reasonable value of his services,[46] he may not recover if no emergency prevented him from securing the defendant's consent.

However, that analogy should not be pressed too far. By hypothesis, the home worker does not volunteer services gratuitously, and the other party receives nothing he did not seek. The beneficiary resembles the recipient of an unsolicited benefit. He may not have actually understood that his benefactor expected payment, but if the presumption of the expectation of fair dealing

44. *See id.* § 10.10(b), at 461.

45. *See* RESTATEMENT OF RESTITUTION § 113, Comment f (1937).

46. *See id.* § 116; Greenspan v. Slate, 12 N.J. 426, 97 A.2d 390 (1953).

is valid, he should have realized he would incur some obligation should the mutual contributions fall into serious disequilibrium. Being relatively freer to terminate the association, he does have a choice of sorts. Thus, requiring restitution may be appropriate.

In the abstract, this analysis seems sensible if we ascribe to the cohabitants the expectation of "fair dealing" (and forget that that ascription may be fictitious). In reality, however, we merely substitute one vague conception (fair dealing) for another (unjust enrichment). We need indicia of "fairness" to determine when the contributions fall out of balance and what the defendant's resulting obligation should be. When the cohabitation arrangement contemplates from its inception that each party's contribution, rather than money or other objectively definable value, will supply the quid pro quo for the other party's contribution, no easy formula can indicate when the contributions are too unequal to be "fair." Analogies drawn from common restitution cases, therefore, probably cannot identify an unjust enrichment except where that disparity is extreme. But, in any event, perhaps that is the only situation in which the courts ought to involve themselves.

When extreme disparity occurs, however, some form of restitution should be available. If the plaintiff seeks a money judgment in quantum meruit, placing a dollar value on the parties' contributions will be difficult. One court has held that a jury can fix the value by drawing upon its general knowledge of the worth of such things.[47] Relying upon the jury's sense of reasonableness may be appropriate in a suit for damages from pain and suffering, which lack objective criteria entirely, but such reliance is questionable where the action seeks monetary recovery for an economic benefit. There is a market for household services,[48] and market value should basically determine the amount of enrichment. Admittedly, services lovingly performed by a resident housekeeper are probably more desirable than those of a domestic servant, but such subjective values have never been weighed in restitutionary recovery.

Unmarried cohabitants seem to seek money awards for their services less frequently than they claim a share of the defendant's property. The cases that allow relief in the form of property to one who contributed primarily household services usually do so pursuant to an express or implied-in-fact agreement (including a

47. Lovinger v. Anglo Cal. Natl. Bank, 243 P.2d 561, 567-68 (Cal. Dist. Ct. App. 1952) (allowed only for express contract).

48. *See* Bruch, *supra* note 7, at 110-14; *see generally* Havighurst, *supra* note 24.

resulting trust).[49] A few cases, however, have indicated that in the absence of an agreement, such a remedy may be predicated on unjust enrichment principles.[50] Traditionally, restitution in the form of an interest in specific property for benefits conferred in a different form has depended upon the plaintiff's ability to trace the benefit actually conferred through successive transformations directly into the specific asset sought.[51] One can trace a benefit in the form of money, for instance, into a bank account, from there into corporate stock purchased from the account, and from there into real estate for which the stock was exchanged. Tracing is obviously more difficult when the benefit consists of services rendered not to the specific property, but to the defendant personally. Arguably, the plaintiff's beneficial services permitted the defendant to expend on the specific property some funds or energies he otherwise would have spent for the services, and thus the plaintiff may trace the services to the property. The law of restitution does not permit this sort of indirect tracing in other situations, however.

A similar argument in favor of tracing—and involving similarly indirect tracing—suggests that the beneficial household services enhance the economic worth of the defendant himself and thus contribute to the defendant's every economic decision, including his purchases of property. The services could even be said to contribute to the defendant's present and future earning capacity and thus to justify a constructive trust against not only presently held property, but future income as well.[52] This rationale essentially duplicates that of the law directing the division of property acquired during marriage when formally married couples divorce.

Whether the same analysis should apply to both married and unmarried couples is questionable. In an actual marriage, spouses exchange not only economic but subjective spiritual and emotional values as well. Marriage implies equal sharing of burdens and benefits, and the courts and legislatures recognize that. The courts have extended that implication to the situation of putative spouses who live together for an extended period mistakenly believing they are actually married, an appropriate extension in

49. *See* Annot., 31 A.L.R.2d 1255 (1953).

50. *See* Hager v. Hager, 553 P.2d 919 (Alaska 1976); Carlson v. Olson, ___ Minn. ___, 256 N.W.2d 249 (1977); Omer v. Omer, 11 Wash. App. 386, 523 P.2d 957 (1974).

51. *See* RESTATEMENT OF RESTITUTION § 160, Comment i (1937).

