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Ordinary Cohabitation

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ORDINARY COHABITATION

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Twenty-five years ago, when the Supreme Court of California decided the case of *Marvin v. Marvin*,[1] it caused a sensation in the popular press. Michelle Triola began living with the actor Lee Marvin in October 1964, while he was separated from his wife Betty. While living with Michelle, Lee Marvin reached the peak of his career, earning an Oscar for *Cat Ballou* in 1965 and making other films including *The Dirty Dozen* (1967), *Hell in the Pacific* (1968), and *Paint Your Wagon* (1969). Although Lee "compelled her to leave his household" in May 1970, he continued supporting Michelle until November 1971.[2] When he stopped paying, Michelle filed an action seeking an award of $1,800,000, or half his earnings during the six years they had spent together.[3] Her lawyer, a Los Angeles divorce attorney named Marvin Mitchelson, was interviewed by a *Newsweek* reporter, who coined the term "palimony" for her claims.[4]

The *Marvin* decision followed a series of older cases in California that had considered claims between nonmarital partners at the end of cohabitation relationships.[5] These cases held that a contract between nonmarital partners was enforceable unless it rested explicitly "upon the immoral and illicit consideration of meretricious sexual services."[6] The court refused to apply the state's community property laws to unmarried couples, but held that, in the absence of an express contract, courts could grant relief on the basis of an implied contract, implied partnership or joint venture agreement, constructive trust, resulting trust, or quantum meruit.[7]

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1 557 P.2d 106 (Cal. 1976).

2 *Id.* at 110.

3 Myrna Oliver, "Marvin" *Cases Hard to Win, Palimony Proves to Be an Exclusive Pot of Gold*, L.A. TIMES, Jan. 30, 1986, at 1.

4 *Id.*

5 *See Marvin*, 557 P.2d at 112.

6 *Id.*

7 *See id.* at 122–23.

On remand, the *Marvin* case was assigned to Judge Arthur K. Marshall. After a three-month trial, Judge Marshall found that Lee and Michelle had never agreed to combine or share their earnings and property, that they had never agreed that Michelle would give up her career as an entertainer and singer to be Lee's full-time companion and homemaker, that Lee had never agreed to provide for her financial needs and support for the rest of her life, that Michelle had been financially enriched rather than suffering damages from her relationship with Lee, and that he had not been unjustly enriched as a result of the relationship or her services.[8] Judge Marshall did find that Michelle was in need of funds to re-educate herself and learn new employable skills and ordered Lee to pay $104,000 for her living expenses during this "rehabilitation."[9] On appeal, however, the award was reversed, leaving Michelle with no recovery at all.[10]

Lee Marvin, who married a former girlfriend from his hometown after separating from Michelle in 1970, died of a heart attack in August 1987 and is buried in Arlington National Cemetery.[11] Since her breakup with Lee, Michelle Triola Marvin has lived in a nonmarital relationship with the actor Dick Van Dyke.[12] When Judge Marshall died in November 1999, the obituaries remembered him as the judge who presided over Lee Marvin's palimony trial.[13] And Marvin Mitchelson, who was convicted in 1993 for tax fraud, was released from prison in 1998 and readmitted to the California bar in May 2000.[14]

Marvin v. Marvin has been cited in approximately two hundred other court decisions, about half of which come from the California

8 Judge Marshall's opinion is reproduced at *Marvin v. Marvin*, 5 Fam. L. Rep. (BNA) 3077, 3077 (Cal. Super. Ct. 1979).

9 *See id.* at 3085.

10 *See* Marvin v. Marvin, 176 Cal. Rptr. 555, 559 (Ct. App. 1981).

11 *See* Associated Press, *Tough-Guy Actor Lee Marvin*, CHI. TRIB., Aug. 30, 1987, § 2, at 8; Bruce McCabe, *Lee Marvin, With Not Enough Warts*, BOSTON GLOBE, Dec. 19, 1997, at E16 (reviewing Pamela Marvin's memoir: *Lee: A Romance*); Bill Zwecker, *Memoir, Film Spotlight Lee Marvin, the Man*, CHI. SUN-TIMES, Nov. 15, 1998, at 3; *see also Lee Marvin Private First Class, United States Marine Corps Movie Actor, at* http://www.arlingtoncemetery.com/lmarvin.htm (Dec. 16, 2000).

12 *See* David Cuthbert, *Who is that Masked Man? "Happy Face" Had a Van Dyke Beard*, NEW ORLEANS TIMES-PICAYUNE, Jan. 1, 2000, at E1 (reviewing television biography special); Monica Guttman, *Dick Van Dyke: Once You Make Them Laugh, You Are Hooked*, ST. PETERSBURG TIMES, Sept. 21, 1986, at 7; Myrna Oliver, *Palimony Pays for "Third Marvin"—Their Attorney*, L.A. TIMES, Jan. 30, 1986, at 24.

13 *See* Myrna Oliver, *Arthur K. Marshall: L.A. Judge Presided Over Actor Lee Marvin's Palimony Trial*, L.A. TIMES, Nov. 24, 1999, at A18.

14 *See* Ann W. O'Neill, *Attorney Mitchelson Fit to Practice Law Again, Judge Rules*, L.A. TIMES, May 16, 2000, at B3; *see also* United States v. Mitchelson, No. CR-92-00716-WK(JR), 1995 WL 139227, at *3 (9th Cir. Mar. 29, 1995).

courts, and approximately three hundred law review articles. It is still a fixture of family law classes, appearing as a principal case in each of the eleven casebooks currently on the market. The term "palimony" has entered general usage, particularly in the context of entertainers, sports figures, and wealthy entrepreneurs.[15]

With all its celebrity, the *Marvin* decision stands more as a cultural icon than as a legal watershed. In the twenty-five years since Lee and Michelle hit the gossip columns, rates of unmarried cohabitation have climbed steadily, and courts have continued to confront the claims of unmarried partners at the end of their relationships. As living together without marriage has become less glamorous, less forbidden, and more ordinary among the middle class, there is more of this legal work for courts and lawyers to do. But the law governing nonmarital relationships remains largely an ad hoc affair, with tremendous variation between states and from case to case.

At one end of the spectrum, courts in Illinois and Georgia have refused to embrace the *Marvin* principle and will not enforce even express written "relationship" contracts between unmarried cohabitants.[16] At the other end of the spectrum, courts in Washington and Nevada have begun to apply rules that treat some nonmarital opposite-sex couples as if they were married for purposes of property claims at the end of their cohabitation.[17] In between these extremes, most states' courts routinely enforce express agreements and recognize various equitable claims between unmarried partners, particularly where they share a business or property.[18]

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15 For recent examples, see Evening Update, *Actor Jack Klugman Wins $5 Million Palimony Suit*, CHI. TRIB., Dec. 2, 1999, at 2; Richard Marosi, *Maglicas Reach a Palimony Settlement*, L.A. TIMES, Mar. 14, 2000, at B1; see also Oliver, *supra* note 3, at 1.

16 *See* Rehak v. Mathis, 238 S.E.2d 81, 82 (Ga. 1977); Hewitt v. Hewitt, 394 N.E.2d 1204, 1211 (Ill. 1979).

17 *See* W. States Constr., Inc. v. Michoff, 840 P.2d 1220, 1224–25 (Nev. 1992); Connell v. Francisco, 898 P.2d 831, 836–37 (Wash. 1995).

18 This was true even before the *Marvin* decision. *See generally* R.P. Davis, Annotation, *Rights and Remedies in Respect of Property Accumulated by Man and Woman Living Together in Illicit Relations or Under Void Marriage*, 31 A.L.R.2d 1255 (1953) (citing cases). Although there is legislation in a few states addressing claims by cohabitants, the law in this area remains mostly judge-made. Minnesota and Texas statutes require that cohabitation agreements be in writing. *See* MINN. STAT. ANN. § 513.075 (West 1990); TEX. BUS. & COM. CODE ANN. § 26.01(b)(3) (Vernon 1987); *see also* N.H. REV. STAT. ANN. § 457:39 (1992) ("Persons cohabitating 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.").

In these many and diverse legal approaches to cohabitation, we can watch the courts fulfilling their time-honored common-law responsibility to revisit the law, one case at a time, and resolve the particular disputes of individual claimants. As they devise new remedies from the commonplace tools of unjust enrichment, property, and contract law, most courts are circumspect, carefully limiting the scope of their decisions. These decisions, which define the normative legal contours of ordinary cohabitation, do not suggest that *Marvin* was at the vanguard of a revolutionary change in the law.

This Essay considers the social and legal norms of ordinary cohabitation that have evolved since the *Marvin* decision. It is clear from the legal and demographic literature that the social practices of cohabitation have shifted significantly over the past twenty-five years and that the transition is still continuing. The law, however, has not changed at the same rate. Remedies available to cohabitants are largely limited to untangling shared property interests and reimbursing extraordinary contributions made by one partner to the other's business or property interests. Under these rules, most cohabitants have no rights or obligations that arise by virtue of their shared life.

I. COHABITATION TRENDS

In his opinion for the court in *Marvin*, Justice Tobriner famously commented on the four-fold increase in cohabitation over the prior fifteen years.[19] Statistics show that the number of cohabiting opposite-sex couples has continued to increase dramatically, growing from 523,000 in 1970 to 1.6 million in 1980, 2.9 million in 1990, and 4.2 million in 1998.[20] These increasing cohabitation rates reflect widespread changes in values and in the social meaning of cohabitation.

For some couples, cohabitation is understood to be a stage in the marriage process.[21] Sixty percent of opposite-sex cohabitants in the United States go on to marry each other, and this often happens quickly.[22] The opinion in *Marvin* suggests this possibility explic-

19 Marvin v. Marvin, 557 P.2d 106, 109 (Cal. 1976) (citing Patrick A. Nelson, Comment, In re Cary: *A Judicial Recognition of Illicit Cohabitation*, 25 HASTINGS L.J. 1226 (1974)).

20 U.S. DEP'T OF COMMERCE, 1999 STATISTICAL ABSTRACT OF THE UNITED STATES 60 (1999).

21 *See* Pamela J. Smock, *Cohabitation in the United States: An Appraisal of Research Themes, Findings, and Implications*, 26 ANN. REV. SOC. 1, 7 (2000). One reoccurring legal question is how to treat a period of premarital cohabitation when a couple later divorces. *See infra* note 27 and accompanying text.

22 Larry L. Bumpass et al., *The Role of Cohabitation in Declining Rates of Marriage*, 53 J. MARRIAGE & FAM. 913, 917 (1991). Half of cohabiting couples have either married

itly,[23] and there is demographic evidence to confirm the pattern. As cohabitation rates have increased, marriage rates have declined, and the average age at first marriage has consistently increased.[24] By 1995, more than half of all "first unions" began as cohabitation relationships.[25]

Numerous studies have found that cohabiting relationships are less stable than married relationships and that marriages preceded by cohabitation are less stable than those in which the couple did not live together prior to their marriage.[26] It is not clear, however, whether cohabitation causes the increase in the chances for divorce.[27] Over time, the patterns have shifted; fewer cohabiting couples are going on to marry each other, and more are breaking up.[28]

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or broken up after one and one-half years. *Id.*; *see also* Judith A. Seltzer, *Families Formed Outside of Marriage*, 62 J. MARRIAGE & FAM. 1247, 1249, 1250–51 (2000).

23 *Marvin*, 557 P.2d at 122.

> We are aware that many young couples live together without the solemnization of marriage, in order to make sure that they can successfully later undertake marriage. This trial period, preliminary to marriage, serves as some assurance that the marriage will not subsequently end in dissolution to the harm of both parties.

Id. There are many divorce cases that reflect a period of premarital cohabitation. *See* cases cited *infra* note 31.

24 *See* Bumpass et al., *supra* note 22, at 914–18; Jay D. Teachman et al., *The Changing Demography of America's Families*, 62 J. MARRIAGE & FAM. 1234, 1235–36 (2000).

25 *See* Larry Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 POPULATION STUD. 29, 33 (2000). To some extent, this is a generational change; the proportion of unmarried unions among younger age cohorts has steadily increased. Bumpass and Lu stress the "dramatic role of cohort replacement as the cohorts on the leading edge of the shift to cohabitation have progressed through the age structure." *Id.* at 32.

26 *See* Seltzer, *supra* note 22, at 1252 ("[T]here is evidence that the inverse relationship between premarital cohabitation and marital stability is diminishing."). *Contra* Smock, *supra* note 21, at 13.

27 As summarized by Judith Seltzer:

> Informal unions dissolve more quickly than do formal marriages because of differences in the quality of the match between partners who marry and those who do not, the strength of normative consensus favoring marriage, the legal and social institutions that support formal marriage over cohabitation, and differences in the attitudes and resources of cohabitors and those who marry.

Seltzer, *supra* note 22, at 1252.

28 *See* Bumpass & Lu, *supra* note 25, at 33. These scholars suggest that, "[a]s cohabitation becomes increasingly accepted, cohabitations may include a greater proportion of couples with less serious commitments—who decide to cohabit as a matter of temporary convenience—leading to lower marriage and higher dissolution rates for the population as a whole." *Id.*; *see also* Seltzer, *supra* note 22, at 1250–52; Smock, *supra* note 21, at 13.

The period since the *Marvin* decision has also been marked by high divorce rates, which have leveled off since reaching a peak in 1980.[29] Divorce interacts with cohabitation in interesting ways. Many divorced individuals choose to cohabit with a partner before entering into a second marriage or as an alternative to a second marriage.[30] A surprising number of published cases treat the claims of cohabitants who had been married to each other, and divorced, and then resumed cohabitation without marrying again.[31] As divorce rates increase, the standard for a successful long-term marriage increases as well, making a trial period seem more important. The fear of divorce may itself prevent some couples from marrying.[32] Some demographers believe that the fact that cohabitation is available as an alternative to marriage has helped to stabilize divorce rates.[33] Marriage may appear more stable than cohabitation because individuals in less promising relationships today choose not to marry.

Some couples choose cohabitation rather than marriage as an ethical matter, based on their personal values and their views of marriage as an institution.[34] In her report of qualitative empirical research conducted in the United Kingdom, Carol Smart characterizes these as "reflexive relationships."[35] By "reflexive relationships," she means

> those in which the couples spectate upon the reasons for entering a relationship, who seek (jointly) to define the nature of that relationship and its boundaries and qualities, who monitor the progress

29 U.S. DEP'T OF COMMERCE, 1998 STATISTICAL ABSTRACT OF THE UNITED STATES 111 (1998).

30 According to Bumpass et al., *supra* note 22, at 918, sixty percent of persons who remarried between 1980 and 1987 had lived with a partner prior to remarrying.

31 *E.g.*, Glasgo v. Glasgo, 410 N.E.2d 1325, 1325–27 (Ind. Ct. App. 1980); Eaton v. Johnston, 681 P.2d 606, 607 (Kan. 1984); Pickens v. Pickens, 490 So. 2d 872, 873–74 (Miss. 1986); Bass v. Bass, 814 S.W.2d 38, 39–41 (Tenn. 1991); Kinnison v. Kinnison, 627 P.2d 594, 594–95 (Wyo. 1981); *see also In re* Marriage of Bukaty, 225 Cal. Rptr. 492, 494–95 (Ct. App. 1986) (reporting that the married couple cohabited for twenty-seven years after their divorce and before their second marriage).

32 *See* Smock, *supra* note 21, at 5.

33 *See* Seltzer, *supra* note 22, at 1253.

34 For same-sex couples, of course, cohabitation is not evaluated as an alternative to marriage, since same-sex marriage is not an option in the United States.

35 Carol Smart, *Stories of Family Life: Cohabitation, Marriage and Social Change*, 17 CAN. J. FAM. L. 20, 36 (2000); *see also* Vivienne Elizabeth, *Cohabitation, Marriage and the Unruly Consequences of Difference*, 14 GENDER & SOC'Y 87, 87–107 (2000) (reporting a study based on interviews with nineteen cohabiting individuals characterized as "marriage resisters").

> of the relationship and put in place contingency plans (like wills) to manage unforeseen or even foreseen changes.[36]

Her study, as well as the anecdotal accounts of unmarried couples that appear regularly in the news media, suggests that these long-term cohabiting couples are more likely to value equality and independence.[37] What percentage of cohabiting couples fit this description is impossible to determine, however, from the statistical demographic evidence.

Although some couples view cohabitation as a transition to marriage, and others make a deliberate decision to reject marriage, many couples fit into a third group. For these couples, moving in together and remaining in an unmarried relationship is largely a response to circumstances. Carol Smart's study describes cohabitation in "risk relationships," which she defines as "relationships . . . that are based on taking a chance (which can be a gradual process) or seizing an opportunity (which can be quite spontaneous) when faced with significant life events."[38] Smart's study also revealed that men and women had different perspectives on these relationships. The women "expected the relationships to last *only* if the men were prepared to change in some fundamental way."[39] Although the women were interested in marriage, they were uncertain whether marriage to this particular man was a good idea. The men in this study were also waiting to see if the relationship would work out, but their concerns centered more on remaining independent, and they were "alert to the need to be able to get away cleanly."[40]

For couples in this third group, the choice of cohabitation may be strongly influenced by economic factors. The court in *Marvin*

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36 Smart, *supra* note 35, at 36. She contrasts reflexive relationships with "risk relationships," discussed below.

37 *See, e.g.*, Michael D'Antonio, *Unmarital Bliss*, L.A. TIMES, Apr. 9, 2000, (Magazine) at 20; Karen S. Peterson, *Couples Are Less Likely to Choose Marriage*, USA TODAY, Apr. 18, 2000, at 1D; Abigail Trafford, *Second Opinion: The Case for Marriage Isn't Open and Shut*, WASH. POST, Oct. 17, 2000, at Health 1; Rene Wisely, *Why Couples Don't Tie the Knot*, DETROIT NEWS, Apr. 12, 2000, at Features 1.

38 Smart, *supra* note 35, at 36. She goes on to observe: "Often it is just hoped that things will work out somehow and actual expectations are left unsaid or are rather minimal." *Id.*

39 *Id.* at 41. Many of these men were unemployed, and there was a significant incidence of domestic violence within this group. *Id.* at 42. Smart points out that there is also a class dimension to this problem: women who are welfare recipients risk losing important benefits if they marry, suggesting that their caution around marriage is economically rational. *Id.* at 37.

40 *Id.* at 45. Even those men in reflexive relationships stressed the value of independence as one reason to choose cohabitation over marriage. *Id.* at 39.

noted that for some couples marriage may mean a loss of pension, welfare, or tax benefits.[41] For others, the cost of a wedding, or of dissolving a previous marriage, may be a significant factor.[42] Various studies report that cohabitation is more common among couples with less education and fewer economic resources.[43] Men's circumstances are particularly significant here; women are more likely to marry when there is a better supply of "marriageable" men, defined in terms of income, education, and employment.[44]

The economic profiles of cohabiting couples tend to be different from married couples. As a group, cohabitants are more likely than married couples to have relatively comparable earnings and more likely to remain together where their earnings remain equal.[45] This is in contrast to married couples, who are somewhat more likely to remain together where there is a specialization of labor.[46] The evidence also suggests that cohabitants are more likely to make the transition to marriage where the male partner's earnings and education are higher.[47]

Rates of marriage and cohabitation are notably different between racial and ethnic groups. Census data indicates that Hispanic women are more likely to marry at an early age, and African-American women are less likely to marry at all.[48] When nonmarital unions are included in the household formation picture, however, racial differences are reduced, since African-American couples are more likely to cohabit

41 *See* Marvin v. Marvin, 557 P.2d 106, 117 n.11 (Cal. 1976).