52. A similar suggestion is made in Kay & Amyx, *supra* note 7, at 964-65 (wife who put husband through school has a constructive trust in the educational capital of her graduated husband).

view of the parties' expectations.[53] The rights of knowingly unmarried couples, on the other hand, must, unless a new status is recognized, spring from legal sources other than the law of marriage: basic principles of tort, contract, trust, property, and unjust enrichment. To allow the subjective, indirect tracing that the rationale behind property division upon divorce entails would go far beyond what cases permit where unjust enrichment is the defendant's sole source of obligation. Courts could ignore tracing and instead candidly recognize a "quasi-marriage" or "quasi-community-property" relationship that enables one who contributed services to claim a share of property, but that would depart even further from established principles of restitution and unjust enrichment. To allow a knowingly unmarried party, in the name of unjust enrichment, the same right allowed a real or putative spouse to claim property acquired by the other (in the absence of an express or implied-in-fact agreement) is to recognize the new "common law status" Dear Abby referred to.

The potential effect of such a status on the institution of monogamous marriage, and on the society which has heretofore believed that institution fundamental, is a profoundly significant issue. Its implications transcend the interests of particular parties and outstrip the ability of a lawsuit—where the adversaries frame the issues and supply the evidence—to consider them adequately. The legislative process is much better equipped to resolve such questions, although it too is seriously handicapped when dealing with issues as emotional and symbolic as the future of marriage.

That some courts have been persuaded to assist a person who worked at home to recover a share of his cohabitant's property after a stable, long-term, knowingly unmarried relationship strongly suggests that some new legal status ought to be recognized. At least one state legislature has recognized an unmarried cohabitant's claim to a share of the partner's property upon the partner's death.[54] In view of the growing numbers who choose to live together unmarried, other states' legislatures cannot long ignore the need to resolve property claims that arise when such relationships terminate. In the meantime, the unmarried cohabitants are well-advised to provide privately, by agreement, their own solutions. In the absence of such agreements, unjust enrichment principles may be resorted to in some cases. The plaintiff

53. *See, e.g.*, Schneider v. Schneider, 183 Cal. 335, 191 P. 533 (1920); Werner v. Werner, 59 Kan. 399, 53 P. 127 (1898). *See generally* Evans, *Property Interests Arising from Quasi-Marital Relations*, 9 CORNELL L.Q. 246, 254-61 (1924).

54. N.H. REV. STAT. ANN. § 457:39 (1968).

whose economic contribution to the relationship was primarily of household services may find it hard to establish unjust enrichment, but not impossible if the *Marvin* court's presumption of an expectation of fair dealing is accepted. Where the relationship lasted a long time, where the plaintiff contributed services the defendant would otherwise have had to provide for himself, where the economic value the plaintiff gave and received differed greatly, and where the plaintiff's economic dependence inhibited his freedom to end the relationship, the defendant's enrichment can be considered unjustified.

A money recovery in the amount by which the value of the plaintiff's services exceeded the support and other economic value the plaintiff received may be appropriate in such cases and would not depart widely from precedents in analogous cases. Restitution in the form of a share of property is another matter. Allowing such a remedy where household services were the benefit would strain established notions of tracing. If that remedy is recognized, it should be understood as a feature of a new status, not as a product of the general law of restitution.[55] And if that status is to be recognized, the legislatures, not the courts should do so.[56]

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55. Washington cases seem to recognize that, even absent legislation, community property rights can be acquired through a stable, long-term meretricious relationship. *See In re* Estate of Thornton, 81 Wash. 2d 72, 499 P.2d 864 (1972) (dicta); 53 WASH. L. REV. 145, 168-69 (1977).

56. *Postscript*: On April 17, 1979, the California Supreme Court announced its decision in Marvin v. Marvin. It found no contract—express or implied; it found no trust—actual, constructive, or resulting; nevertheless, it awarded the plaintiff $104,000 "for rehabilitation purposes, so that she may have the economic means to educate herself and to learn new, employable skills . . . and so that she may return from her status as companion of a motion picture star to a separate but perhaps more prosaic existence." Los Angeles Daily Journal, April 19, 1979, at 10. The only justification offered by the court was a reference to footnote 25 of the California Supreme Court's *Marvin* decision, 18 Cal. 3d at 685, 557 P.2d at 123, 134 Cal. Rptr. at 832, which it said authorized trial courts to employ "whatever equitable remedy may be proper under the circumstances."

It is impossible to contemplate a remedy, equitable or otherwise, apart from a right. One may thus wonder where the substantive right to "rehabilitation" came from. The findings of the court exclude the possibility that the right stemmed from unjust enrichment or from a contract to share in the defendant's earnings. No express finding was made, however, relating to a contract for the rehabilitation of the plaintiff at the termination of the relationship. Perhaps the court found an implied contract deriving from the "expectation of fair dealing" recognized by the California Supreme Court. *See* text at note 37 *supra*. If so, it would have been helpful if the court had made that clear.