42 *Id.*; *see also* Oystein Kravdal, *Does Marriage Require a Stronger Economic Underpinning than Informal Cohabitation?*, 53 POPULATION STUD. 63, 67 (1999).

43 *See* ANDREW J. CHERLIN, MARRIAGE, DIVORCE, REMARRIAGE 11–18 (1992); Seltzer, *supra* note 22, at 1250; *see also* Kravdal, *supra* note 42, at 63–80 (reviewing data from Norway). *But see* Julie Brines & Kara Joyner, *The Ties that Bind: Principles of Cohesion in Cohabitation and Marriage*, 64 AM. SOC. REV. 333, 341 (1999) (noting that cohabiting and married couples have similar combined earnings during their first year together).

44 *See* Teachman et al., *supra* note 24, at 1237.

45 *See* Brines & Joyner, *supra* note 43, at 341, 350–51.

46 *See id.* at 348–50.

47 *See* Pamela J. Smock & Wendy D. Manning, *Cohabiting Partners' Economic Circumstances and Marriage*, 34 DEMOGRAPHY 331, 338 (1997). These authors also report that women's economic circumstances have no apparent effect on the transition from cohabitation to marriage. *See id.* Bumpass has demonstrated that despite a popular conception that cohabitation is a college student phenomenon, rates of cohabitation have been consistently higher for young people in lower economic classes and lower among better educated segments of the population. Bumpass et al., *supra* note 22, at 916–17.

48 Teachman et al., *supra* note 24, at 1236.

than white couples.[49] To what extent these differences are a function of economic circumstances is uncertain. Although it is clear that job opportunities and earning power have diminished significantly for African-American men, the empirical evidence suggests that neither women's increased earning power or men's decreased earning power fully explains the lower rates of marriage for African-Americans.[50]

Demographers have noted one particularly significant change in cohabitation relationships over the past twenty-five years. There has been a substantial increase in the numbers of unmarried couples having or raising children together. By 1995, fifty percent of all cohabiting couples lived with children.[51] This change is connected to the enormous increase in nonmarital births over the same time period.[52] Most of the recent increases in unmarried childbearing results from births to cohabiting couples rather than births to single women.[53] Unmarried parents increasingly choose cohabitation rather than marriage when an unexpected pregnancy occurs. In addition, a large proportion of children born to single mothers, as well as some children born to married parents, go on to experience cohabiting families.[54] As a result, cohabitants often play an active role as stepparents for their partners' children.[55]

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49 *Id.* at 1238. The authors note studies indicating that African-Americans are also less likely to move from cohabitation to marriage. *See, e.g.*, Wendy D. Manning & Pamela J. Smock, *Why Marry? Race and the Transition to Marriage Among Cohabitors*, 32 DEMOGRAPHY 509, 518 (1995). Note, however, that there is no racial difference in the proportion of couples who have ever cohabited. *See* Bumpass & Lu, *supra* note 25, at 32.

50 The difference may result from changes in local marriage markets—a decline in the pool of marriageable men—rather than men's economic position relative to women. Teachman et al., *supra* note 24, at 1237–38.

51 Bumpass & Lu, *supra* note 25, at 34–35; *see also* Seltzer, *supra* note 22, at 1251–52; Smock, *supra* note 21, at 13.

52 In 1970, just over ten percent of all births were nonmarital births. U.S. DEP'T OF COMMERCE, 1992 STATISTICAL ABSTRACT OF THE UNITED STATES 828, tbl. 1365 (1992). By 1995 almost one-third were nonmarital. U.S. DEP'T OF COMMERCE, *supra* note 29, at 81, tbls. 101, 102, 1365.

53 Overall, almost forty percent of all children born to unmarried women from 1990 to 1994 had parents cohabiting at the time of birth. *See* Bumpass & Lu, *supra* note 25, at 34–35. There are racial and ethnic differences here as well. For white and Hispanic mothers, the rate was fifty percent or more; for black mothers, the rate was twenty-two percent. *See id.*

54 *See id.* at 35.

55 Seltzer, *supra* note 22, at 1251–52. The presence of children in cohabiting households increases the likelihood that the cohabitants will go on to marry. *See* Manning & Smock, *supra* note 49, at 517–18.

Beyond these three groups, same-sex couples form another large category of cohabitants.[56] Whatever their values and motivations, these couples do not now have the right to marry. As a consequence, their cohabitation cannot be understood as a transitional stage prior to marriage or as a deliberate rejection of marriage. Most likely, however, there are similar differences between the "reflexive" and "risk" relationships within this group, at least to the extent that some couples plan their cohabitation carefully and monitor the progress of their relationship, while others act more spontaneously.

Judith Seltzer points out that cohabiting couples are very diverse in part "because they are forming their relationships under a rapidly changing set of social rules about marriage, cohabitation, and childbearing outside of marriage."[57] Steven Nock characterizes cohabitation as an "incomplete institution."[58] The instability of the rules fosters experimentation, and makes it difficult to understand what cohabitation means. Without established social norms and expectations, cohabiting couples need to invent the rules for their relationship as it unfolds.[59] Frequently, these rules are based on equality principles, and there is evidence to suggest that cohabitation relationships are more stable where couples have an equal balance of power.[60] Equality

56 Statistical data is much more difficult to develop for this group. *See generally* Dan Black et al., *Demographics of the Gay and Lesbian Population in the United States: Evidence from Available Systematic Data Services*, 37 DEMOGRAPHY 139 (2000).

57 Seltzer, *supra* note 22, at 1263.

58 Steven L. Nock, *A Comparison of Marriages and Cohabitating Relationships*, 16 J. FAM. ISSUES 53, 56–57 (1995); *see also* PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES 321–22 (1983).

59 *See* Brines & Joyner, *supra* note 43, at 350–51. A couple looking for practical assistance might find advice books in a library or bookstore covering some of the legal, financial, and psychological dimensions of cohabitation. *See, e.g.*, ROSANNE ROSEN, THE COMPLETE IDIOT'S GUIDE TO LIVING TOGETHER (2000). For a particularly detailed legal guide, see TONI LYNNE IHARA ET AL., THE LIVING TOGETHER KIT: A LEGAL GUIDE FOR UNMARRIED COUPLES (10th ed. 2001) (with CD-ROM).

60 Brines and Joyner put the point this way:

> Cohabiting couples are prone to follow the equality principle because of the conditions they confront, high uncertainty, an unspecified time horizon, and the absence of a reliably enforceable contract. These conditions grant couples a certain freedom to experiment with organizational forms that are less responsive to external norms or contractual obligations and more responsive to the needs of each partner. This freedom, however, comes with the loss of incentives to invest jointly in the relationship and of clear cultural guidelines for how partners might conduct themselves once they set up a household.

Brines & Joyner, *supra* note 43, at 350–51; *see also* Seltzer, *supra* note 22, at 1253–54 (noting that couples who cohabit have more liberal gender-role attitudes). *But see* Smock, *supra* note 21, at 14 (noting that cohabiting and married couples are not

is difficult, however, to achieve and to maintain over a long period of time.[61]

II. LEGAL NORMS

Against this background of social experimentation and demographic change, the courts have articulated legal norms that reinforce the tendency toward equality as the organizing principle in cohabitation relationships. By refusing to assimilate cohabitation to the norms of marriage, the courts define ordinary cohabitation as a relationship in which the parties do not acquire rights or take on obligations to each other. In most states, the sharing norms that apply to property and support claims at the dissolution of a marriage do not apply. To the extent that cohabiting couples are aware of this difference, it is a signal that sharing behavior is not expected and that such behavior may prove to be financially risky in the long run.

Courts in a few states have signaled their willingness to compensate cohabitants for the types of sharing behavior that we associate with marriage. In Washington and Nevada, courts apply the law governing distribution of community property to some cohabiting couples "by analogy."[62] In Kansas, Mississippi, and Oregon, courts sometimes enter property distribution orders in cohabitation cases based on "general equitable principles."[63] In California, West Virginia, and Wisconsin, courts achieve a similar result through generous application of implied contract principles.[64]

In all these jurisdictions, however, relief under these principles is limited to cohabitants who lived together in stable, long-term relationships.[65] The requirement that this cohabitation be "marriage-like" has

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different in their division of household labor and that women "perform the vast majority of housework in both contexts").

61 *See* Brines & Joyner, *supra* note 43, at 351.

62 *See* W. States Constr., Inc. v. Michoff, 840 P.2d 1220, 1222 (Nev. 1992); Connell v. Francisco, 898 P.2d 831, 835–36 (Wash. 1995).

63 *See* Eaton v. Johnston, 681 P.2d 606, 610–11 (Kan. 1984); Pickens v. Pickens, 490 So. 2d 872, 875–76 (Miss. 1986); Shuraleff v. Donnelly, 817 P.2d 764, 768–69 (Or. Ct. App. 1991).

64 *See* Marvin v. Marvin, 557 P.2d 106, 110 (Cal. 1976); Goode v. Goode, 396 S.E.2d 430, 439 (W. Va. 1990); Watts v. Watts, 405 N.W.2d 303, 313–14 (Wis. 1987). Decisions in Nevada and Oregon, predating the cases cited in the two preceding notes, indicated support for this kind of generous view of implied contract principles. *See* Hay v. Hay, 678 P.2d 672, 675 (Nev. 1984); Beal v. Beal, 577 P.2d 507, 510 (Or. 1978).

65 A number of California cases have denied recovery to individuals in long-term relationships who did not share a household, on the basis that there was no consideration for any implied or express contracts. *See* Bergen v. Wood, 18 Cal. Rptr. 2d 75, 79

led at least one court to conclude that recovery is not available to same-sex partners, since they are excluded from marriage.[66] Relief may be limited to orders distributing property accumulated during the period of cohabitation, as opposed to orders for ongoing support.[67]

Those courts asserting inherent equitable authority to divide cohabitants' property draw an analogy to the remedies available after the breakup of a common-law business partnership, rather than the remedies available for dissolution of marriage.[68] Recognizing the parties' joint efforts toward accumulation of property, including both financial and nonfinancial contributions,[69] these decisions approve

(Ct. App. 1993) (reversing the award to a plaintiff who did not live with the defendant and who could not show any consideration independent of the sexual relationship); Taylor v. Fields, 224 Cal. Rptr. 186, 194 (Ct. App. 1986) (approving summary judgment in a case brought against the wife of a deceased lover after forty-two year relationship). The requirement of cohabitation was not applied to a partition case where a dating couple acquired real property together and terminated their relationship without ever marrying. Milian v. DeLeon, 226 Cal. Rptr. 831, 835 (Ct. App. 1986). The recovery in *Milian* is better explained by the principles outlined *infra* at text accompanying notes 62 to 64. These cases frequently involve couples who held themselves out as married, and a number of them describe relationships in which the parties were married, then divorced, and then resumed cohabitation without marrying a second time. *See* cases cited *supra* note 63. In some cases, courts seem influenced by the fact that one or both of the cohabiting individuals is married to someone else. *See, e.g.*, Thomas v. LaRosa, 400 S.E.2d 809, 811–14 (W. Va. 1990).

66 Vasquez v. Hawthorne, 994 P.2d 240, 242–43 (Wash. Ct. App. 2000), *appeal docketed*, 11 P.3d 825 (Wash. 2000). The court did suggest, however, that Vasquez could make a claim based on constructive trust or implied partnership theories. *See id.* at 242–43. This is consistent with practice in many jurisdictions in which courts apply the rules outlined in the text below to same-sex as well as opposite-sex cohabitants. *See, e.g.*, Bramlett v. Selman, 597 S.W.2d 80, 85 (Ark. 1980) (constructive trust); Weekes v. Gay, 256 S.E.2d 901, 904 (Ga. 1979) (implied trust); Ireland v. Flanagan, 627 P.2d 496, 500 (Or. Ct. App. 1981) (implied contract to hold title as cotenants); Mitchell v. Moore, 729 A.2d 1200, 1206 (Pa. Super. Ct. 1999) (unjust enrichment); Doe v. Roe, 475 S.E.2d 783, 787 (S.C. Ct. App. 1996) (constructive trust); Small v. Harper, 638 S.W.2d 24, 26–27 (Tex. App. 1982) (constructive trust).

67 *See Thomas*, 400 S.E.2d at 814–15 (rejecting a claim for support); Goode v. Goode, 396 S.E.2d 430, 439 n.16 (W. Va. 1990) (allowing an implied contract claim for property distribution); *see also Pickens*, 490 So. 2d at 875 (citing Taylor v. Taylor, 317 So. 2d 422 (Miss. 1975)). *But see* Byrne v. Laura, 60 Cal. Rptr. 2d 908, 913–16 (Ct. App. 1997) (allowing cohabiting partner to enforce promises for support against the other partner's estate). Some cases distinguish *Marvin* as a case involving a claim for "palimony," that is ongoing support payments. *E.g.*, *Glasgo*, 410 N.E.2d at 1327.

68 *E.g.*, *Eaton*, 681 P.2d at 610; *Pickens*, 490 So. 2d at 875–76.

69 *E.g.*, *Pickens*, 490 So. 2d at 876; Wilbur v. DeLapp, 850 P.2d 1151, 1153 (Or. Ct. App. 1993).

property division orders without requiring proof of express or implied agreements.[70]

In Oregon, the courts begin by attempting to determine the parties' intent, but "[i]n the absence of an expression of intent . . . look at the facts and inferences that can be drawn therefrom to determine whether the parties implicitly agreed to share assets equally."[71] Factors that are relevant to this determination include "how the parties held themselves out to their community, the nature of the cohabitation, joint acts of a financial nature, if any, how title to the property was held, and the respective financial and nonfinancial contributions of each party."[72] The cases suggest that there is a presumption that cohabitants intend to share property where there are such joint financial acts, absent specific evidence to the contrary.[73]

Courts that premise recovery on an implied contract between cohabitants rely on evidence of the parties' relationship and particularly on their financial conduct.[74] Recovery is more likely where the parties had a long-term relationship, where they represented themselves as

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70 In Kansas, courts sometimes invoke this equitable authority as basis for relief where the parties have failed to prove the existence of a common-law marriage. *See In re* Marriage of Thomas, 825 P.2d 1163, 1165–67 (Kan. Ct. App. 1992); *Eaton*, 681 P.2d at 610–611. Both of these cases involved formerly married couples who resumed cohabitation after being divorced.

71 Wallender v. Wallender, 870 P.2d 232, 234 (Or. Ct. App. 1994). This is consistent with the suggestion in *Marvin* that courts might divide property "in accord with the parties' own tacit understanding and that in the absence of such understanding the courts [may] fairly apportion property accumulated through mutual effort." Marvin v. Marvin, 557 P.2d 106, 121 (Cal. 1976), *quoted in* Alderson v. Alderson, 225 Cal. Rptr. 610, 615 (Ct. App. 1986).

72 *Wallender*, 870 P.2d at 234; *see also* Pinto v. Smalz, 955 P.2d 770, 773 (Or. Ct. App. 1998) (noting that no one of these factors is dispositive); Ireland v. Flanagan, 627 P.2d 496, 499–500 (Or. Ct. App. 1981) (applying the same rule to a cohabiting same-sex couple).

73 *Compare Wilbur*, 850 P.2d at 1151 ("There is no evidence that this financial arrangement was not agreeable to both parties."), *with Wallender*, 870 P.2d at 234–35 ("[P]laintiff knew that defendant did not intend to share his ownership of the farm after the dissolution."). In *Shuraleff v. Donnelly*, 817 P.2d 764, 768 (Or. Ct. App. 1991), the court refused to give effect to one party's evident intention not to share property where the other party thought the finances involved "just one pot."

74 *See* Alderson v. Alderson, 225 Cal. Rptr. 610, 615 (Ct. App. 1986); Goode v. Goode, 396 S.E.2d 430, 438 (W. Va. 1990); Watts v. Watts, 405 N.W.2d 303, 313 (Wis. 1987) (citing Beal v. Beal, 577 P.2d 507, 510 (Or. 1987)).

In *Taylor v. Polackwich*, 194 Cal. Rptr. 8 (Ct. App. 1983), the appellate court reversed a "rehabilitative" property and support award made by the trial court after a jury had concluded there was no implied agreement to acquire property jointly. *Id.* at 11–12. During their eight-year cohabitation, Joseph supported Janina and her seven children. *Id.* at 10. Janina earned some income and received welfare payments; she

husband and wife, and where they combined their financial resources. Joint bank accounts, jointly owned property, joint purchases, and jointly filed income tax returns seem particularly significant.

The same factors are important in the cases in Washington, which permit distribution of property based on an analogy to community property rules for parties to a "meretricious relationship."[75] Without acknowledging the irony of its terminology, the Washington Supreme Court defines a meretricious relationship as "a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist."[76] The court goes on to state, "Relevant factors . . . include, but are not limited to: continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties."[77] The court has recently stressed that not all cohabitation relationships "rise to the level of meretricious relationships" and therefore justify an equitable division of property.[78] Where cohabitation is sporadic, where one or both of the parties is married to another person, or where one party wants to get married but the other refuses, the evidence may not establish that there was mutual intent to form a stable, long-term relationship.[79] Moreover, the court of appeals recently concluded that a same-sex couple could not have a "meretricious relationship" in Washington state because they were not free to marry.[80]

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paid $205 a month as "rent" to Joseph and got receipts for these payments to show the welfare department. *Id.*

75 The division of property is somewhat different than what would be ordered in a divorce case. Property acquired during a meretricious relationship is presumed to belong to both parties, without regard to who holds title. *See* Connell v. Francisco, 898 P.2d 831, 836 (Wash. 1995). Only property acquired during the relationship may be considered for distribution. *See id.* It need not be equally divided. *See In re* Meretricious Relationship of Sutton and Widner, 933 P.2d 1069, 1071 (Wash. Ct. App. 1997) (sustaining an award to a cohabitant of thirty-six percent of accumulated assets based on her share of the parties' combined annual income). The courts in meretricious relationship cases confront the usual complexities of community property distribution, however, including commingling and tracing questions, *see* Koher v. Morgan, 968 P.2d 920, 921–22 (Wash. Ct. App. 1998), and valuation of professional goodwill, *see* Chesterfield v. Nash, 978 P.2d 551, 555–56 (Wash. Ct. App. 1999), *rev'd on other grounds sub nom. In re* Marriage of Pennington, 14 P.3d 764 (Wash. 2000).

76 *Connell*, 898 P.2d at 834 (citing *In re* Marriage of Lindsey, 678 P.2d 328 (Wash. 1984)).

77 *Id.*

78 *In re* Marriage of Pennington, 14 P.3d 764, 773 (Wash. 2000).

79 *Id.* at 771–72.

80 Vasquez v. Hawthorne, 994 P.2d 240, 243 (Wash. Ct. App. 2000).

Historically, the doctrine of common-law marriage served to assimilate many unmarried couples into the institution of marriage.[81] In the group of states that still recognizes common-law marriage,[82] cohabitants who can establish such a marriage have all the rights of married individuals, including property rights when their relationship ends in death or divorce.[83] As cohabitation without marriage has become more open and widespread across social classes, common-law marriage has faded in significance. It is also harder to prove, since unmarried couples today are less likely to feel the need to represent themselves as married.

Although the states discussed above make broad remedies available to some cohabitants when their relationship ends, most cohabitation relationships are subject to a much narrower set of legal rules. The published cases suggest that cohabitants in most states are able to recover in only a few types of situations. Courts are willing in almost every state to enforce express contracts between cohabitants, particularly if those agreements are in writing. Courts are regularly called upon to sort out the parties' property interests where they have taken title jointly or commingled their finances. Courts sometimes order restitution for major financial contributions made by one cohabiting partner to the other or for services that go beyond ordinary household work. In most states, however, one partner does not share in the other's financial gains from employment or investment and is not compensated for financial support or household services provided to the other partner.

A. Express Contracts Between Cohabitants Are Enforceable

In its opinion in *Marvin* the California Supreme Court reaffirmed its rule that express contracts between cohabitants are enforceable,

81 Courts in many of the cohabitation cases, beginning with *Marvin*, are careful to acknowledge that common-law marriage has been abolished in their state. *E.g.*, Marvin v. Marvin, 557 P.2d 106, 122 n.24 (Cal. 1976). For the court in Illinois, the abolition of common-law marriage was presented as a significant factor barring recognition of any legal or equitable claims between cohabitants. *See* Hewitt v. Hewitt, 394 N.E.2d 1204, 1209–10 (Ill. 1979). On the history of common-law marriage and its abolition, see MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 83–102 (1985).

82 Common-law marriages may still be contracted in Alabama, Colorado, the District of Columbia, Iowa, Kansas, Montana, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah.

83 *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 45–54 (2d ed. 1988). Recovery as a common-law spouse requires proof that both members of the couple were free to marry and that they had a present intention to be married. *Id.*

unless "sexual acts form an inseparable part of the consideration for the agreement."[84] This principle was already well established in California and in other states,[85] and many state courts have subsequently indicated their agreement with *Marvin* on this point.[86] In Minnesota and Texas, the statutes of frauds have been amended to require that cohabitation contracts be put in writing.[87] Most other states permit proof of an oral express contract, and the contracts discussed in the cases are rarely based on a writing.[88]

Courts (and juries) are sometimes persuaded, and sometimes not persuaded, by evidence of an express oral contract. Michelle Marvin may be a typical plaintiff in her failure, ultimately, to persuade the trial court that the parties had reached an agreement.[89] In New York and several other states, the courts have approved enforcement of express, but not implied, contracts, because of the problems of proof

84 *Marvin*, 557 P.2d at 114; *see id.* at 111–15.

85 *See* Vallera v. Vallera, 134 P.2d 761, 736 (Cal. 1943); Trutalli v. Meraviglia, 12 P.2d 430, 431–32 (Cal. 1932); *see also* Heatwole v. Stansbury, 33 So. 2d 196, 197 (La. 1947); Baxter v. Wilburn, 190 A. 773, 774 (Md. 1937). These rules were revisited by other courts in other states in the early 1970s, and those courts reached similar conclusions. *See, e.g.*, Green v. Richmond, 337 N.E.2d 691, 695–96 (Mass. 1975); Tyranski v. Piggins, 205 N.W.2d 595, 597 (Mich. Ct. App. 1973); Latham v. Latham, 547 P.2d 144, 146–47 (Or. 1976).

86 *See* Boland v. Catalano, 521 A.2d 142, 145–46 (Conn. 1987) (including citations); *see also* Cook v. Cook, 691 P.2d 664, 668 (Ariz. 1984); Wilcox v. Trautz, 693 N.E.2d 141, 146 (Mass. 1998); Carlson v. Olson, 256 N.W.2d 249, 252 (Minn. 1977); Kozlowski v. Kozlowski, 403 A.2d 902, 906 (N.J. 1979); Morone v. Morone, 413 N.E.2d 1154, 1156–57 (N.Y. 1980); Watts v. Watts, 405 N.W.2d 303, 308 (Wis. 1987). *Contra* Rehak v. Mathis, 238 S.E.2d 81, 82 (Ga. 1977); *Hewitt*, 394 N.E.2d at 1206. *See generally* George L. Blum, Annotation, *Property Rights Arising from Relationship of Couple Cohabiting Without Marriage*, 69 A.L.R.5th 219 (1999). Although they are rare, there are cases decided after *Marvin* in which the validity of the consideration for a cohabitation agreement was seriously considered. *Compare* Jones v. Daly, 176 Cal. Rptr. 130, 133 (Ct. App. 1981) (finding sexual services an inseparable part of the consideration), *with* Whorton v. Dillingham, 248 Cal. Rptr. 405, 409–10 (Ct. App. 1988) (finding sexual relationship severable from the remainder of the contract).

87 MINN. STAT. ANN. §§ 513.075–.076 (West 1990), *applied in* Roatch v. Puera, 534 N.W.2d 560 (Minn. Ct. App. 1995); TEX. BUS. & COM. CODE ANN. § 26.01(b)(3) (Vernon 1987), *applied in* Zaremba v. Cliburn, 949 S.W.2d 822 (Tex. App. 1997).

88 Cases addressing written agreements include *Wilcox*, 693 N.E.2d at 147–48 (settlement agreement entered into by cohabitants after a twenty-five year relationship); *Silver v. Starrett*, 674 N.Y.S.2d 915, 919–20 (N.Y. Sup. Ct. 1998) (settlement agreement entered into by a lesbian couple at the end of a fourteen year cohabitation); *Baldassari v. Baldassari*, 420 A.2d 556, 559–60 (Pa. Super. Ct. 1980) (agreement regarding use of real estate); and *Harman v. Rogers*, 510 A.2d 161, 166 (Vt. 1986) (agreement to own and develop a residential apartment building).

89 *See supra* text accompanying note 8.

with implied contracts.[90] Other cases suggest that the line between implied contracts and express oral contracts is difficult to draw, however, since in both situations "reference to the parties' actions is usually necessary . . . to ascertain the terms of the agreement."[91] One court, concluding that the parties had an express oral contract, made this observation:

> Although isolated acts of joint participation such as cohabitation or the opening of a joint account may not suffice to create a contract, the fact finder may infer an exchange of promises, and the existence of the contract, from the entire course of conduct between the parties. Here, there is ample evidence to support a finding that [the cohabitants] agreed to pool their resources and share equally in certain accumulations; their course of conduct may be seen as consistently demonstrating the existence of such an agreement.[92]

Plaintiffs seem to have more success persuading the court that there was an express oral agreement in cases that also fit within the other principles described below. Conversely, plaintiffs in states that reject implied contract remedies for cohabitants are sometimes successful in reframing their claims based on property theories or equitable remedies.[93]

B. Commingled Property Is Divided Between Cohabitants at the End of Their Relationship

Courts routinely divide the shared property of cohabiting partners at the end of their relationship. The property disputed ranges from real estate, automobiles, and bank accounts to furniture and household items. Many of these disputes are framed as actions for partition or accounting where cohabitants held property as joint te-

90 *See Morone*, 413 N.E.2d at 1156; *see also Wilcox*, 693 N.E.2d at 144–46; Merrill v. Davis, 673 P.2d 1285, 1286 (N.M. 1983).

91 Hudson v. DeLonjay, 732 S.W.2d 922, 928 (Mo. Ct. App. 1987) (citing *Boland*, 521 A.2d at 144; *Cook*, 691 P.2d at 667; and *Kozlowski*, 403 A.2d at 906). This boundary is particularly important in states such as New York and Massachusetts, in which courts enforce express, but not implied, contracts between cohabitants.

92 Cook v. Cook, 691 P.2d 664, 667 (Ariz. 1984). Other cases in which courts have found express oral agreements include *Donovan v. Scuderi*, 443 A.2d 121, 125–26 (Md. Ct. Spec. App. 1982); *Kinkenon v. Hue*, 301 N.W.2d 77, 80–81 (Neb. 1981); and *Knauer v. Knauer*, 470 A.2d 553, 558 (Pa. Super. Ct. 1983).

93 The most dramatic example of this tendency is Illinois, where the *Hewitt* case rejected the *Marvin* decision in sweeping terms. Hewitt v. Hewitt, 394 N.E.2d 1204, 1209 (Ill. 1979). Despite *Hewitt*, the Illinois Court of Appeals approved relief for cohabitants in a number of cases on a constructive trust theory. *See* Kaiser v. Strong, 735 N.E.2d 144, 148–49 (Ill. App. Ct. 2000); Spafford v. Coats, 455 N.E.2d 241, 244 (Ill. App. Ct. 1983).

nants or cotenants.[94] Although the determination of ownership is based primarily on title, courts sometimes inquire into the parties' intentions.[95] Courts also use constructive trust or implied contract theories to allow a party without title to recover, particularly where one cohabitant has promised to title property jointly or coerced the other into releasing an interest in what had been a jointly titled asset.[96]

94 *E.g.*, Carroll v. Lee, 712 P.2d 923, 926–27 (Ariz. 1986) (partition of jointly titled real and personal property); Libby v. Lorrain, 430 A.2d 37, 38–39 (Me. 1981) (partition of jointly titled real estate); Carlson v. Olson, 256 N.W.2d 249, 255 (Minn. 1977) (partition of real and personal property); Beal v. Beal, 577 P.2d 507, 510–11 (Or. 1978) (determining parties' respective rights as cotenants). Some cases turn on the specific form in which title is held. *E.g.*, Jones v. Green, 337 N.W.2d 85, 85–87 (Mich. Ct. App. 1983) (refusing to partition property because title was held as joint tenants with right of survivorship). A number of cases involve property held by cohabitants as if they were married. *E.g.*, Estate of Wilson, 740 S.W.2d 694, 697 (Mo. Ct. App. 1987) (ruling that property jointly held by unmarried persons is held in tenancy in common unless joint tenancy is proved by evidence other than the fact that property was erroneously titled as if the couple were married); Brazell v. Meyer, 600 P.2d 460, 462–63 (Or. Ct. App. 1979); *see also* Diedricks v. Reinhardt, 466 So. 2d 375, 377 (Fla. Dist. Ct. App. 1985) (ruling that the widow of a male cohabitant/cotenant was entitled to an accounting from the female cohabitant/cotenant).

95 *E.g.*, *Carlson*, 256 N.W.2d at 255; *Kinkenon*, 301 N.W.2d at 79–80; *see also* Wade v. Porreca, 472 N.Y.S.2d 482, 484 (N.Y. App. Div. 1984) (concluding that the parties must have intended to share earnings as well as expenses based on evidence of how the parties handled bank accounts).

96 *See* Bramlett v. Selman, 597 S.W.2d 80, 84–85 (Ark. 1980) (imposing constructive trust where one cohabitant placed funds for a down payment in the other cohabitant's name); Alderson v. Alderson, 225 Cal. Rptr. 610, 615–17 (Ct. App. 1986) (implied contract theory); Edwards v. Miller, 378 N.E.2d 583, 586–87 (Ill. App. Ct. 1978) (imposing a constructive trust after the defendant pressured the plaintiff to transfer her interest to him); Sullivan v. Rooney, 533 N.E.2d 1372, 1374 (Mass. 1989) (imposing a constructive trust based on the promise to convey joint title); Estate of Eriksen, 337 N.W.2d 671, 674 (Minn. 1983) (imposing a constructive trust where the parties intended joint ownership); Hay v. Hay, 678 P.2d 672, 674 (Nev. 1984) (involving an implied agreement to hold property as if married); Small v. Harper, 638 S.W.2d 24, 26–27 (Tex. App. 1982) (allowing cohabitant's claim to proceed based on constructive trust and oral partnership); *cf.* Collins v. Guggenheim, 631 N.E.2d 1016, 1017 (Mass. 1994) (holding no claim for constructive trust without a showing of fraud, breach of fiduciary duty, or other misconduct); Kohler v. Flynn, 493 N.W.2d 647, 649 (N.D. 1992) (holding that cohabitation is not a sufficient basis for partition without evidence of intent to own property jointly); Doe v. Roe, 475 S.E.2d 783, 786–87 (S.C. Ct. App. 1996) (same). A few of the constructive trust cases involve facts that are closer to the implied contract theory recognized in *Marvin*. *See, e.g.*, Estate of Eriksen, 337 N.W.2d at 674; Williams v. Lynch, 666 N.Y.S.2d 749, 751–52 (N.Y. App. Div. 1997) (allowing the claim for constructive trust where the cohabitant's money and effort were used to improve the partner's property). In both of these states, however, recovery on an implied contract theory would not have been available.

C. *Joint Financial Investment in Property or a Business Must Be Compensated at the End of a Relationship*

Even without proof of an express agreement, courts frequently grant relief to a former cohabitant who loaned money to a partner or invested funds directly in the partner's business or property. This type of recovery is based either on an implied contract theory, or equitable principles of restitution or constructive trust.[97] The usual remedy in these cases is compensation for the funds invested.

Cohabiting partners who have recovered in these cases have typically made a substantial equity investment in real estate or personal property titled in the other partner's name.[98] Simply making monthly mortgage payments is not generally sufficient.[99] Claimants are also successful in cases alleging joint business ventures, provided that both cohabitants invested funds in the enterprise.[100] Recovery is based on either restitution or an implied partnership agreement.

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97 *See* Weekes v. Gay, 256 S.E.2d 901, 904 (Ga. 1979) (imposing a constructive trust where the cohabitant furnished funds to purchase property); Kaiser v. Strong, 735 N.E.2d 144, 145–46 (Ill. App. Ct. 2000) (allowing recovery for "money had and received" where the plaintiff gave the defendant more than $47,000 to pay off the mortgage balance); Lawlis v. Thompson, 405 N.W.2d 317, 322 (Wis. 1987) (ordering restitution of $65,000 transferred to the cohabitant to pay for real estate, farm equipment, and divorce settlement); *see also* Saporta v. Saporta, 766 So. 2d 379, 380–81 (Fla. Dist. Ct. App. 2000) (applying constructive principles to award to the wife a home purchased with her funds during cohabitation prior to marriage and which had been titled in husband's name to prove that he would be the head of their household).

98 *E.g.*, Salzman v. Bachrach, 996 P.2d 1263, 1266 (Colo. 2000) (investment of $170,000 toward the cost of constructing a new residence); *Kaiser*, 735 N.E.2d at 147 ($47,000 to pay off the mortgage balance); Spafford v. Coats, 455 N.E.2d 241, 245 (Ill. App. Ct. 1983) (the plaintiff furnished "substantially all" of the consideration for four vehicles owned by the defendant); Estate of Palmen, 588 N.W.2d 493, 496 (Minn. 1999) (investment of $17,000 in materials and $30,000 in labor for construction of a cabin); Collins v. Davis, 315 S.E.2d 759, 761 (N.C. Ct. App. 1984) (money loaned for purchase and improvement of real estate); *see also* Ward v. Jahnke, 583 N.W.2d 656, 661 (Wis. Ct. App. 1998) (involving one cohabitant who paid the parties' living expenses for three and a half years, allowing the other to save $11,000 for the down payment on his house).

99 *E.g.*, Ayala v. Fox, 564 N.E.2d 920, 922 (Ill. 1990) (denying recovery based on contributions to mortgage payments).

100 *E.g.*, Hudson v. DeLonjay, 732 S.W.2d 922, 927–29 (Mo. Ct. App. 1987); W. States Constr., Inc. v. Michoff, 840 P.2d 1220, 1224–25 (Nev. 1992); Lee v. Slovak, 440 N.Y.S.2d 358, 360 (N.Y. App. Div. 1981); Bass v. Bass, 814 S.W.2d 38, 43 (Tenn. 1991); *cf.* Maglica v. Maglica, 78 Cal. Rptr. 2d 101, 105–06 (Ct. App. 1998) (holding that a cohabitant who invested services but no property in the business was entitled only to restitution for the value of services). In a series of cases, the Oregon Court of Appeals has granted equity interests in property to cohabitants who were active partners in a business conducted on the property, based on "general equitable principles." *See*

D. A Cohabitant May Recover in Quantum Meruit for Services to the Other Partner's Business or Property Interests

The case law of cohabitation makes it clear that courts will not order compensation for services performed by one partner that can be characterized as part of the ordinary give-and-take of a shared life.[101] Where these services go beyond the everyday, compensation is made available under a quantum meruit theory. Some cases involve services performed for a partner's business;[102] another group of cases involves services invested in home construction or renovation.[103]

E. A Cohabiting Partner Does Not Share in the Other Partner's Financial Gains (or Losses) from Employment and Investment

Most state courts have agreed with the California Supreme Court's conclusion in *Marvin* that marital or community property laws do not apply to nonmarital partners.[104] Therefore, an unmarried cohabitant does not have the type of claim to a share of the other partner's earnings that a spouse could make in a divorce proceeding. As some courts put this point, cohabitation alone does not give rise to a presumption of shared property rights.[105]

Raimer v. Wheeler, 849 P.2d 1122, 1123 (Or. Ct. App. 1993); Wilkinson v. Higgins, 844 P.2d 266, 268–69 (Or. Ct. App. 1993); Shuraleff v. Donnelly, 817 P.2d 764, 768 (Or. Ct. App. 1991).

101 Some cases permit recovery for housekeeping services on a quantum meruit basis, particularly if the plaintiff was hired on this basis before the cohabitation relationship began. *See, e.g.*, Estate of Steffes, 290 N.W.2d 697, 704–08 (Wis. 1980). Traditionally, restitution has not been available for housework performed by a household member based on a presumption that such services are gratuitously provided. *See generally* Carol S. Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L.Q. 101 (1976).

102 *See, e.g., Maglica*, 78 Cal. Rptr. 2d at 103; Humiston v. Bushnell, 394 A.2d 844, 845 (N.H. 1978); Suggs v. Norris, 364 S.E.2d 159, 162–63 (N.C. Ct. App. 1988); Harman v. Rogers, 510 A.2d 161, 165 (Vt. 1986).

103 *See, e.g., Salzman*, 996 P.2d at 1266; Mason v. Rostad, 476 A.2d 662, 666 (D.C. 1984).

104 *See* Marvin v. Marvin, 557 P.2d 106, 120–21 (Cal. 1976); *see also* Watts v. Watts, 405 N.W.2d 303, 305–06, 307–09 (Wis. 1987). As noted above, however, these principles are now applied to cohabiting couples in several states "by analogy." *See supra* text accompanying note 62.

105 *See, e.g.*, Boland v. Catalano, 521 A.2d 142, 145 (Conn. 1987); Aehegma v. Aehegma, 797 P.2d 74, 79 (Haw. Ct. App. 1990); Glasgo v. Glasgo, 410 N.E.2d 1325, 1331–32 (Ind. Ct. App. 1980); Davis v. Davis, 643 So. 2d 931, 932 (Miss. 1994); Martin v. Coleman, 19 S.W.3d 757, 760–61 (Tenn. 2000). Cohabitants have sought to recover on the basis of implied agreements to share earnings, but recovery on this basis is relatively rare beyond those states described *supra* in notes 62 to 64 and accompanying text.

One particularly dramatic recent case from California involved claims by Claire Maglica against her long-time partner, Anthony Maglica, seeking to recover a portion of the enormous increase in the value of his company during their twenty-year cohabitation.[106] The evidence established that Claire and Anthony "worked side by side building the business" and that its enormous success was "thanks in part to some great ideas and hard work on Claire's part . . . ."[107] In the absence of proof of a financial investment by Claire, or proof of an implied contract to share the equity of the business equally, Claire's recovery was limited to the value of the services she provided.[108] Moreover, the appellate court reversed the jury's award of $84 million to Claire, reasoning that the quantum meruit recovery should be measured by what it would have cost Anthony to obtain those services from someone else rather than the amount by which he had benefited from her services.[109] Pointing out that Claire had not established a right to an equity stake, the court wrote, "People who work for businesses for a period of years and then walk away with $84 million do so because they have acquired some *equity* in the business, not because $84 million is the going rate for the services of even the most workaholic manager."[110]

F. Cohabitants Are Not Entitled to Restitution for Other Services or Financial Contributions

The cohabitation cases indicate that courts will not order restitution for unequal contributions of funds or effort to the parties' shared life. Individuals are not generally compensated for such contributions as paying the rent or a mortgage, paying more than half the parties' shared living expenses, raising or supporting children or stepchildren, or assisting with a partner's career.[111] In denying compensation, one court put the issue this way: "The evidence clearly establishes parties

106 *Maglica*, 78 Cal. Rptr. 2d 101.

107 *Id.* at 103.

108 *Id.* at 103–04. Claire argued that they had an implied contract to share the equity of the business. This claim was rejected by the jury, but the court of appeals held that the jury was not properly instructed and remanded this aspect of the case. *See id.* at 108–10. The Maglicas settled their dispute for $29,000,000 midway through the second trial. *See* Marosi, *supra* note 15, at B1.

109 *See Maglica*, 78 Cal. Rptr. 2d at 102.

110 *Id.*

111 *See, e.g.*, Maria v. Freitas, 832 P.2d 259, 274–75 (Haw. 1992); Bright v. Kuehl, 650 N.E.2d 311, 315 (Ind. Ct. App. 1995); Carnes v. Sheldon, 311 N.W.2d 747, 759 (Mich. Ct. App. 1981); Tarry v. Stewart, 649 N.E.2d 1, 6–7 (Ohio Ct. App. 1994); Seward v. Mentrup, 622 N.E.2d 756, 757 (Ohio Ct. App. 1993); Mitchell v. Moore, 729 A.2d 1200, 1206 (Pa. Super. Ct. 1999). As noted above, these services may be the basis

living in a family relationship with each contributing work or money to the common cause and each receiving mutual benefits from the joint efforts."[112] This is a corollary to the rules described above and serves to limit recovery to the more extraordinary cases in which one partner has made a very substantial investment of time or money in the other partner's business or assets. As another court commented, "We do not perceive this doctrine to invest this court with a roving mandate to sort through terminated personal relationships in an attempt to nicely judge and balance the respective contributions of the parties."[113] In this respect, these cases are similar to divorce cases in which the courts are extremely reluctant to measure and compare the respective contributions of husband and wife.[114]

The boundary between those contributions subject to restitution and those which are not was carefully maintained in *Ward v. Jahnke*.[115] Sandra Ward and Dennis Jahnke lived together for twelve years, maintaining separate finances throughout that period. During the first three and a half years, however, they lived in Sandra's apartment. She paid the rent and all household expenses, so that Dennis could save money for the down payment on a house. After Dennis bought a house, they lived there together, with Dennis paying the mortgage and Sandra paying for utilities and groceries. The court concluded that Sandra was entitled to restitution based on their mutual effort toward accumulating the $11,000 Dennis saved for a down payment, but that she was not entitled to share in the increase in the value of the house during the years they lived in it together, when they had no shared economic enterprise.[116]

III. LIMITS OF THE CURRENT LAW

Taken altogether, the legal norms of ordinary cohabitation developed in the quarter century since *Marvin* are not particularly gener-

for finding an implied contract of some sort in a few states. *See supra* notes 64–66 and accompanying text.

112 Murphy v. Bowen, 756 S.W.2d 149, 151 (Ky. Ct. App. 1988); *see also* Tapley v. Tapley, 449 A.2d 1218, 1219–20 (N.H. 1982); Kozlowski v. Kozlowski, 395 A.2d 913, 919 (N.J. 1978); Morone v. Morone, 429 N.Y.S.2d 592, 595 (N.Y. 1980).

113 Slocum v. Hammond, 346 N.W.2d 485, 491–92 (Iowa 1984).

114 *See, e.g.*, Pyeatte v. Pyeatte, 661 P.2d 196, 207 (Ariz. Ct. App. 1982) ("[T]he courts cannot and will not strike a balance regarding the contributions of each to the marriage and then translate that into a monetary award."); Mahoney v. Mahoney, 453 A.2d 527, 533 (N.J. 1982) ("Marriage is not a business arrangement in which the parties keep track of debits and credits, their accounts to be settled upon divorce.").

115 583 N.W.2d 656 (Wis. Ct. App. 1998).

116 *See id.* at 661–62.

ous. Only a small percentage of cohabitants will have even a possibility of legal recovery when their relationships end. To the extent that these rules have any effect on the choice between cohabitation and marriage, they are likely to encourage marriage for anyone seeking financial security and to encourage cohabitation rather than marriage for anyone seeking to avoid financial commitments.

Moreover, as a number of legal scholars pointed out in the years after *Marvin* was decided, the various doctrines the court discussed provide some basis for property allocation at the end of cohabitation relationships, but they do very little else.[117] Twenty-five years after *Marvin*, cohabitation remains entirely distinct from marriage, even in those states that have gone the farthest toward assimilating the two statuses. Cohabitants in California have no access to social security[118] and less access to other types of public and private insurance coverage that provide financial security for those in married families.[119] They have no standing to sue for wrongful death, loss of consortium, or emotional distress if their partner is killed or injured,[120] no access to testimonial privileges,[121] and no right to treatment as a family for various state and federal tax purposes.[122]

The Principles of the Law of Family Dissolution,[123] recently adopted by the American Law Institute, propose that cohabitants be entitled to property and support remedies on the same basis as married individuals. This proposal effectively adopts and extends the approach taken to stable, long-term cohabitation in states such as Washington, Ne-

117 *See generally* Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125 (1981); William A. Reppy, Jr., *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44 LA. L. REV. 1677 (1984).

118 *See* Califano v. Boles, 443 U.S. 282, 296 (1979). *See generally* Blumberg, *supra* note 117, at 1144–49. As Blumberg points out, many of these programs do take unmarried cohabitation into account for the purpose of reducing or eliminating benefits, *id.* at 1138, and cohabitation is also used to reduce or deny benefits under programs like AFDC, *see id.* at 1153–57.

119 *See* Norman v. Unemployment Ins. Appeals Bd., 663 P.2d 904, 905 (Cal. 1983) (unemployment insurance); Beaty v. Truck Ins. Exch., 8 Cal. Rptr. 2d 593, 596–97 (Ct. App. 1992) (liability insurance); Dep't of Indus. Relations v. Workers' Comp. Appeals Bd., 156 Cal. Rptr. 183, 185 (Ct. App. 1979) (workers' compensation.); *see also* Blumberg, *supra* note 117, at 1140–44.

120 *See* Elden v. Sheldon, 758 P.2d 582, 594 (Cal. 1988) (no claim for emotional distress or loss of consortium); Nieto v. City of Los Angeles, 188 Cal. Rptr. 31, 33 (Ct. App. 1982) (no claim for wrongful death).

121 *See* People v. Delph, 156 Cal. Rptr. 422, 425 (Ct. App. 1979).

122 *See* Blumberg, *supra* note 117, at 1157–59.

123 PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 6 (Tentative Draft No. 4, 2000) [hereinafter ALI PRINCIPLES].

vada, and Oregon.[124] If widely adopted, the ALI *Principles* would allow financial recovery to many more cohabiting partners at the end of their relationships. They also have the strong virtue of extending equally to same-sex and opposite-sex cohabiting couples.[125] The ALI *Principles* are limited, however, to the private law aspect of family life and do not advocate the kinds of public law measures that would equate the treatment of cohabiting families and married families.

Another limitation of the *Marvin* approach is that it ignores the presence of children in a cohabiting household. Although Lee and Michelle Marvin did not have children, many of the parties in the cases that followed did raise children together.[126] By 1995, fifty percent of cohabiting households had children present.[127] Since 1976, the framework of legal rules governing paternity determination, child support, and custody for nonmarital children has grown enormously, and under those rules the parental rights and obligations of unmarried biological parents are now largely equivalent to those of married parents. But in divorce cases, property and support remedies may be influenced by a concern for children's support or for compensation of a caregiver,[128] and the link between these is lost for nonmarital children. In this respect, the ALI *Principles* are a clear improvement.[129]

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124 The ALI *Principles* define "domestic partners" as two persons of the same or opposite sex, not married to each other, "who for a significant period of time share a primary residence and a life together as a couple." *Id.* § 6.01(1). This determination is made under principles that are elaborated in § 6.03. *Id.* § 6.03. Where parties qualify as domestic partners, most of the rules governing property and support rights of married couples are made applicable under §§ 6.04–.06. Domestic partners would be governed by these rules unless they reached an agreement otherwise. *See id.* § 6.01.

125 *See id.* § 6.01(1).

126 *See, e.g.*, Hewitt v. Hewitt, 394 N.E.2d 1204, 1205 (Ill. 1979); Goode v. Goode, 396 S.E.2d 430, 432 (W. Va. 1990); Watts v. Watts, 405 N.W.2d 303, 305 (Wis. 1987).

127 *See* sources cited *supra* note 51.

128 *See, e.g.*, UNIF. MARRIAGE AND DIVORCE ACT § 307 [Alternative B], 9A U.L.A. 288–89 (Part 1) (1998) (directing the court deciding property division to consider "the desirability of awarding the family home or the right to live therein for a reasonable period to the spouse having custody of any children"); *id.* § 308(a)(2), 9A U.L.A. 446 (authorizing the court to grant a maintenance order to a spouse who is "the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home"). For an argument that these policies should be given greater weight in divorce proceedings, see generally Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721 (1993).

129 *See* ALI PRINCIPLES, *supra* note 123, §§ 6.05–.06 (providing for allocation of property and "compensatory payments" for domestic partners on the same basis as married individuals).

A more difficult problem confronts cohabitants who are stepparents for their partners' children. Without a marriage, stepparent adoption is not generally available to formalize this relationship, leaving a cohabiting stepparent with no legal tie to the child.[130] Conversely, a child has no basis for claiming support from a non-marital stepparent.[131] This problem is on the current frontier of cohabitation law, and courts in some states have begun cautiously to address it.[132] Here as well, the ALI *Principles* would move the law toward comparable treatment for cohabiting and married couples.[133]

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130 This issue has been litigated primarily by same-sex couples, and courts in some jurisdictions have permitted "second parent adoptions" in these cases. *See, e.g., In re* Jacob, 660 N.E.2d 397, 405–06 (N.Y. 1995); Adoption of B.L.V.B., 628 A.2d 1271, 1276 (Vt. 1993). *See generally* Sonja Larsen, Annotation, *Adoption of Child by Same-Sex Partners*, 27 A.L.R.5th 54 (1995). In New York, the rule extends to opposite-sex cohabiting couples as well. *See In re Jacob*, 660 N.E.2d at 405.

131 *See* 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, 35–37 (2000).

132 When cohabiting couples have biological children together, both parents have parental rights and obligations with respect to those children. Several recent cases have concluded that a cohabiting partner without a biological tie to his partner's child cannot establish parental rights, even if he believed himself to be and acted as a parent for the child. *See* Petition of Ash, 507 N.W.2d 400, 404–05 (Iowa 1993); Van v. Zahorik, 597 N.W.2d 15, 23 (Mich. 1999); Price v. Howard, 484 S.E.2d 528, 537 (N.C. 1997). *But see* W. v. W., 728 A.2d 1076, 1087 (Conn. 1999) (holding mother's cohabitant equitably estopped from denying paternity). By contrast, a married man who is not the biological father of his wife's child is often treated as the child's "equitable parent" and may be estopped from denying paternity. *See, e.g., In re* Gallagher, 539 N.W.2d 479, 483 (Iowa 1995). *See generally* Alan Stephens, Annotation, *Parental Rights of Man Who Is Not Biological or Adoptive Father of Child But Was Husband or Cohabitant of Mother When Child Was Conceived or Born*, 84 A.L.R.4th 655 (1991). Some state statutes permit a cohabitant without a legal or biological tie to a child to seek visitation. *E.g.*, WASH. REV. CODE ANN. §§ 26.09.160, 26.09.240 (West 1997), *discussed in In re* Wolcott, 933 P.2d 1066, 1068–69 (Wash. Ct. App. 1997) (denying visitation), *aff'd in part and rev'd in part*, 969 P.2d 21, 27 (Wash. 1998). There is a constitutional question as to how broadly these statutes may be applied following the Supreme Court's ruling in *Troxel v. Grainville*, 530 U.S. 57 (2000).

133 Section 2.03(1) defines "parent" to include a legal parent, a parent by estoppel, and a de facto parent. ALI PRINCIPLES, *supra* note 123, § 2.03(1). A "parent by estoppel" is defined as an individual who has lived with a child for at least two years and acted as a parent in circumstances that serve to estop the legal parent from contesting the individual's status as a parent. *Id.* § 2.03(1)(b). "De facto parent" is defined as an adult who has resided with the child for a significant period of time and who has regularly performed either a majority of the caretaking functions for the child or a share of the caretaking at least as great as that of the parent with whom the child has lived primarily. *Id.* § 2.21 (setting out the circumstances in which parental responsibilities could be allocated to parents by estoppel and de facto parents). Although the definition of a de facto parent is designed to be a narrow one that few individuals who are not legal parents will be able to satisfy, this rule and the rule

As a policy matter, the current legal regime functions reasonably well for two of the three groups described above. For couples who cohabit briefly before marriage, the primary legal question is how to treat any economic changes that occurred during that period.[134] For those couples who have deliberately rejected marriage, the legal devices surveyed in the *Marvin* decision are available to adjust the equities where the individuals have not used written agreements, wills, or other devices to protect their interests. Indeed, there are important arguments for not imposing marriage-like rules in this situation.[135]

For couples whose cohabitation begins as a response to circumstances, such as an unintended pregnancy, and continues indefinitely,[136] the legal and policy problems are much more complex, and the current rules are much less adequate. Frequently, these are households with children.[137] The demographic evidence suggests that they are more likely to be poor, working class, and African-American families.[138] These may be relationships of long duration, with substantial sharing and dependence over time. The parties may have good reasons for deciding not to marry. When the relationship ends, the parties are likely to confront the same needs and difficulties that married people face at the end of a marriage, but the law will have very little to contribute toward working things out.

CONCLUSION

To the extent that the trend away from marriage is encouraged or accelerated by changes in the law, it is hard to identify the impact of high profile cases like *Marvin* and the celebrity palimony suits that followed it. How far are wider cultural norms set by the rich and fa-

governing parents by estoppel make no distinction between adults married to a child's legal parent and other adults. *See id.* at xxxvi–xxxviii.

134 In California, a married person who wants to make financial claims based on a period of premarital cohabitation is required to bring "a *Marvin* action" in addition to the divorce proceeding. *See* Watkins v. Watkins, 192 Cal. Rptr. 54, 55–56 (Ct. App. 1983); *see also* Rolle v. Rolle, 530 A.2d 847, 851–52 (N.J. Super. Ct. App. Div. 1987) (allowing for equitable remedies to divide assets acquired by one spouse during the period of premarital cohabitation); *In re* Marriage of Lindsey, 678 P.2d 328, 332 (Wash. 1984) (requiring that courts make equitable disposition of property acquired during the premarital relationship).

135 *See, e.g.*, David L. Chambers, *The "Legalization" of the Family: Toward a Policy of Supportive Neutrality*, 18 U. MICH. J.L. REFORM 805, 826 (1985). *But see* Blumberg, *supra* note 117, at 1167–70.

136 These are the "risk relationships" described *supra* at text accompanying note 38.

137 *See supra* notes 51–55 and accompanying text.

138 *See supra* notes 41–50 and accompanying text.

mous? What impact do the many marriages of Elizabeth Taylor or the famous divorces of Johnny Carson and Donald Trump have on the behavior of ordinary folks?

Within the law, other developments have had far greater practical consequences for cohabiting families than the *Marvin* decision. Many states abolished criminal penalties for cohabitation, adultery, and fornication during the decades before and after the *Marvin* decision.[139] With its decision in *Eisenstadt v. Baird*,[140] the Supreme Court ruled that states must give unmarried individuals the same rights to use contraceptives enjoyed by married couples.[141] In one series of decisions beginning with *Stanley v. Illinois* in 1972, the Court recognized and elaborated parental rights for unwed fathers,[142] and in another, beginning with *Levy v. Louisana* in 1968, the Court eliminated the traditional legal disabilities of illegitimate children.[143]

The *Marvin* decision drew popular attention to the legal questions that emerge from cohabitation relationships. By suggesting that courts utilize readily available tools—property, contract, and restitution law—the opinion helped define the range of remedies that courts across the country would apply to the growing numbers of cohabitation property claims. But *Marvin* and the cases that followed were careful to maintain a substantial rhetorical and practical distance from the law of cohabitation.[144] This distance marks these decisions as fundamentally conservative.

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139 *See* MODEL PENAL CODE § 213.6 note on Adultery and Fornication (1962). At the time the court made its ruling in *Marvin*, California had recently abolished its criminal statute prohibiting adulterous cohabitation. *See* Marvin v. Marvin, 557 P.2d 106, 112 n.4 (Cal. 1976); *see also In re* Estate of Steffes, 290 N.W.2d 697, 708–09 (Wis. 1980). *See generally* Martha L. Fineman, *Law and Changing Patterns of Behavior: Sanctions on Non-marital Cohabitation*, 1981 WIS. L. REV. 275, 276–77 (1981). A number of states still have these laws on the books, but they are rarely enforced. *See* Commonwealth v. Stowell, 449 N.E.2d 357, 361 (Mass. 1983) (holding that the adultery statute was constitutional and could be applied to private consensual acts between adults). *See generally* Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 HARV. L. REV. 1660 (1991).

140 405 U.S. 438 (1972).

141 *See id.* at 454–55.

142 Stanley v. Illinois, 405 U.S. 645, 658 (1972); *see also* Lehr v. Robertson, 463 U.S. 248, 267 (1983); Caban v. Mohammed, 441 U.S. 380, 394 (1979); Quilloin v. Walcott, 434 U.S. 246, 256 (1978). Although it was not the basis for the Court's holding, it is worth noting that in these cases only those fathers who lived together with their partner and the nonmarital child were extended constitutionally recognized parental rights. Compare *Stanley* and *Caban* (protecting parental rights) with *Quilloin* and *Lehr* (refusing protection).

143 Levy v. Louisiana, 391 U.S. 68, 88 (1968).

144 *See* Marvin v. Marvin, 557 P.2d 106, 122 (Cal. 1976).

Writing for the court, Justice Tobriner acknowledged in *Marvin* the "pervasiveness" of nonmarital relationships and the importance of effectuating justice between the parties to these relationships. At the same time, he emphasized the court's view that cohabitation could not be accorded the same respect as marriage.[145] More recent cases from the California courts have reiterated this point, leaving for the legislature the larger problem of whether and how far to extend legal protections to individuals in cohabitation relationships.[146] In California, and in other states, legislatures have declined to take up this question.

Those who believe that law is a useful tool for shaping family behavior sometimes argue for maintaining a strong distinction between cohabitation and marriage in order to channel couples into marriage. The experience of the past quarter century, however, is not encouraging on this front. With more than four million cohabiting couples in the United States today,[147] the law's failure to address cohabitation is increasingly difficult to justify. One result of the fear that cohabitation will encroach further on marriage is that the courts have largely taken themselves out of the process of creating broader social norms to govern nonmarital relationships.

Cohabitation has become well established as a demographic reality and an emerging social practice. In the law, however, cohabitation is still regarded as anomolous, and its consequences remain highly indeterminate. Twenty-five years after *Marvin v. Marvin*, cohabitants are still left to their own devising, in a space set off between legal rules. In this respect, for all their fame and fortune, Lee and Michelle were simply ordinary.

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145 *Id.*

> Lest we be misunderstood, however, we take this occasion to point out that the structure of society itself largely depends upon the institution of marriage, and nothing we have said in this opinion should be taken to derogate from that institution. The joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime.

Id. at 122.

146 *See, e.g.*, Norman v. Unemployment Ins. Appeals Bd., 663 P.2d 904, 907–08 (Cal. 1983); People v. Delph, 156 Cal. Rptr. 422, 424–25 (Ct. App. 1979) (denying the marital communication privilege to unmarried cohabitants).

147 *See supra* text accompanying note 20.